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DISCIPLINE AND DISABILITY OF ATTORNEYS;
CONTINUING LEGAL EDUCATION

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY 28, 2024

MAILING ADDRESS: The Judicial Department
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SUPREME COURT OF NORTH CAROLINA

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FILED 15 DECEMBER 2023

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for fraudulent inducement). The matter was remanded for the trial court to exercise its discretion as authorized by Civil Procedure Rule 43(e). **D.V. Shah Corp. v. VroomBrands, LLC, 402.**

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IMMUNITY

Judicial—magistrate—sued in official capacity—applicability—In a statutory bond action against a magistrate who failed to timely serve plaintiff's nephew with an involuntary commitment order (subsequently, the nephew shot plaintiff with a crossbow during an acute psychotic episode), the Court of Appeals erred by holding that judicial immunity is a categorically unavailable defense to an official capacity claim against a judicial officer. Judicial immunity applies to both official capacity and individual capacity claims. **Wynn v. Frederick, 576.**

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not encompass magistrates, which are state officers, when it provided the limited waiver for five specifically named categories of county officers "or other officer." The section's internal structure, broader statutory context, and statutory history made clear that the General Assembly intended to limit the section's scope to bonded county officers. **Wynn v. Frederick, 576.**

INDICTMENT AND INFORMATION

Sufficiency—going armed to the terror of the public—act committed on a public highway—not an essential element—Defendant's indictment for the common law offense of going armed to the terror of the public was sufficient to confer jurisdiction upon the trial court, where the indictment alleged that defendant waved a firearm around in the parking lots of two different locations, including a private apartment complex. After overruling a prior case saying otherwise, the Supreme Court clarified that the crime of going armed to the terror of the public does not include as an essential element that the act occur on a public highway. Therefore, defendant's indictment was not fatally defective where the locations it mentioned did not constitute public highways. **State v. Lancaster, 459.**

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Coverage under parents' policy—resident of household—time spent in the home—intent to form common household—In an action where an insurance company sought a declaratory judgment stating that defendant was not covered under her mother's and stepfather's underinsured motorist policy (for severe injuries resulting from a car accident), the trial court erred in granting summary judgment to defendant where a genuine issue of material fact existed regarding whether she was a "resident" of her mother's household entitled to coverage under the policy. Although defendant claimed in affidavits that she split her residency between her divorced parents' homes, she also gave sworn testimony indicating that she merely visited her mother's home for occasional, short periods of time without necessarily spending the night. Moreover, some of defendant's statements cast doubt on whether she and her mother intended to form a common household, indicating instead that she was part of her father's household only (she stated that she lived alone with her father for the fifteen-year period preceding her car accident; she depended on her father for financial support; all of her mail went to her father's home; and she treated her father's address as her home address for car title, property tax, and voter registration purposes). **N.C. Farm Bureau Mut. Ins. Co., Inc. v. Herring, 419.**

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JURY—Continued

the content of both items could have been discovered previously through reasonable diligence. The Supreme Court noted that any arguments related to pretext (step three of the *Batson* inquiry) had no place in the review of defendant's MAR since the trial court's determination during jury selection that defendant failed to establish a prima facie case of discrimination (step one of the *Batson* inquiry) rendered analysis of the State's reasons for its strikes (erroneously solicited by the trial court) unnecessary. **State v. Tucker, 471.**

MOTOR VEHICLES

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SEARCH AND SEIZURE

Traffic stop—independent reasonable suspicion—traffic violation—impaired driving—Defendant's Fourth Amendment rights were not violated as a result of a traffic stop and search of his vehicle where law enforcement officers had independent reasonable suspicion—apart from a traffic checkpoint—to justify stopping defendant's vehicle, based on the officers' observation that defendant's car ran off the road and onto the grass alongside the road before coming to a stop at the checkpoint, which indicated a traffic violation of failure to maintain lane control and possible impaired driving. **State v. Alvarez, 431.**

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STATUTES OF LIMITATION AND REPOSE

Medical malpractice—minor plaintiff—thirteen years old at time of accrual of claim—ordinary three-year limitations period—The Court of Appeals properly concluded that plaintiff's medical malpractice claim—in which he alleged that

defendants negligently performed an appendectomy on him when he was thirteen years old—was time barred pursuant to N.C.G.S. §§ 1-15(c) and 1-17(c) because plaintiff did not file his action until more than five years after the surgery that gave rise to the claim. Although plaintiff argued that, since his injury accrued when he was still a minor, he had until the age of nineteen to file a claim, where none of the exceptions contained in section 1-17(c) applied to toll the limitations period, plaintiff's claim was subject to the standard three-year statute of limitations. **Morris v. Rodeberg, 405.**

SCHEDULE FOR HEARING APPEALS DURING 2024

NORTH CAROLINA SUPREME COURT

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

February 13, 14, 15, 20, 21, 22
April 9, 10, 11, 16, 17, 18
September 17, 18, 19, 24, 25, 26
October 29, 30, 31
November 5, 6, 7

D.V. SHAH CORP.
v.
VROOMBRANDS, LLC, a North Carolina limited liability company,
and VICTOR OBAIKA

No. 351A22

Filed 15 December 2023

Appeal and Error—summary judgment hearing—failure to exercise discretion to allow testimony—mistake of law—remand

The Court of Appeals properly vacated the trial court's order granting plaintiff's motion for summary judgment (on plaintiff's claims for breach of a commercial lease) where the trial court had acted under a misapprehension of the law and failed to exercise its discretion when it erroneously determined that it was prevented by the Rules of Civil Procedure from receiving oral testimony (that defendant sought to introduce in support of his counterclaim for fraudulent inducement). The matter was remanded for the trial court to exercise its discretion as authorized by Civil Procedure Rule 43(e).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 286 N.C. App. 223 (2022), vacating an order entered on 10 June 2021 by Judge Karen Eady Williams in Superior Court, Mecklenburg County, and remanding the case. Heard in the Supreme Court on 1 November 2023.

Miller Austin Law, by Carol L. Austin, for plaintiff-appellant.

David P. Ferrell for defendant-appellees.

RIGGS, Justice.

This appeal asks us to consider whether a trial court reversibly errs when it declines to exercise its discretion to hear oral testimony at a summary judgment hearing under the misapprehension that the North Carolina Rules of Civil Procedure outright prohibit receipt of such testimony. We hold, consistent with our precedents, that a trial court's failure to exercise its discretion under the mistaken belief that no such discretion exists warrants vacatur, and we remand for reconsideration "in the true legal light." *Capps v. Lynch*, 253 N.C. 18, 22 (1960) (cleaned up). We

modify and affirm the decision of the Court of Appeals vacating the trial court's summary judgment order and remanding the case in accordance with our holding.

I. Factual Background and Procedural History

Plaintiff sued defendants by verified complaint for breach of a commercial lease in October 2019. Defendants filed an answer and counterclaim for fraud through counsel on 1 June 2020, alleging plaintiff fraudulently induced them to enter into the commercial lease. After the entry of several scheduling orders, limited discovery, and the withdrawal of defendants' counsel by consent, plaintiff moved for summary judgment in April 2021 on the claims alleged in its verified complaint.

Plaintiff's summary judgment motion was calendared for and heard on 24 May 2021. By that point unrepresented, Mr. Obaika appeared *pro se* and requested a continuance; the trial court denied that request for reasons of futility and judicial economy. Mr. Obaika also sought to introduce live testimony in opposition to plaintiff's motion and in support of his counterclaim for fraudulent inducement, but was interrupted by the trial court as follows:

> THE COURT: I can't—I can't accept your statements because it's—it's along the lines of, like, testimonial. I can't accept that in the context of a summary judgment hearing. It has to be provided to the Court or in response to her affidavit and her documents. It has to be provided by way of an affidavit. And so [that is] why I asked whether an affidavit was submitted.

The trial court ultimately granted summary judgment for plaintiff on all claims, and defendants appealed to the Court of Appeals.

In a divided decision, a majority of the Court of Appeals vacated the trial court's summary judgment order and remanded the case. *D.V. Shah Corp. v. VroomBrands, LLC*, 286 N.C. App. 223, 237–38 (2022). Judge Jackson concluded that vacatur and remand was required based on perceived violations of the trial court's scheduling orders, the Mecklenburg County Local Rules, and the North Carolina Rules of Civil Procedure. *Id.* at 232–37. According to Judge Jackson, these acts compelled the trial court to grant Mr. Obaika's request for a continuance. *Id.* at 237. Judge Dillon concurred in the result and wrote separately, reasoning that the trial court's failure to recognize and exercise its discretion to take oral testimony allowed by Rule 43(e) of the North Carolina Rules of Civil Procedure was reversible, prejudicial error. *Id.* at 238–39

(Dillon, J., concurring in result). Finally, Judge Tyson dissented, arguing that summary judgment was proper based on the evidence presented and that any errors committed by the trial court were not prejudicial. *Id.* at 241–46 (Tyson, J., dissenting). Plaintiff appeals to this Court based on the dissent.

II. Analysis

As Judge Dillon rightly noted in his concurrence, *id.* at 238–39 (Dillon, J., concurring in result), we have long held that "[w]here . . . the court is clothed with discretion, but rules as a matter of law, without the exercise of discretion, the offended party is entitled to have the proposition reconsidered and passed upon as a discretionary matter," *Capps v. Lynch*, 253 N.C. 18, 22 (1960). This is no less true when the discretion is afforded by our Rules of Civil Procedure. *See, e.g.*, *Byrd v. Mortenson*, 308 N.C. 536, 540 (1983) (vacating and remanding an order denying a Rule 55(d) motion to set aside entries of default "because it appears that rather than exercising his *discretion*, the trial judge erroneously ruled as a *matter of law* that defendants had not demonstrated 'good cause' to justify setting aside the entries of default against them"). We consider the record and ruling "in context" to discern whether the trial court's decision was made under such a mistaken belief. *State v. Cotton*, 318 N.C. 663, 668 (1987). We will vacate and remand where "[t]here is nothing in the record to support a conclusion that [the trial court] *discretionarily*" rendered its decision. *Byrd*, 308 N.C. at 540.

Turning to the specific rule of civil procedure at issue in this case, Rule 43(e) plainly allows for the introduction of live oral testimony at a summary judgment hearing in the trial court's discretion: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." N.C.G.S. § 1A-1, Rule 43(e) (2021) (emphasis added). This Court has explicitly held as much. *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533 (1971).

The record here demonstrates the trial court believed it entirely lacked the discretion to hear oral testimony afforded to it by Rule 43(e). As in other cases remedying similar errors, *see, e.g.*, *Byrd*, 308 N.C. at 540, nothing in the transcript suggests that the trial court understood it possessed discretion to allow Mr. Obaika to testify. The natural effect of this ruling was to prohibit Mr. Obaika from introducing evidence concerning any fraudulent inducement, itself a defense to a breach of contract claim and a basis for a counterclaim for damages.

Fields v. Brown, 160 N.C. 295, 298 (1912). Having "failed to exercise its discretion regarding a discretionary matter and . . . ruled on it under the mistaken impression it [was] required to rule a particular way as a matter of law, [the trial court's] holding must be reversed and the matter remanded for the trial court to exercise its discretion." *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 277 (1988). Consistent with the rationale stated in Judge Dillon's concurring opinion—rather than that enunciated by Judge Jackson in the majority opinion for the court—we modify and affirm the decision of the Court of Appeals. We decline to address the parties' other arguments raised in this appeal given our dispositive holding that vacatur and remand is required.

MODIFIED AND AFFIRMED.

FREEDOM MORRIS
v.
DAVID RODEBERG, M.D., INDIVIDUALLY AND IN HIS INDIVIDUAL CAPACITY, AND PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED D/B/A VIDANT MEDICAL CENTER

No. 296A22

Filed 15 December 2023

Statutes of Limitation and Repose—medical malpractice—minor plaintiff—thirteen years old at time of accrual of claim—ordinary three-year limitations period

The Court of Appeals properly concluded that plaintiff's medical malpractice claim—in which he alleged that defendants negligently performed an appendectomy on him when he was thirteen years old—was time barred pursuant to N.C.G.S. §§ 1-15(c) and 1-17(c) because plaintiff did not file his action until more than five years after the surgery that gave rise to the claim. Although plaintiff argued that, since his injury accrued when he was still a minor, he had until the age of nineteen to file a claim, where none of the exceptions contained in section 1-17(c) applied to toll the limitations period, plaintiff's claim was subject to the standard three-year statute of limitations.

Justice EARLS concurring in part and dissenting in part.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 285 N.C. App. 143 (2022), reversing an order entered on 16 March 2021 by Judge J. Carlton Cole in the Superior Court, Pitt County. Heard in the Supreme Court on 19 September 2023.

Zaytoun Ballew & Taylor, PLLC, by Matthew D. Ballew and Robert E. Zaytoun; The Law Offices of John M. McCabe, P.A., by Spencer S. Fritts; and James A. Barnes IV and Ryan D. Oxendine for plaintiff-appellant.

Ellis & Winters LLP, by Alex J. Hagan, Michelle A. Liguori, and Chelsea Pieroni, for defendant-appellee David Rodeberg, M.D.; and Cranfill Sumner LLP, by Colleen N. Shea and Steven A. Bader, for defendant-appellee Pitt County Memorial Hospital, Incorporated d/b/a Vidant Medical Center.

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

Tin Fulton Walker & Owen PLLC, by Sam McGee and Gagan Gupta, for North Carolina Advocates for Justice, amicus curiae.

ALLEN, Justice.

A divided panel of the Court of Appeals interpreted the relevant statute of limitations to bar the medical malpractice claims alleged by plaintiff against defendants. It also rejected plaintiff's argument that the statute of limitations so construed violates his constitutional right to the equal protection of the laws. We conclude that the Court of Appeals correctly applied the statute of limitations to plaintiff's claims. Plaintiff's equal protection argument is not properly before this Court, and we therefore decline to address it.

This case arises from defendants' motions to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, so we must take the complaint's factual allegations as true. *Blue v. Bhiro*, 381 N.C. 1, 2 (2022). According to those allegations, plaintiff Freedom Morris—then thirteen years old—sought emergency treatment on 23 February 2015 at defendant Vidant Medical Center for abdominal

pain caused by acute appendicitis. Defendant David Rodeberg, M.D., operated on plaintiff the next day to remove his appendix. Despite complaining of intense pain following surgery, plaintiff was discharged on 25 February 2015. He returned to defendant hospital one day later with a fever and sharp abdominal pain. A second surgery performed by a different doctor revealed that defendant Rodeberg had not removed the entire appendix. The remaining portion had ruptured, spreading infection inside plaintiff's body. Plaintiff was discharged from defendant hospital a second time on 4 March 2015. Severe abdominal pain and a high fever prompted a return visit on 17 March 2015. Plaintiff underwent a third surgery, this time to drain a pelvic abscess. He was discharged yet again on 20 March 2015.

More than five years later, on 14 September 2020, plaintiff filed a lawsuit against defendants in the Superior Court, Pitt County, alleging medical malpractice and medical negligence. Defendants responded with motions asking the trial court to dismiss the complaint. In their motions, defendants argued that plaintiff filed the complaint outside the statute of limitations for the medical malpractice claims of persons who are over ten years old but under eighteen years old when their claims accrue. Specifically, defendants asserted that, pursuant to N.C.G.S. § 1-15(c) and N.C.G.S. § 1-17(c), plaintiff had three years from 24 February 2015 —the date on which defendant Rodeberg operated on plaintiff—to file suit against defendants.

Plaintiff submitted a brief to the trial court opposing defendants' motions. Therein plaintiff argued that N.C.G.S. § 1-17(b) is the relevant statute of limitations for his claims and that, consequently, he had until age nineteen to commence this litigation. Plaintiff further contended that if the trial court were to interpret subsections 1-15(c) and 1-17(c) to require him to file suit before he turned eighteen and could make his own legal decisions, the result would be a violation of his right to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

On 16 March 2021, the trial court entered an order denying defendants' motions, thereby clearing the way for plaintiff to proceed with his lawsuit. Defendants filed a notice of appeal from the trial court's order. They also filed a petition for writ of certiorari with the Court of Appeals asking that body to review the order even if defendants lacked a legal right to an immediate appeal. *See* N.C. R. App. P. 21(a)(1) ("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 no right of appeal from an interlocutory order exists . . . .”). The Court of Appeals subsequently allowed defendants’ petition for certiorari. *Morris v. Rodeberg*, 285 N.C. App. 143, 147–48 (2022).

On 16 August 2022, a divided panel of the Court of Appeals issued an opinion reversing the trial court’s order. *Id.* at 144. The majority noted that although subsection 1-15(c) specifies a three-year statute of limitations for most claims of medical malpractice, the provisions in subsection 1-17(c) control when the cause of action accrued while the plaintiff was still a minor. *Id.* at 151. As interpreted by the majority, subsection 1-17(c) adopts the three-year limitations period in subsection 1-15(c) for the medical malpractice claims of minors except when the limitations period would expire before the minor’s tenth birthday, in which case the statute of limitations must be calculated in accordance with N.C.G.S. § 1-17(c)(1). *Id.* at 149–51. Inasmuch as plaintiff’s lawsuit did not fall under subdivision 1-17(c)(1), the majority held that it was time-barred under subsection 1-17(c) “because [plaintiff’s] medical malpractice action accrued when [plaintiff] was thirteen years old, and he filed suit five years later.” *Id.* at 151.

Turning to plaintiff’s constitutional argument, the majority found no merit in plaintiff’s contention that applying a three-year statute of limitations to his claims would deprive him of his constitutional right to equal protection. *Id.* at 151–52. For reasons discussed later in this opinion, this issue is not properly before us.

The dissenting judge at the Court of Appeals would have affirmed the trial court’s order denying defendants’ motions to dismiss the complaint. *Id.* at 158–59 (Hampson, J., dissenting). According to the dissenting judge, when a minor plaintiff’s medical malpractice claims are not subject to any of the exceptions in subdivisions 1-17(c)(1) through (c)(3), a court must resort to subsection 1-17(b) to assess their timeliness. *Id.* at 156–57. As applied by the dissenting judge to the facts of this case, subsection 1-17(b) “required [plaintiff] to bring this lawsuit before reaching age nineteen.” *Id.* at 158. Because plaintiff filed the complaint before his nineteenth birthday, the dissenting judge concluded that his claims were timely. *Id.* The dissenting judge also endorsed plaintiff’s argument that “if [subs]ection 1-17(c) did operate to require [p]laintiff to bring suit as a sixteen year old, while still under a legal disability and legally unable to do so, . . . such an application of the statute would violate his federal and state constitutional right to equal protection of the laws.” *Id.*

Plaintiff filed a notice of appeal from the decision of the Court of Appeals pursuant to N.C.G.S. § 7A-30(2), which then provided a right

of appeal to this 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."[1] N.C.G.S. § 7A-30(2) (2021).

We review a lower court's interpretation of statutes *de novo*. *DTH Media Corp. v. Folt*, 374 N.C. 292, 299 (2020). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337 (2009) (quoting parenthetical and internal quotation marks omitted).

To resolve whether plaintiff's claims for medical malpractice and negligence are time-barred, we must construe N.C.G.S. § 1-15 and N.C.G.S. § 1-17 together. "It is, of course, a fundamental canon of statutory construction that statutes which are *in pari materia*, *i.e.*, which relate or are applicable to the same matter or subject, . . . must be construed together in order to ascertain legislative intent." *Carver v. Carver*, 310 N.C. 669, 674 (1984).

By enacting a statute of limitations, the General Assembly "establish[es] a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Statute of Limitations*, *Black's Law Dictionary* (11th ed. 2019). "Once a defendant properly raises a statute of limitations defense, the plaintiff must show that she initiated the action within the applicable time period." *King v. Albemarle Hosp. Auth.*, 370 N.C. 467, 469 (2018).

Statutes of limitations are blunt instruments. They bar claims filed outside their temporal boundaries regardless of whether the claims have merit. Nonetheless, such statutes exist to promote—not defeat—the ends of justice. Statutes of limitations represent the legislature's determination of the point at which the right of a party to pursue a claim must yield to competing interests, such as the unfairness of requiring the opposing party to defend against stale allegations. *Ord. of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944); *see also Estrada v. Burnham*, 316 N.C. 318, 327 (1986) ("With the passage of time, memories fade or fail altogether, witnesses die or move away, evidence is lost or destroyed; and it is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate

1. The General Assembly repealed N.C.G.S. § 7A-30(2) in 2023. An Act to Make Base Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions, S.L. 2023-134, § 16.21.(d)–(e), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf. The repeal applies to all cases filed with the Court of Appeals on or after 3 October 2023, when the repealing legislation took effect. *Id.* § 16.21(e).

without regard to the merits of a cause of action."), *superseded by statute on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163–64 (1989).

"Subsection 1-15(c) establishes [a] standard three-year statute of limitations for medical malpractice actions." *King*, 370 N.C. at 469. The General Assembly enacted the provision "in an attempt to preserve medical treatment and control malpractice insurance costs, both of which were threatened by the increasing number of malpractice claims." *Roberts v. Durham Cnty. Hosp. Corp.*, 56 N.C. App. 533, 541 (1982), *quoted in Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 237 (1985).

In general, the three-year statute of limitations imposed by subsection 1-15(c) begins running "at the time of the occurrence of the last act of the defendant giving rise to the cause of action." N.C.G.S. § 1-15(c) (2021). It can be extended to as many as four years if the plaintiff's injuries are "not readily apparent to the [plaintiff] at the time of [their] origin." *Id.*

This would be an easy case if subsection 1-15(c) were the only statutory provision on point. Plaintiff did not file his medical malpractice claims against defendants within three years of his first surgery, and this case does not involve latent injuries. Plaintiff's claims are undeniably time-barred if subsection 1-15(c) controls.

The legislature has recognized, however, "that individuals under certain disabilities are unable to appreciate the nature of potential legal claims and take the appropriate action." *King*, 370 N.C. at 470. For most kinds of civil claims, subsection 1-17(a) pauses the statute of limitations if the individual with the claim "is under a disability at the time the cause of action accrued." N.C.G.S. § 1-17(a) (2021). In such cases, the limitations period does not begin to run until "the disability is removed." *Id.*

Subsection 1-17(a) defines "a person [who] is under a disability" to include anyone who "is within the age of 18 years." N.C.G.S. § 1-17(a), (a)(1). "The disability of minority can be removed by the appointment of a [guardian ad litem] or by the passage of time, whichever occurs first." *King*, 370 N.C. at 471. Accordingly, when a statute of limitations has been tolled under subsection 1-17(a) based on a plaintiff's age, it starts running as soon as the court appoints a guardian ad litem to pursue the plaintiff's claims or the plaintiff turns eighteen years old.

"Whereas the tolling provision of subsection [1-17](a) focuses on general torts, the tolling provision of subsection [1-17](b) specifically addresses professional negligence claims . . . ." *Id.*

> *Notwithstanding the provisions of subsection (a) of this section, and except as otherwise provided in subsection (c) of this section*, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), *except that if those time limitations expire before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years.*

N.C.G.S. § 1-17(b) (2021) (emphases added).

On its face, the tolling provision in subsection 1-17(b) applies to the professional malpractice claims of minors, to the exclusion of subsection (a) and except as provided in subsection (c). This Court has described the interaction between subsections 1-17(a) and 1-17(b) as follows:

> [For a professional malpractice claim asserted by a minor, subs]ection 1-17(b) . . . reduces the standard three-year statute of limitations, after a plaintiff reaches the age of majority, to one year by requiring a filing before the age of nineteen. Thus, a minor plaintiff who continues under that status until age eighteen has one year to file her claim. The language of "Notwithstanding the provisions of subsection (a)" refers to this reduced time period to bring an action. Like subsection (a), subsection (b) still allows the minor to reach adulthood before requiring her to pursue her . . . malpractice claim, assuming her disability is otherwise uninterrupted. Removal of the disability either by reaching the age of majority or by appointment of a [guardian ad litem] triggers the running of the statute of limitations.

King, 370 N.C. at 471–72 (internal citations omitted).

Inasmuch as medical malpractice is a subcategory of professional malpractice, subsection 1-17(b) would supply the controlling statute of limitations for the medical malpractice claims of minors if the statute ended there. Indeed, prior to 2011, subsection 1-17(b) did govern such claims. *See id.* at 471 ("[W]hen a medical malpractice claim accrues while a plaintiff is a minor, N.C.G.S. § 1-17(b) tolls the standard three-year statute of limitations . . . ."); N.C.G.S. § 1-17 (2010).

In 2011, however, the General Assembly added subsection (c) to N.C.G.S. § 1-17. An Act to Reform the Laws Relating to Money Judgment Appeal Bonds, Bifurcation of Trials in Civil Cases, and Medical Liability, S.L. 2011-400, § 9, 2011 N.C. Sess. Laws 1712, 1716–17. As we acknowledged in *King*, subsection 1-17(c) "further narrow[s] the time period for a minor to pursue a medical malpractice claim." 370 N.C. at 471 n.2. *See generally LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Off. of the Cts.*, 368 N.C. 180, 187 (2015) ("[A] specific provision of a statute ordinarily will prevail over a more general provision in that same statute. . . . [T]he later addition of a specific provision to a pre-existing more general statute indicates the General Assembly's most recent intent." (citations omitted)).

Subsection 1-17(c) reads in full:

> *Notwithstanding the provisions of subsection (a) and (b) of this section*, an action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health care provider's performance of or failure to perform professional services *shall be commenced within the limitations of time specified in G.S. 1-15(c), except as follows*:
>
> (1) If the time limitations specified in G.S. 1-15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.
>
> (2) If the time limitations in G.S. 1-15(c) have expired and before a minor reaches the full age of 18 years a court has entered judgment or consent order under the provisions of Chapter 7B of the General Statutes finding that said minor is an abused or neglected juvenile as defined in G.S. 7B-101, the medical malpractice action shall be commenced within three years from the date of such judgment or consent order, or before the minor attains the full age of 10 years, whichever is later.
>
> (3) If the time limitations in G.S. 1-15(c) have expired and a minor is in legal custody of the State, a county, or an approved child placing agency as defined in G.S. 131D-10.2, the medical malpractice action shall be commenced within

> one year after the minor is no longer in such legal custody, or before the minor attains the full age of 10 years, whichever is later.

N.C.G.S. § 1-17(c) (emphases added).

The first sentence in subsection 1-17(c) unambiguously declares that its tolling provision—not those in subsections 1-17(a) and 1-17(b)—applies to the medical malpractice claims of minors. It further states that such claims must be filed "within the limitations of time specified in G.S. 1-15(c)" unless they fit into one of the exceptions in subdivisions 1-17(c)(1) through (c)(3). In other words, subject to the exceptions in subdivisions 1-17(c)(1) through (c)(3), subsection 1-17(c) eliminates tolling of the medical malpractice claims of minors.

The parties agree that this case does not fall within any of the exceptions in subdivisions 1-17(c)(1) through (c)(3). We concur. Plaintiff was not under the age of ten when "the time limitations specified in [subsection] 1-15(c) expire[d]," nor does the record anywhere indicate that he has ever been adjudicated "an abused or neglected juvenile as defined in G.S. 7B-101" or placed "in legal custody of the State, a county, or an approved child placing agency." N.C.G.S. § 1-17(c)(1)–(3). Consequently, subsection 1-17(c) required plaintiff to commence his lawsuit within the time frame set out in subsection 1-15(c). Because plaintiff failed to do so, his claims are time-barred.

In reaching the opposite conclusion, the dissenting judge in the Court of Appeals reasoned in part:

> Section 1-17(c) is itself an exception to the general rule applicable to minors injured by professional negligence set forth in Section 1-17(b). Indeed, Section 1-17(b), as amended, makes this express. N.C. Gen. Stat. § 1-17(b) ("Notwithstanding the provisions of subsection (a) of this section, *and except as otherwise provided in subsection (c) of this section* . . ." (emphasis added)). As such, Section 1-17(b) remains generally applicable unless one of the exceptions under Section 1-17(c) applies. As in Section 1-17(b), the language in Section 1-17(c) of "Notwithstanding the provisions of subsection (a) and (b) of this section" references the reduced time period to bring an action in the three instances to which subsection (c) is applicable.

Morris, 285 N.C. App. at 156 (Hampson, J., dissenting) (alteration in original). Simply put, the dissent in the Court of Appeals would apply the tolling provision in subsection 1-17(b) to any medical malpractice claim alleged by a minor that does not fall within one of the exceptions in subdivisions 1-17(c)(1) through (c)(3).

The dissent's strained reading of N.C.G.S. § 1-17 cannot be squared with the statute's plain meaning. *See Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45 (1999) ("Where the language of a statute is clear, the courts must give the statute its plain meaning . . . ."). As we have seen already, subsection 1-17(c) exempts the medical malpractice claims of minors from the tolling provisions in subsections 1-17(a) and (b). *See* N.C.G.S. § 1-17(c) ("Notwithstanding the provisions of subsection (a) and (b) of this section . . . ."). Subsection 1-17(c) mandates that such claims "be commenced within the limitations of time specified in G.S. 1-15(c), except" when they fall under (c)(1), (c)(2), or (c)(3). *Id.* Put differently, subsection 1-17(c) is an exception to subsections 1-17(a) and (b), and subdivisions 1-17(c)(1) through (c)(3) are exceptions to subsection 1-17(c).

In his primary brief to this Court, plaintiff insists that interpreting subsection 1-17(c) to subject his medical malpractice claims and those of similarly situated individuals to the standard three-year limitations period in subsection 1-15(c) would produce "patently unfair and absurd" results. He points out that pursuant to subdivision 1-17(c)(1), a child who is injured through the medical malpractice of hospital staff on the day of his birth has ten years—or until he "attains the full age of 10 years"—to sue for medical malpractice. On the other hand, under the reading of subsection 1-17(c) adopted by the Court of Appeals and endorsed by this Court, if the injury occurs instead on the child's thirteenth birthday, he has only three years to bring a claim. According to plaintiff, the provisions of N.C.G.S. § 1-17 "cannot possibly be intended to yield this type of result, where a claim for one child brought ten years later is not considered stale but brought by an older child would be barred if filed three years and a day following the negligence."

In our view, the scenario posed by plaintiff cannot accurately be characterized as absurd. The legislature may have reasonably decided that young children should have more time to bring their claims because older children often are better able to understand and describe their injuries and to grasp the import of a legal proceeding. Whatever the reason, whether the law ought to distinguish between minor plaintiffs in this way is a separate issue, and one on which the courts must defer to the legislature's judgment so long as the legislature acts within constitutional bounds.

Plaintiff had three years from the accrual of his causes of action in February 2015 to sue defendants for medical malpractice. Because he waited until 14 September 2020 to file his complaint, the Court of Appeals correctly held that his lawsuit is barred by the statute of limitations.

In front of the Court of Appeals, plaintiff argued that, as applied to his claims, subsection 1-17(c) "violates the Equal Protection Clause of both the United States and North Carolina Constitutions." *Morris*, 285 N.C. App. at 151. The Court of Appeals majority held that "plaintiff's constitutional challenge to [subsection] 1-17(c) . . . lacks merit." *Id.* The dissenting judge disagreed:

> [p]laintiff has raised . . . the colorable argument if [subsection] 1-17(c) did operate to require [p]laintiff to bring suit as a sixteen year old, while still under a legal disability and legally unable to do so, that as applied to [p]laintiff, such an application of the statute would violate his federal and state constitutional right to equal protection of the laws . . . .

Id. at 158 (Hampson, J., dissenting).

When the Court of Appeals issued its decision, N.C.G.S. § 7A-30(2) still provided parties with an appeal of right to this Court based on a dissent in the Court of Appeals. In *Cryan v. National Council of YMCA*, we explained what was necessary for a dissent to confer jurisdiction on this Court pursuant to N.C.G.S. § 7A-30(2): "To confer appellate jurisdiction, a Court of Appeals dissent must specifically set out the basis for the dissent—meaning the reasoning for the disagreement with the majority. A dissent that does not contain any reasoning on an issue cannot confer jurisdiction over that issue." 384 N.C. 569, 570 (2023).

In this case, the dissent registers disagreement with the majority's analysis of plaintiff's constitutional challenge, but it offers no reasons for that disagreement. We therefore lack jurisdiction under N.C.G.S. § 7A-30(2) to review the constitutional issues raised by plaintiff.[2] *See id.*

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2. Our dissenting colleagues argue that *Cryan* does not apply here because the dissenting judge in the Court of Appeals "raised and explained his disagreement with the majority on whether plaintiff's constitutional challenge [to subsection 1-17(c)] has merit." In fact, the dissenting judge provided no such explanation. As noted above, he merely described plaintiff's equal protection challenge as "colorable" without making any argument in support of his position. *Morris*, 285 N.C. App. at 158–59 (Hampson, J., dissenting). Like the dissenting judge in *Cryan*, he "did not expressly . . . provide any explanation for why [the majority's] decision was wrong." 384 N.C. at 574.

The three-year statute of limitations bars plaintiff's medical malpractice claims. No other issue is properly before this Court. Accordingly, we affirm the judgment of the Court of Appeals reversing the trial court's denial of defendants' motions to dismiss.

AFFIRMED.

Justice EARLS concurring in part and dissenting in part.

I concur with the majority's holding that N.C.G.S. § 1-17(c) creates a three-year statute of limitations for medical-malpractice claims brought by minors injured after the age of seven, even though they are legally incapable of filing suit until they reach the age of eighteen.

The majority's further conclusion that this Court lacks jurisdiction over plaintiff's constitutional challenge to this interpretation of subsection 1-17(c) is wrong as a matter of precedent and constitutional law. It is true that questions about this Court's jurisdiction under N.C.G.S. § 7A-30(2) will have no significance under the new version of the statute which eliminates the right to appeal based on a dissent, *see* An Act to Make Base Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions, S.L. 2023-134, § 16.21(d), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf (eliminating right of appeal based on a dissent for cases filed in the Court of Appeals on or after 3 October 2023). But it still matters to the litigants in this case.

As a matter of precedent, plaintiff has met all the requirements for us to consider his constitutional challenge. Plaintiff argued his claim in the Court of Appeals, the dissenting judge raised the constitutional question as grounds for "diverg[ing] from the opinion of the majority," and the parties briefed the issue in our Court. *See State v. Hooper*, 318 N.C. 680, 682 (1987); *see also State v. Norris*, 360 N.C. 507, 511 (2006). Under our case law, that is enough to invoke our review. As this Court has explained:

> In determining which specific issues are properly before the Court in an appeal based upon a dissent, we must consider whether the issue was raised at the trial court and the Court of Appeals, whether the error was properly assigned in the record on appeal, and whether the issue was a point of dispute set out in the dissenting opinion of the Court of Appeals.

In re R.L.C., 361 N.C. 287, 290, *cert. denied*, 552 U.S. 1024 (2007).

And when this Court has found a dissenting opinion insufficient to confer jurisdiction under section 7A-30(2), that dissent was far more threadbare than the one here. In *Cryan*, for instance, the dissent appended just one sentence to the end of the opinion: "Because I would determine jurisdiction to decide the constitutional issue is proper before the three-judge panel in Wake County, I would deny Defendant's petition for writ of certiorari." *Cryan v. Nat'l Council of YMCA of the United States*, 384 N.C. 569, 574 (2023) (cleaned up). We found that "single sentence" insufficient to trigger our review. *Id.* at 575. The "dissent did not expressly oppose the majority's" ruling that a party raised an as-applied constitutional challenge. *Id.* at 574. Even more, the opinion did not "provide any explanation for why that decision was wrong." *Id.* In view of those palpable deficiencies, we held that such a "vague, implied disagreement with the majority's decision" devoid of "any reasoning" could not confer jurisdiction on this Court. *Id.* at 575; *see also C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgmt. Corp.*, 311 N.C. 170, 176 (1984) (holding that when a dissenting judge "does not set out the issues upon which he bases his disagreement with the majority, the appellant has no issue properly before this Court").

Here, by contrast, the dissenting judge in the Court of Appeals raised and explained his disagreement with the majority on whether plaintiff's constitutional challenge had merit. *See Morris v. Rodeberg*, 285 N.C. App. 143, 158–59 (2022) (Hampson, J., dissenting). The dissent clarified why, in its view, plaintiff raised a "colorable argument" on his constitutional claim—that subsection 1-17(c), as interpreted, would "require [p]laintiff to bring suit as a sixteen year old, while still under a legal disability and legally unable to do so." *Id.* at 158. It flagged the constitutional problems with a three-year statute of limitations for plaintiff's medical-malpractice claim—that as applied to plaintiff, such a truncated window would violate his "federal and state constitutional right to equal protection of the laws including by depriving him of" a fundamental right. *Id.* And it specified the constitutional provision imperiled by subsection 1-17(c)—the Open Courts Clause. *See id.* at 158–59 (quoting N.C. Const. art. I, § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.")).

Justice does not require, nor does our precedent demand, that we split hairs about whether a dissent sufficiently parsed a constitutional issue that it plainly raised. The confusion that would follow from opening that door makes clear the problem: Is one paragraph enough? How

much detail is required? Must the dissent cite other authorities, and if so, how many? Those questions are not ones this Court should spend its time answering. Especially here where the parties themselves did not argue that the dissent in the Court of Appeals lacked enough reasoning to satisfy section 7A-30(2).

Second, as a matter of constitutional law, this Court is sworn to uphold the constitutional rights of all citizens, including minors. Indeed, that duty is at its zenith for parties who cannot vindicate their rights on their own. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90(3) Harv. L. Rev. 489, 498 (1977) ("The very lifeblood of courts is popular confidence that they mete out evenhanded justice and any discrimination that denies [disadvantaged] groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence."). In service of that principle, this Court wields jurisdiction to vary the provisions of any rule of appellate procedure "[t]o prevent manifest injustice to a party." N.C. R. App. P. 2; *see also Blumenthal v. Lynch*, 315 N.C. 571, 578 (1986) (explaining that Rule 2 grants us the "residual power to suspend or vary operation of our published rules" when "the justice of doing so or the injustice of failing to do so appears manifest to the Court"). We owe it to these parties to consider the constitutional issues that have been properly raised and briefed in this case.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v.
CASSIE HERRING AND CURTIS LEE TURMAN AND RUTH HERRING

No. 227A22

Filed 15 December 2023

Insurance—coverage under parents' policy—resident of household—time spent in the home—intent to form common household

In an action where an insurance company sought a declaratory judgment stating that defendant was not covered under her mother's and stepfather's underinsured motorist policy (for severe injuries resulting from a car accident), the trial court erred in granting summary judgment to defendant where a genuine issue of material fact existed regarding whether she was a "resident" of her mother's household entitled to coverage under the policy. Although defendant claimed in affidavits that she split her residency between her divorced parents' homes, she also gave sworn testimony indicating that she merely visited her mother's home for occasional, short periods of time without necessarily spending the night. Moreover, some of defendant's statements cast doubt on whether she and her mother intended to form a common household, indicating instead that she was part of her father's household only (she stated that she lived alone with her father for the fifteen-year period preceding her car accident; she depended on her father for financial support; all of her mail went to her father's home; and she treated her father's address as her home address for car title, property tax, and voter registration purposes).

Justice EARLS dissenting.

Justice RIGGS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 334 (2022), affirming an order entered on 15 October 2021 by Judge G. Bryan Collins in Superior Court, Wake County. Heard in the Supreme Court on 14 September 2023.

Haywood, Denny & Miller, LLP, by Robert E. Levin and Frank W. Bullock, III, for plaintiff-appellant.

Martin & Jones, PLLC, by Huntington M. Willis for defendant-appellees.

ALLEN, Justice.

In upholding the trial court's order granting summary judgment for defendants, the Court of Appeals determined that defendant Cassie Herring (Cassie) resides with her mother and stepfather and thus qualifies for benefits under their automobile insurance policy. Because the evidence raises genuine issues of material fact about Cassie's residency, we reverse the judgment of the Court of Appeals and remand this case for further proceedings.

On 19 April 2019, Cassie was injured in a two-automobile collision in the Town of Wendell in Wake County while riding with her father, Franklin Herring, in his vehicle. The accident left Cassie with fractured ribs, injuries to her face and jaw, and a shattered knee. The driver of the other car was insured, and her insurance company ultimately tendered $100,000.00—the policy's limit per individual—to Cassie.

Cassie's mother, defendant Ruth Herring, and stepfather, defendant Curtis Lee Turman, maintained a personal automobile policy issued by plaintiff North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) for the period of 22 February 2019 to 22 August 2019. The policy included underinsured motorist (UIM) coverage of up to $100,000.00 per person payable to "an insured [who] is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of . . . bodily injury sustained by an insured and caused by an accident." The policy defined "insured" to include "any family member" of the named insureds (Ruth Herring and Curtis Lee Turman) and defined "family member" as "a person related to [a named insured] by blood, marriage or adoption who is a resident of [the named insured's] household." The policy did not define the term "resident."

On 26 May 2020, Cassie filed a lawsuit in the Superior Court, Wake County, seeking benefits under the Farm Bureau policy's UIM coverage. On 12 August 2020, the trial court entered a consent order staying the lawsuit so that the parties could participate in arbitration.

Prior to arbitration, and with her legal counsel in attendance, Cassie disclosed the following information while testifying under oath in an examination conducted by Farm Bureau's legal counsel. Afflicted by anxiety and bipolar disorder, Cassie was unemployed at the time of her accident and had worked only sporadically since graduating from high

school in 2003. Her parents divorced in 2006, after which Cassie and her father lived alone in the Town of Knightdale in Wake County for about ten years. She and her father then moved to her father's current home near the border of Wake and Johnston Counties. Cassie gave her father's address as her home address when obtaining a driver's license and registering to vote. She received all her mail, including bank statements and bills, at her father's address. Cassie used her father's address when purchasing her car and paying property taxes on the car. She saw a doctor and a dentist whose offices were located within a few miles of her father's home.

In 2007 Cassie's mother and stepfather took up residence in Bahama, an unincorporated community in Durham County. During the approximately five-year period between her move to her father's present home and the accident, Cassie would travel to her mother's home a couple of times each week. She sometimes visited for the day, but other times she stayed overnight. Cassie had a room at her mother's house and occasionally kept clothes there. She could not specify how many times per month she stayed overnight at her mother's home in 2019, though Cassie estimated that "all of the days" she spent there that year "probably" equaled roughly four months. When asked whether her mother supported her financially, Cassie responded, "My mom is on disability." She later added, though, that she was on her mother's cell phone plan. Cassie denied receiving any mail at her mother's home in 2019 or using her mother's address for any official correspondence.

On 2 December 2020, several days before the scheduled arbitration, Farm Bureau filed this action in the Superior Court, Wake County, seeking a judicial declaration that Cassie was not entitled to UIM coverage because, at the time of the accident, she lived with her father and "was not a resident of the household of Curtis Lee Turman and Ruth Herring." Farm Bureau subsequently filed a motion for summary judgment on its declaratory judgment claim based on Cassie's testimony.

Defendants responded with their own summary judgment motion, supported by affidavits executed by defendants and Cassie's father. Each affidavit asserted that Cassie maintained a split residence, dividing her time between her father's home and the home of her mother and stepfather. The affidavits alleged that long-term severe depression and anxiety disorder have impaired Cassie's ability to live independently. In their affidavits, Cassie's mother and stepfather further alleged that Cassie was listed as a driver on their automobile insurance policy and that she stored items at her mother's home, including "items of daily living such as clothing, toiletries, and bedding." All four affidavits claimed that Cassie "routinely" received mail at her mother's address.

On 15 October 2021, the trial court entered an order denying Farm Bureau's motion for summary judgment but granting defendants' motion. Farm Bureau timely appealed.

A divided panel of the Court of Appeals affirmed the trial court's order. *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 284 N.C. App. 334, 339 (2022). The majority "examine[d] the record to determine if, under any reasonable construction of the term, [Cassie] may be considered a 'resident' of her mother's household" and concluded that "at the very least" Cassie could establish that she maintained a split residency between the two homes. *Id.* at 338. The dissenting judge would have held that summary judgment was inappropriate because a genuine issue of fact existed as to whether Cassie was a resident of her mother's home. *Id.* at 343 (Dillon, J., dissenting). The dissenting judge argued that certain statements in Cassie's testimony could lead a jury to find that Cassie "is part of her father's household and merely visits her mother." *Id.* at 342–43.

On 26 July 2022, Farm Bureau filed a notice of appeal with this Court based on the dissent in the Court of Appeals. Although it has since been repealed, N.C.G.S. § 7A-30(2) then provided a right of appeal to this 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." N.C.G.S. § 7A-30(2) (2021), *repealed by* An Act to Make Base Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions, S.L. 2023-134, § 16.21.(d)–(e), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf.

The only issue before this Court is whether the Court of Appeals erred in affirming summary judgment for defendants.[1] "We review de novo an appeal of a summary judgment order." *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 285 (2020). 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).

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1. In their brief to this Court, defendants additionally argue that Farm Bureau waived its right to decline coverage by, *inter alia*, paying Cassie $5,000.00 under the policy's no-fault medical payments coverage. Although the dissenting judge in the Court of Appeals addressed this issue, the majority expressed no view on it. *Herring*, 284 N.C. App. at 343–44 (Dillon, J., dissenting). Accordingly, the issue is not properly before this Court. *See State v. McKoy*, 385 N.C. 88, 94 (2023) ("When a case comes to us under N.C.G.S. § 7A-30(2) based solely on a dissent in the Court of Appeals, the scope of review is limited to those questions on which there was division in the intermediate appellate court." (internal quotation marks and citation omitted)).

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2021). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action . . . . The issue is denominated 'genuine' if it may be maintained by substantial evidence." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972). "A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018).

In the context of an insurance coverage dispute, summary judgment "is appropriate . . . where the material facts and the relevant language of the policy are not in dispute and the sole point of contention is 'whether events as alleged in the pleadings and papers before the court are covered by the policies.' " *Martin*, 376 N.C. at 285 (quoting *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690–91 (1986)). "The party seeking coverage under an insurance policy bears the burden 'to allege and prove coverage.' " *Id.* (quoting *Brevard v. State Farm Mut. Auto. Ins. Co.*, 262 N.C. 458, 461 (1964)).

"As with all contracts, the goal of construction [of an insurance policy] is to arrive at the intent of the parties when the policy was issued." *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505 (1978). "If no definition [of a term used in the policy] is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended." *Id.* at 506. When the meaning of a term "is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder." *Id.* In other words, we will construe ambiguous terms in favor of coverage. *Martin*, 376 N.C. at 286.

"[T]his Court has struggled in attempting to formulate a precise definition of the term 'resident' in connection with an insurance policy." *Id.* at 288. Nonetheless, consistent with our preference for extending coverage, we have construed the term to encompass a variety of living arrangements. *See, e.g.*, *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430 (1966) (holding that an adult son who had recently moved back in with his father qualified as a resident of his father's household under his father's automobile insurance policy); *Barker v. Iowa Mut. Ins. Co.*, 241 N.C. 397 (1955) (holding that a nineteen-year-old college student who lived in an apartment near campus remained a resident of his father's household for purposes of his father's fire insurance policy).

On the other hand, we have explained that an individual cannot qualify as a resident of an insured relative's household unless he can show that he "actually lived in the same dwelling as the insured relative for a meaningful period of time." *Martin*, 376 N.C. at 291; *see also id.* at 284, 294 (discerning no intent on the part of the policy holder and her granddaughter and daughter-in-law to form a common household even though the granddaughter and daughter-in-law (1) lived in a guest house located on the policy holder's farm and within one hundred feet of the policy holder's house; (2) visited the policy holder almost every day and occasionally stayed with her overnight; (3) possessed keys to the policy holder's house and enjoyed "unlimited access to enter her residence"; and (4) had many of their living expenses paid for by the policy holder out of the farm's business account).

Under this Court's decision in *Martin*, "the question [is] whether the party seeking coverage ha[s] stayed in the insured family member's residence on more than merely a temporary basis *and* whether the facts support[] a finding that the family members intended to form a common household." *Id.* at 292 (emphasis added). Answering this two-part question "can require a particularized, fact-intensive inquiry into the circumstances of the parties' current and prior living arrangements." *Id.* at 291.

Based on the record before us, the trial court should have denied defendants' motion for summary judgment. Even if an adult may be considered a resident of more than one household for purposes of the policy's UIM coverage,[2] the available evidence when viewed in the light most favorable to Farm Bureau—the nonmoving party—raises genuine issues of material fact as to whether Cassie was a resident of her mother's household at the time of the accident.

The Court of Appeals affirmed summary judgment for defendants largely because, according to the majority, Cassie testified that she "lives in her mother's home for 'four months out of the year,' an arrangement that she has 'always' had." *Herring*, 284 N.C. App. at 338. Of course, whether Cassie actually lived with—and did not merely visit—her mother is the very point in dispute. Some of the statements made by Cassie about her trips to her mother's home seem consistent with visitor status. Her testimony establishes that she did not stay with her mother for extended stretches. Cassie testified that she "saw her [mother] a

2. Farm Bureau has not argued to this Court that the policy issued to Cassie's mother and stepfather excludes the possibility of dual residency. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

couple of times a week" and that her trips sometimes involved overnight stays but sometimes not.

Moreover, even if Cassie stayed with her mother on "more than merely a temporary basis," other parts of her testimony appear to cast doubt on whether she and her mother "intended to form a common household." *Martin*, 376 N.C. at 292. When asked for her address at the outset of her testimony, Cassie gave her father's address and said nothing about living with her mother. She went on to testify that she had lived alone with her father for the fifteen-year period immediately preceding her accident. Cassie also stated that she depended on her father for financial support but did not claim to receive such aid from her mother.[3] Cassie testified that all her mail went to her father's address and that she treated her father's address as her home address for car title, property tax, and voter registration purposes. Despite her twice-weekly trips to her mother's home, Cassie said that she only occasionally kept clothes there. Taken as a whole and viewed in the light most favorable to Farm Bureau, this testimony would allow a jury to find that Cassie "is part of her father's household and merely visits her mother." *Herring*, 284 N.C. at 343 (Dillon, J., dissenting).

Defendants' affidavits do not overcome the hurdles to summary judgment erected by Cassie's testimony. To the contrary, as remarked by the dissenting judge in the Court of Appeals, they raise credibility issues that must be resolved by a jury at trial and not by a trial court at summary judgment. *Id*. at 341–42; *see also City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 655 (1980) ("[I]f there is any question as to the credibility of affiants in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied.").

This Court has outlined the circumstances in which a trial court may grant summary judgment to a moving party based on that party's own affidavits.

> [S]ummary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and

3. Cassie did testify that she was on her mother's cellular phone plan, but she did not provide any details regarding the cost to her mother of having Cassie on the plan.

> contradiction . . . ; and (3) when summary judgment is otherwise appropriate. This is not a holding that the trial court is required to assign credibility to a party's affidavits merely because they are uncontradicted. To be entitled to summary judgment the movant must still . . . show that there are no genuine issues of fact . . . . Further, if the affidavits seem inherently incredible; if the circumstances themselves are suspect; or if the need for cross-examination appears, the court is free to deny the summary judgment motion. *Needless to say, the party with the burden of proof, who moves for summary judgment supported only by his own affidavits, will ordinarily not be able to meet these requirements and thus will not be entitled to summary judgment.*

Kidd v. Early, 289 N.C. 343, 370–71 (1976) (emphasis added).

Here the affidavits submitted by defendants conflict with Cassie's testimony on key points, raising more than latent doubts regarding defendants' credibility. For instance, all four affidavits aver that Cassie "routinely" received mail at her mother's home. Yet, in her testimony Cassie more than once maintained without exception that her mail went to her father's address, and she expressly denied receiving any mail whatsoever at her mother's address in 2019, the year of her accident. Additionally, in her affidavit Cassie swears that she received financial support from both her father and her mother. When asked during her testimony whether her parents supported her financially, however, Cassie stated that she depended on her father for financial assistance but that her mother was on disability. Because the task of resolving such factual discrepancies lies with the jury, the trial court should have denied defendants' motion for summary judgment.

The evidence in the record raises genuine issues of material fact as to whether Cassie qualifies as a resident of her mother's household under the two-part test articulated by this Court in *Martin*. Accordingly, we reverse the decision of the Court of Appeals affirming summary judgment for defendants and remand this case for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice EARLS dissenting.

The law of this State, as established by the General Assembly in the North Carolina Motor Vehicle Safety-Responsibility Act of 1953, N.C.G.S. §§ 20-279.1 to 279.39 (2021), "is to compensate innocent victims of financially irresponsible motorists." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 266 (1989). That purpose "is best served when the statute is interpreted to provide the innocent victim with the fullest possible protection." *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 225 (1989); *see also Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574 (2002) (same). It is also the intent of the General Assembly "that insurance policies and contracts be readable by a person of average intelligence, experience, and education." N.C.G.S. § 58-38-5 (2021). In this case, Ms. Herring's mother and stepfather purchased an underinsured motorist policy and listed Ms. Herring as an insured driver, and they had every reason to believe from the plain language of the policy that as a part-time resident of their household, Ms. Herring's injuries would be compensated if she was an innocent victim of a financially irresponsible motorist. The undisputed evidence, taken in the light most favorable to N.C. Farm Bureau, shows that Ms. Herring was a resident of her mother's household and that she is therefore entitled to summary judgment in this action.

This case asks us to determine if the trial court properly granted summary judgment in favor of Ms. Herring on the issue of whether she is a "resident" of her mother's home under her mother and stepfather's underinsured motorist policy. I agree with the majority that our law evinces a preference for extending insurance coverage, and accordingly the term "resident" encompasses a "variety of living arrangements." Included within the term "resident" are adult children like Ms. Herring, who depend on their parents for financial and emotional support. While it is true that under our precedent a person who has not lived with an insured relative "in the same dwelling . . . for a meaningful period of time" is not considered a resident of that home, *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 291 (2020), the four months that Ms. Herring stays with her mother each year is sufficient to meet this standard, particularly when the evidence shows that her mother intended to form a common household with her, *see id.* at 292. There are adult children who, for a variety of reasons, may depend heavily on their parents. The fact that such an adult child's parents are divorced, live in different households, and yet share responsibilities for caring for that adult child does not invalidate the child's residency in those homes. *See id.* Thus "[t]he material question of fact in this case is not whether the mother's

home is [Ms. Herring's] *primary* residence; rather, it is whether [Ms. Herring] maintains *multiple* residences." *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 284 N.C. App. 334, 339 (2022).

Accordingly, I disagree with the majority's holding that summary judgment in favor of Ms. Herring was erroneous. Instead, I would affirm the decision of the Court of Appeals and instruct that court to reinstate the trial court's order granting summary judgment in favor of Ms. Herring.

On 19 April 2019, Ms. Herring and her father, Franklin Herring, were involved in a car accident while traveling down Wendell Boulevard in Wendell, North Carolina. Ms. Herring's father was operating the vehicle when Debbie Perry, who failed to yield the right of way, crashed into Ms. Herring and her father. As a result of the accident, Ms. Herring suffered multiple injuries including, rib fractures, a crushed kneecap, facial injuries, and jaw injuries. Due to her injuries, Ms. Herring required major surgery and hospitalization. Ms. Perry's insurance policy, issued by North Carolina Farm Bureau Insurance Company (Farm Bureau), provided Ms. Perry with $300,000 coverage per accident, and $100,000 coverage per person. Pursuant to Ms. Perry's policy, Farm Bureau paid Ms. Herring the $100,000 policy limit.

However, because Ms. Herring's injuries were substantial, Ms. Perry's $100,000 per person policy limit was inadequate, and Ms. Herring pursued additional compensation through both of her parents' underinsured motorist policies. The policy at issue here is an underinsured motorist policy issued by Farm Bureau and maintained by Ms. Herring's mother, Ruth Herring, and her stepfather, Curtis Lee Turman. Ms. Herring is listed as an insured driver on this policy, and in May 2020, she filed a lawsuit to recover under the policy's benefits. The parties agreed to arbitration, and in August 2020, the trial court stayed the lawsuit to allow the parties to participate in an arbitration hearing. On 23 November 2020, at Farm Bureau's request, Ms. Herring sat for an "Examination Under Oath." During this proceeding, she was asked about her home address, where she lived, and the fact that most of her documents, including her medical records, bank statements, and drivers' license only referenced her father's address.

In order to qualify for coverage pursuant to her mother and stepfather's policy, Ms. Herring must satisfy two requirements: (1) she must be the family member of a named insured related by blood, marriage, or adoption; and (2) she must be a "resident" of the insured's household. While the phrase "family member" is defined in the policy, and

Ms. Herring's classification as a family member is not disputed, the term "resident" is not defined in the policy and is the center of this dispute.

Ms. Herring contends that she is a resident of both her mother's home and her father's home and accordingly she is a "resident" of her mother's home pursuant to Farm Bureau's insurance policy. The record supports Ms. Herring's position and shows that while Ms. Herring is an adult and was thirty-three years old at the time of the crash, she has maintained residency in both homes due to being diagnosed with anxiety and depression, which has required medication management and inpatient and outpatient treatment. Ms. Herring's symptoms have also prevented her from maintaining employment and owning her own home. Due to the impact Ms. Herring's symptoms have on her daily life activities, she has relied on her parents' support since she was first diagnosed at age seventeen. In connection with her mental health diagnoses, Ms. Herring also depends on both of her parents for emotional comfort and financial support. Because neither parent can provide for Ms. Herring's financial support exclusively, particularly because her mother's primary source of income is derived from disability payments, both of her parents' households have shared this responsibility.

Moreover, Ms. Herring maintains a permanent room at both homes and keeps personal belongings at each residence. These belongings include toiletries, bedding, and clothing. Evidence from Ms. Herring's Examination Under Oath also showed that she has lived "between" her mother's and father's homes and that she spends "a couple of [days] a week" with her mother, which is a schedule she has "always" kept. There, Ms. Herring also noted that she stays the night at her mother's home "a lot," which she quantified as "[p]robably four months out of the year."

In response, Farm Bureau asserts that Ms. Herring is not a resident of her mother's home because: (1) her mother does not support her financially; (2) she receives her mail at her father's home; (3) she is registered to vote in Johnston County, where her father lives; (4) her doctor and dentist are located in Zebulon, North Carolina, near her father's home; and (5) her vehicle registration uses her father's address. However, none of this information invalidates or contradicts Ms. Herring's position that she is a resident of two homes, her father's and her mother's. While there are some legal purposes for which an individual must designate a primary residence under our precedent, residency for purposes of insurance is not one of those.

The record shows that Ms. Herring receives mail at both her mother's and father's homes. Because Ms. Herring resides with her mother

approximately four months out of the year and with her father approximately eight months out of the year, it is simply logical that she would not only receive mail at both residences,[1] but also that she would register to vote in the county where her father's home is located, register her vehicle using her father's home address, and visit medical professionals near her father's home. Furthermore, Ms. Herring's statement that her mother is "on disability" cannot be reasonably interpreted to mean that her mother does not provide her with financial support. After all, providing a child, adult or otherwise, with a roof over their head for four months out of the year is a form of financial support. Also, there is evidence that Ms. Herring's mother pays her phone bill. Indeed, Ms. Herring's mother and stepfather have her listed as a driver on their insurance policy and are thus financially supporting her by paying that bill.

As noted above, the question of material fact in this case is whether Ms. Herring maintains multiple residences, and not whether Ms. Herring's mother's residence is her primary home. Because the evidence here conclusively demonstrates that Ms. Herring held multiple residences at the time of her car accident, namely at her mother's and father's homes, summary judgment in favor of Ms. Herring was appropriate. Thus, I would affirm the Court of Appeals' decision and instruct that court to reinstate the trial court's order granting summary judgment for Ms. Herring.

Justice RIGGS joins in this dissenting opinion.

1. Additionally, at oral argument counsel for Farm Bureau conceded that Farm Bureau sent a $5,000 check for medical benefits in connection with Ms. Herring's claim under her mother's underinsured motorist policy to her mother's address.

STATE v. ALVAREZ

[385 N.C. 431 (2023)]

STATE OF NORTH CAROLINA
v.
FERNANDO ALVAREZ

No. 278PA21

Filed 15 December 2023

Search and Seizure—traffic stop—independent reasonable suspicion—traffic violation—impaired driving

Defendant's Fourth Amendment rights were not violated as a result of a traffic stop and search of his vehicle where law enforcement officers had independent reasonable suspicion—apart from a traffic checkpoint—to justify stopping defendant's vehicle, based on the officers' observation that defendant's car ran off the road and onto the grass alongside the road before coming to a stop at the checkpoint, which indicated a traffic violation of failure to maintain lane control and possible impaired driving.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA20-611 (N.C. Ct. App. July 20, 2021), affirming an order entered on 2 December 2019 by Judge Anna Mills Wagoner in Superior Court, Rowan County. Heard in the Supreme Court on 20 September 2023.

Joshua H. Stein, *Attorney General*, *by Zachary K. Dunn*, *Assistant Attorney General*, *for the State-appellant.*

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

BARRINGER, Justice.

In this case, we are tasked with determining whether the Court of Appeals erred in refusing to address whether officers possessed reasonable suspicion to stop defendant's vehicle. We are further tasked with determining whether the Court of Appeals erred in concluding that the traffic checkpoint did not comply with the Fourth Amendment.

For the following reasons, we hold that the officers had independent reasonable suspicion and, therefore, did not violate defendant's Fourth Amendment rights. Since the officers had independent reasonable suspicion, we do not reach the constitutionality of the checkpoint. Thus,

the trial court erred in granting the motion to suppress and the Court of Appeals erred in affirming the trial court's order. We reverse the decision of the Court of Appeals and remand to that court for further remand to the trial court for appropriate proceedings.

I. Background

On 6 June 2018, the Rowan County Sheriff's Office set up a checkpoint at the intersection of Stone and Rainey Roads in Salisbury, North Carolina, from 12:00 a.m. to 2:00 a.m. The checkpoint was in response to a fatal traffic accident in that location.

At approximately 1:45 a.m., defendant came into view of the checkpoint. Deputy Nolan Shue testified, and the trial court found as fact, that defendant's passenger side wheels came off the road and onto the grass before coming to a stop at the checkpoint. Deputy Shue further testified that this observation led him to believe that defendant might be driving while impaired, and that defendant appeared "very nervous and overly talkative," could not stop smiling, and had "glassy eyes."

Based on defendant's driving, demeanor, and appearance, officers initiated a search of defendant's vehicle. During the search, officers discovered cocaine, buprenorphine, marijuana, and drug paraphernalia, for which defendant was later indicted for possessing. Defendant moved to suppress the evidence against him on grounds that it was collected at an unconstitutional checkpoint.

The trial court concluded that the State failed to provide a valid primary programmatic purpose for the checkpoint. Therefore, the State violated the Fourth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Accordingly, the trial court granted defendant's motion and suppressed all evidence collected at the checkpoint. The trial court did not address whether the officers had independent reasonable suspicion to stop defendant, despite having heard arguments on independent reasonable suspicion.

The Court of Appeals affirmed the trial court's order, holding that the checkpoint was unconstitutional because the State failed to establish "a valid primary programmatic purpose" for its implementation. *State v. Alvarez*, No. COA20-611, slip op. at 2 (N.C. Ct. App. July 20, 2021) (unpublished). In a brief concurrence, Judges Dietz and Murphy opined that the Court of Appeals should have addressed whether officers had independent reasonable suspicion. *Id.* at 18. However, the Court of Appeals reasoned, "it is unnecessary to address whether officers possessed independent reasonable articulable suspicion." *Id.* at 16. We disagree.

II. Standard of Review

In reviewing a motion to suppress evidence, this Court examines whether the trial court's findings of fact are supported by competent evidence and whether those findings support the conclusions of law. *State v. Cooke*, 306 N.C. 132, 134 (1982). Conclusions of law are reviewed de novo. *State v. Biber*, 365 N.C. 162, 168 (2011).

III. Analysis

"When an officer observes conduct which leads him reasonably to believe that criminal conduct may be afoot, he may stop the suspicious person to make reasonable inquiries." *State v. Pearson*, 348 N.C. 272, 275 (1998). The officer "must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *State v. Thompson*, 296 N.C. 703, 706 (1979) (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). Reasonable suspicion is an issue independent of the constitutionality of the checkpoint. *State v. Griffin*, 366 N.C. 473, 477 (2013).

Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

> Only some minimal level of objective justification is required. This Court has determined that the reasonable suspicion standard requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.

State v. Barnard, 362 N.C. 244, 247 (2008) (cleaned up).

Here, officers had reasonable suspicion to stop defendant. Deputy Shue articulated in his testimony that defendant's failure to maintain lane control made him "believe that there might be possibly some impaired driving," in violation of N.C.G.S. § 20-138.1. Further, consistent with the trial court's finding of fact, three officers testified that they observed defendant's vehicle veer out of its lane and "basically run off the road." Thus, officers had reasonable suspicion that defendant's actions constituted a traffic violation under N.C.G.S. § 20-146(d)(1), which requires drivers to remain "within a single lane" and not depart from that lane unless it can be departed safely. *See* N.C.G.S. § 20-146(d)(1) (2021).

Although the trial court found that "[t]he location of the checkpoint played a role in the vehicle's alleged 'failure to maintain lane control,' " this finding appears to be based on Deputy Shue's testimony on the hypothetical use of checkpoints as speed enforcement. Neither Deputy Shue's testimony, nor that of any other witness, supports the inference that placement of the checkpoint contributed to defendant's failure to maintain lane control. Moreover, in closing argument, defendant's counsel conceded that "[w]e have no testimony as to whether or not the checking station might have caused him to look down or something as he was approaching and run off the road."

Officers' observation of defendant as he approached the checkpoint gave them reasonable suspicion based on defendant's failure to maintain lane control and possible impaired driving. The officers had reasonable suspicion to justify stopping defendant. Thus, the officers did not violate defendant's Fourth Amendment rights.

Since we hold that the officers had independent reasonable suspicion to stop defendant, we decline to address whether the traffic checkpoint was constitutional. We disavow the Court of Appeals' broad statements on traffic stop constitutionality.

IV. Conclusion

The officers had reasonable suspicion to stop defendant independent of the traffic checkpoint. Thus, stopping defendant did not violate the Fourth Amendment. Accordingly, the trial court erred in granting the motion to suppress and the Court of Appeals erred in affirming the trial court. We reverse the decision of the Court of Appeals and remand to that court for further remand to the trial court for appropriate proceedings.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA
v.
ISAIAH SCOTT BECK

No. 264A21

Filed 15 December 2023

Conspiracy—multiple conspiracies—sufficiency of evidence—separate and distinct agreements

In a criminal prosecution in which defendant was charged with two different conspiracies—to commit robbery with a dangerous weapon and to commit felonious breaking and entering—based on one sequence of events where the victim was threatened at gunpoint in her apartment, the trial court's denial of defendant's motion to dismiss one of the conspiracy charges was proper because the State presented sufficient evidence from which a jury could conclude that defendant formed multiple conspiracies, based on separate agreements with his co-conspirators to, first, rob the victim and, subsequently, to break and enter the victim's apartment. Therefore, the decision of the Court of Appeals vacating defendant's conviction for conspiracy to commit robbery with a dangerous weapon was reversed and the matter remanded with instructions to reinstate defendant's conviction for that offense.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 255 (2021), vacating in part and finding no error in part in a judgment entered on 31 October 2019 by Judge Susan E. Bray, in Superior Court, Watauga County. On 14 December 2021, the Supreme Court allowed defendant's petition for discretionary review of an additional issue. Heard in the Supreme Court on 13 September 2023.

Joshua H. Stein, *Attorney General*, *by Robert C. Ennis*, *Assistant Attorney General*, *for the State-appellant/appellee.*

Glenn Gerding, *Appellate Defender*, *by Sterling Rozear*, *Assistant Appellate Defender*, *for defendant-appellant/appellee.*

BARRINGER, Justice.

Here, we consider whether the Court of Appeals erred by vacating defendant's conviction for conspiracy to commit robbery with a dangerous weapon. Upon careful review, we hold that the trial court did not err. Therefore, we reverse the Court of Appeals and direct the Court of Appeals to reinstate defendant's conviction for conspiracy to commit robbery with a dangerous weapon.

I. Factual Background

In April of 2017, Daniel Silva, Javier Holloway, and defendant Isaiah Scott Beck lived in Lexington, North Carolina. The three also knew Cameron Baker who, at that time, lived in Boone, North Carolina. Baker knew Mackenzie Beshears, a drug dealer selling marijuana and Xanax in Boone.

At defendant's trial, the evidence tended to show as follows. Defendant, Silva, and Holloway made plans to rob a drug dealer in Boone. Initially, the three did not have a plan as to whom, specifically, they would rob. On 18 April 2017, Silva texted Holloway, "Send me a pic with me and the gun [ ] so I can show my [a]migo." Later that day, Holloway texted Silva, "[hit me up as soon as possible] got a lick," referring to a robbery. On 24 April 2017, Holloway texted Silva saying, "Aye bro I need that AR asap." On 26 April 2017, Holloway texted Silva asking whether he was "try[ing to get in] on this lick in the [a.m.]." When Silva texted back asking, "Where?", Holloway replied, "Boone, certified we gone come up bro we just need a ride." Silva responded to Holloway, "I got you" and "Be ready at 9." Silva clarified by asking, "me you and [defendant]?", to which Holloway replied, "Yeah."

While defendant, Silva, and Holloway were en route to Boone on 27 April 2017, defendant contacted Baker and asked him if he knew where defendant "could buy some drugs and stuff." Baker then coordinated a meeting between Beshears and defendant, Holloway, and Silva, to take place that day. Defendant then informed Baker he was going to "take all the money [Beshears] got too . . . ."

At trial, Beshears testified that Baker had contacted her on 27 April 2017, asking if she had any marijuana or Xanax for sale. Baker told Beshears that he and a friend would be coming over to purchase the drugs. Baker later told Beshears that only his friend Silva would meet her instead. On the afternoon of 27 April 2017, Beshears and her boyfriend, Devon Trivette, saw Silva pull into the empty parking lot at her apartment. Beshears spoke with Silva on the phone, identifying which

apartment was hers. Then Silva drove away unexpectedly. Beshears texted Silva, who replied that he had become "sketched . . . out [when he saw] somebody peaking [sic] round the corner . . . ." Silva explained that he understood from Baker that Beshears was going to come to the parking lot to transact the sale. Beshears replied "I'll come down if ya want!" Roughly twenty-four minutes later, Silva returned to Beshears' apartment complex, parked his vehicle, and went inside Beshears' apartment.

Upon entering Beshears' apartment, Silva sat down on her couch. Then defendant and Holloway, wearing all black clothing and face coverings, broke in the door of the apartment. Defendant pointed the barrel of an AR-15 at Beshears' head while instructing Holloway to "grab everything." A struggle ensued. Beshears and Trivette were able to push defendant and Holloway out of the apartment, while their roommate called police. Silva helped hold the door closed as Beshears and Trivette pushed defendant and Holloway outside. Beshears testified that during the struggle, Silva stated that he did not know the break-in was going to happen.

II. Procedural Background

Defendant was indicted on four charges: conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, conspiracy to commit felonious breaking or entering, and felonious breaking or entering. At the close of the State's evidence, defendant moved to dismiss all charges. Pertinent to this appeal, defendant contended that the State failed to present sufficient evidence of multiple conspiracies. The trial court denied defendant's motions to dismiss. A jury found defendant guilty of all four charges.

On appeal, the Court of Appeals held that the trial court erred by denying defendant's motion to dismiss one of the two conspiracy charges, and vacated defendant's conviction for conspiracy to commit robbery with a dangerous weapon. *State v. Beck*, 278 N.C. App. 255, 261–62 (2021).[1] The Court of Appeals reasoned that the State's evidence established one single conspiracy that continued from on or around 18 April 2017 through the date of the breaking or entering and armed robbery on 27 April 2017. *Id.* Judge Tyson issued an opinion, dissenting in

1. We also note that the Court of Appeals erred in determining the charge of conspiracy to commit breaking or entering would be the conspiracy charge to remain if there had been sufficient evidence of only one conspiracy. During oral argument, defendant conceded that the conspiracy to commit robbery with a dangerous weapon would be the conspiracy charge to remain, if only one conspiracy charge would stand. *See* Oral Argument at 53:34, *State v. Beck* (No. 264A21) (Sept. 13, 2023).

part, in which he opined that the State presented sufficient evidence to deny defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon. *Id.* at 264–65. The State appealed that issue to this Court, in accordance with N.C.G.S. § 7A-30(2). Defendant also filed a petition for discretionary review of an additional issue pursuant to N.C.G.S. § 7A-31, which this Court allowed.[2]

III. Standard of Review

Whether the State presented substantial evidence of conspiracy to commit robbery with a dangerous weapon is a question of law. Therefore, we review the denial of defendant's motion to dismiss de novo. *E.g.*, *State v. Golder*, 374 N.C. 238, 250 (2020). Substantial evidence is the "amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* at 249 (quoting *State v. Winkler*, 368 N.C. 572, 574 (2015)). Substantial evidence means "more than a scintilla of evidence." *State v. Powell*, 299 N.C. 95, 99 (1980). In our review of the sufficiency of evidence, we consider the evidence in the light most favorable to the State. *E.g.*, *Golder*, 374 N.C. at 250. The State is entitled to "every reasonable intendment and every reasonable inference to be drawn" from the evidence presented. *Id.* (cleaned up). If the record reveals that substantial evidence of the charged offenses has been presented, "the case is for the jury and the motion to dismiss should be denied." *Id.* (cleaned up).

IV. Analysis

The crime of conspiracy is committed when two or more persons agree to perform an unlawful act. *State v. Cox*, 375 N.C. 165, 169 (2020). A single conspiracy can encompass multiple crimes. *See State v. McLamb*, 313 N.C. 572, 578 (1985).

However, in the course of completing the target crime of an original conspiracy, a defendant may enter into an additional and separate conspiracy to commit a different crime not conspired to originally. *State v. Gibbs*, 335 N.C. 1, 48–49 (1993) (defendant first conspired to commit murder with two co-conspirators, then formed a second conspiracy when, in the course of committing the murders, he and one of the original co-conspirators formed a separate agreement to commit burglary in order to accomplish the murders), *cert. denied*, 512 U.S. 1246 (1994). "[W]hether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury." *State v. Tirado*, 358

2. The issue presented in the petition for discretionary review was whether the Court of Appeals erred when it failed to remand for resentencing after vacating one of two convictions that had been consolidated for judgment.

N.C. 551, 577 (2004), *cert. denied*, 544 U.S. 909 (2005) (identifying a non-exhaustive list of factors that *may be considered* by the *Tirado* jury). Evidence of an express agreement is not required. *State v. Winkler*, 368 N.C. 572, 575 (2015). Rather, "evidence tending to show a mutual, implied understanding will suffice." *Id.* (quoting *State v. Morga*n, 329 N.C. 654, 658 (1991)).

The issue before us is whether the State presented substantial evidence of multiple conspiracies, or just one conspiracy. As related to the conspiracies, the State had the burden of presenting substantial evidence tending to show that defendant and at least one other person formed the original conspiracy by agreeing to commit robbery with a dangerous weapon. The State also had the burden of presenting substantial evidence tending to show that defendant and at least one other person formed an additional and separate conspiracy by agreeing to commit the crime of felonious breaking or entering. *See Cox*, 375 N.C. at 169. The elements of robbery with a dangerous weapon are: (1) the unlawful taking or attempt to take personal property from another; (2) having in possession or with the use or threatened use of any firearms or other dangerous weapon; (3) whereby the life of a person is endangered or threatened. *Id.*; N.C.G.S. § 14-87(a) (2021). The elements of felony breaking or entering are: (1) the breaking or entering; (2) of any building; (3) with the intent to commit any felony or larceny therein. *Cox*, 375 N.C. at 172; N.C.G.S. § 14-54 (2021).

Here, the State presented evidence that on 18 April 2017, Silva texted Holloway asking for "a pic with [Silva] and the gun [ ] so [he] can show [his] [a]migo." Holloway then texted Silva later that same day, "[hit me up as soon as possible] got a lick," referring to a robbery. On 24 April 2017, Holloway texted Silva, saying, "Aye bro I need that AR asap." On 26 April 2017, Holloway texted Silva asking whether he was "try[ing to get in] on this lick in the [a.m.]?" When Silva texted back asking, "Where?", Holloway replied, "Boone, certified we gone come up bro we just need a ride." Silva texted Holloway, "I got you" and "Be ready at 9." Silva clarified by asking "me you and [defendant]?" to which Holloway replied "Yeah." While en route to Boone, defendant contacted Baker and asked where he "could buy some drugs and stuff." Baker then coordinated a meeting between Beshears and Silva to take place on 27 April 2017.

When viewed in the light most favorable to the State, the State presented more than a scintilla of evidence from which a rational juror could conclude that defendant conspired with Silva and Holloway to commit robbery with a dangerous weapon against Beshears. Further, that juror could reasonably conclude that the original crime of conspiracy—to

commit robbery with a dangerous weapon—was complete no later than the morning of 27 April 2017.

Importantly, no evidence was produced that the *original* plan included breaking or entering the apartment. Instead, the evidence presented indicates that defendant, Silva, and Holloway *originally* wanted to rob Beshears somewhere other than inside her apartment. Baker testified that "they weren't trying to necessarily go to [Beshears'] house to get the [drugs] . . . . They wanted to meet somewhere else." Silva went to Beshears' apartment complex, thinking they would meet in the parking lot.

Upon arrival at the apartment complex, Silva became "sketched . . . out" and drove away. Silva then texted Beshears, communicating that he understood that Beshears was going to leave her apartment and come to the parking lot. Beshears replied, offering to come to the parking lot. Roughly twenty-four minutes later, Silva texted Beshears that he was returning to the apartment complex. No evidence was presented regarding what communication may or may not have transpired amongst defendant, Silva, and Holloway in those twenty-four minutes. Silva then went inside Beshears' apartment and sat down. Shortly thereafter, defendant and Holloway, wearing all black clothing and face coverings, broke in the door of Beshears' apartment. Beshears testified that during the ensuing struggle, Silva stated that he did not know the break-in was going to happen. Silva helped hold the front door closed as Beshears and Trivette pushed defendant and Holloway outside. This testimony creates a question of fact for jury consideration.

When viewed in the light most favorable to the State, a rational juror could conclude that the original plan was to rob Beshears in the parking lot. When viewed in the light most favorable to the State, a rational juror could also conclude that, in those twenty-four minutes between Silva's first and second appearances at the apartment complex, defendant and at least one other person formed an additional and separate conspiracy—a new plan. *Gibbs*, 335 N.C. at 48 ("[T]he defendant committed the offense of conspiracy to commit murder when he, Doris, and Yvette agreed to kill Ann's family. . . . [O]n the night of the murder, a separate agreement was made between the defendant and Yvette . . . to commit first-degree burglary."); *Tirado*, 358 N.C. at 578 ("a rational juror, considering [facts specific to *Tirado*, could find] the evidence established multiple separate conspiracies, rather than one single conspiracy") In the new plan, Silva would enter Beshears' apartment for the meeting, and defendant and Holloway would feloniously break into the apartment.

V. Conclusion

A rational juror could find, based on the State's evidence presented at trial, that defendant entered into multiple conspiracies—namely, conspiracy to commit robbery with a dangerous weapon and conspiracy to commit felonious breaking or entering. Accordingly, we conclude that, when the evidence is viewed in the light most favorable to the State, sufficient evidence supports the trial court's decision to deny defendant's motion to dismiss the charges against him, including the charge of conspiracy to commit robbery with a dangerous weapon. Thus, we hold that the trial court did not err in denying defendant's motion to dismiss that charge. Therefore, we reverse the Court of Appeals and direct the Court of Appeals to reinstate the defendant's conviction for conspiracy to commit robbery with a dangerous weapon.

Because we reverse the decision of the Court of Appeals as to the issue on direct appeal and have thus ordered reinstatement of the trial court's judgment upon defendant's conviction for conspiracy to commit robbery with a dangerous weapon, we do not reach the sentencing issue on which defendant seeks discretionary review. Therefore, we conclude that the petition for discretionary review as to an additional issue was improvidently allowed.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice RIGGS dissenting.

The majority reverses the Court of Appeals because, in its view, the State submitted sufficient evidence to permit a rational juror to find the existence of two separate conspiracies. Its rationale rests largely on the fact that the evidence did not show the conspiracy to rob Ms. Beshears originally included an agreement to break and enter into her apartment. But our precedents are clear that a multifactor analysis applies to the factual question of whether multiple conspiracies existed: "The nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings are all factors that may be considered." *State v. Tirado*, 358 N.C. 551, 577 (2004). So, too, is the time at which the purported separate conspiracies were complete. *Id.* at 577–78. Because I believe a full consideration of these several factors shows that the agreement to break and enter was part and parcel of the conspiracy to rob Ms. Beshears, I would affirm the Court of Appeals' vacatur of the conspiracy to commit felonious breaking or entering. And, because I

believe that improper conviction may have led the trial court to impose a harsher consolidated sentence than if only one conspiracy conviction was returned, I would also remand for resentencing based on a single conspiracy to commit robbery with a dangerous weapon.

I. Single or Multiple Conspiracies as a Constitutional Concern

I do not disagree with the majority's recitation of the applicable scope of review on appeal and the evidentiary burden placed on the State in attempting to send multiple conspiracy counts to the jury. I do, however, think it appropriate to reiterate the evidentiary standard's constitutional underpinnings. That this evidentiary standard—and any test adopted by this Court to distinguish between single and multiple conspiracies—seeks to protect the constitutional right against double jeopardy cannot be overlooked.

The Fifth Amendment's Double Jeopardy Clause establishes that "[n]o person shall be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, "[t]he Law of the Land Clause incorporates similar protections under the North Carolina Constitution," *State v. Oliver*, 343 N.C. 202, 205 (1996) (citing N.C. Const. art. I, § 19), and "[d]ouble jeopardy has long been a fundamental prohibition of our common law and is deeply imbedded in our jurisprudence," *State v. Hill*, 287 N.C. 207, 214 (1975) (citations omitted). This constitutional protection bears directly on the ability of the State to bring multiple conspiracy charges in connection with related activities,[1] as "[t]he double jeopardy clause clearly prohibits the division of a single criminal conspiracy into multiple violations of a conspiracy statute." *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986) (citations omitted) (citing *Braverman v. United States*, 317 U.S. 49, 52–53 (1942)).

Courts have struggled with how to cleanly and clearly distinguish between single and multiple conspiracies in vindication of this constitutional right. *See, e.g.*, *State v. Rozier*, 69 N.C. App. 38, 52 (1984) ("Defining the scope of a conspiracy or conspiracies remains a thorny problem for the courts."). Most have recognized that a consideration of the full factual circumstances surrounding the criminal enterprise is the appropriate course. *See, e.g.*, *United States v. Leavis*, 853 F.2d 215, 218 (4th Cir. 1988) ("Whether there is a single conspiracy or multiple

1. As the majority recognizes, the law is clear that plans to commit multiple different crimes may nonetheless constitute a single conspiracy. *E.g.*, *State v. McLamb*, 313 N.C. 572, 578–79 (1985).

conspiracies depends upon the overlap of key actors, methods, and goals." (citations omitted)). Our Court of Appeals—which, by simple dint of volume, has had more occasion than this Court to consider the issue—has recognized the same. *See, e.g.*, *Rozier*, 69 N.C. App. at 52 ("There is no simple test for determining whether single or multiple conspiracies are involved: . . . factors such as time intervals, participants, objectives, and number of meetings all must be considered."). Central to the evaluation of these factors is "the nature of the agreement." *Id.* (citing *Braverman*, 317 U.S. 49).

II. The *Tirado* Factors Applied

Recognizing the wisdom of our Court of Appeals' decisions in cases involving multiple conspiracies, this Court explicitly adopted a multifactor analysis in *Tirado*. 358 N.C. at 577. Our holding in that case tasks us with considering, *inter alia*, "[t]he nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings." *Id.* (citing *State v. Dalton*, 122 N.C. App. 666, 672–73 (1996)). Also relevant is the timing of when each purportedly separate conspiracy ended. *Id.* at 577–78.

Viewing the evidence in the light most favorable to the State, I believe the nature and objectives of the agreements in this case weigh against multiple conspiracies. There is no evidence suggesting, for example, that breaking and entering into Ms. Besehears' apartment was considered an end in and of itself; in other words, the breaking and entering was not agreed to and accomplished for its own sake. Nor does the breaking and entering appear to have been undertaken for any purpose *other than* to rob Ms. Beshears. To the contrary, all the evidence demonstrates that Mr. Silva, Mr. Holloway, and Mr. Beck agreed to break and enter for the single and sole purpose of stealing from Ms. Beshears; no other motivation is suggested by the evidence. The nature and object of the agreements are thus functionally indistinguishable and militate against submitting separate conspiracy counts to the jury.

The time interval, number of participants, and number of meetings likewise weigh against multiple conspiracies, even considered in the light most favorable to the State. As the majority notes, the State's evidence shows the agreement to rob Ms. Beshears was complete amongst Mr. Silva, Mr. Holloway, and Mr. Beck on the morning of 27 April 2017.[2]

2. Assuming the text messages between Mr. Silva and Mr. Holloway suggest some prior agreement by Mr. Beck to participate in a robbery of Ms. Beshears, the first mention of his involvement occurred on the night of 26 April 2017. I do not find this difference of less than twenty-four hours to be significant.

That afternoon, and a mere twenty-four minutes after the original plan was frustrated by Ms. Beshears' absence, Mr. Silva, Mr. Holloway, and Mr. Beck agreed to break and enter into her apartment to accomplish the previously planned robbery. A few hours difference in plans amongst the same three participants, spread between a few text messages and a single physical meeting, does not suggest the existence of multiple conspiracies.

That both conspiracies terminated at the same time also suggests the existence of a single conspiracy. While it is true that the *offense* of conspiracy is complete "[a]s soon as the union of wills for the unlawful purpose is perfected," *State v. Knotts*, 168 N.C. 173, 188 (1914), the crime itself "ends with the attainment of its criminal objectives," *Tirado*, 358 N.C. at 577 (cleaned up). I therefore believe the majority's narrow focus and emphasis on which crimes were contemplated when the offense of conspiracy to commit armed robbery was completed misses the mark, as the evidence shows the conspiracy was still continuing when the plan to break and enter was formed. Indeed, to hold otherwise renders that consideration dispositive—a result plainly not contemplated, let alone suggested, by the multifactor test enunciated in *Tirado*.[3]

In sum, the evidence in the light most favorable to the State shows three men conspired to rob Ms. Beshears. Less than twenty-four hours later, and before the robbery was accomplished, those same three men agreed to breaking and entering in order to accomplish the planned robbery.[4] Consideration of these facts consistent with the multifactor test in *Tirado* leads me to conclude that the evidence establishes the existence of a single overarching conspiracy, consisting of multiple planned crimes, to rob Ms. Beshears. Because our caselaw recognizes only a single chargeable offense arises in these circumstances, *McLamb*, 313 N.C. at 578—79, and with concern for constitutional double jeopardy protections, I respectfully disagree with the majority's holding that the trial court properly submitted two separate conspiracy counts to the jury.

III. Resentencing

My resolution of the above issues necessarily leads me to dissent from the majority's decision to dismiss Mr. Beck's petition for

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3. The majority suggests that a full consideration of all relevant factors is not required by *Tirado*. I do not believe that is consistent with the analysis actually conducted in that case, which reached its ultimate decision only after "considering the series of meetings, the variety of locations and participants, their different objectives, and the statements of conspirators." *Id.* at 578.

4. Mr. Baker, for his part, set up both the initial robbery and Mr. Silva's return to the apartment complex after the initial buy fell through.

discretionary review as improvidently allowed. Turning to the arguments raised in that petition on the merits, I would hold that the Court of Appeals erred in declining to remand this matter for resentencing after vacating one of the conspiracies consolidated at Mr. Beck's initial sentencing.

In *State v. Wortham*, this Court identified the influence of multiple convictions in consolidated discretionary sentencing, and concluded that remand for resentencing is appropriate when at least one of the consolidated convictions was in error:

> Since it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.

318 N.C. 669, 674 (1987). While *Wortham* was decided in the context of the discretion afforded to judges under the repealed Fair Sentencing Act rather than under the now-controlling Structured Sentencing Act, trial court judges nonetheless retain discretion under current law to sentence a defendant "within the range specified for the class of offense and prior record level." N.C.G.S. § 15A-1340.13(b) (2023). *See also State v. Parker*, 143 N.C. App. 680, 685–86 (2001) ("The Structured Sentencing Act clearly provides for judicial discretion in allowing the trial court to choose a minimum sentence within a specified range."). I would thus continue to apply the practice adopted in *Wortham* and remand for resentencing.[5] *See, e.g.*, *State v. Dew*, 379 N.C. 64, 74–75 (2021) (remanding for resentencing when one of the convictions incorporated in the consolidated sentence was in error).

IV. Conclusion

The majority's analysis omits substantive engagement with *Tirado*'s recitation of a multifactor test for determining whether the State has introduced sufficient evidence of multiple conspiracies. The majority's elision of that precedent flattens the relevant analysis to a single question—namely, whether commission of the later agreed-upon crime was originally envisioned when the conspiracy was first formed. My reading

5. Notably, Mr. Beck received the maximum sentence allowed within the presumptive range for each offense.

of *Tirado*—and my concern for the double jeopardy protection undergirding the rule against improper prosecution for multiple conspiracies—would lead me to affirm the vacatur of Mr. Beck's conviction for conspiracy to commit breaking and entering. I also would remand for resentencing on the remaining conspiracy conviction. I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
LARRY FRITSCHE

No. 344PA21

Filed 15 December 2023

Sexual Offenders—registration—early termination—ten-year registration requirement—prior out-of-state registration

The trial court did not err by denying defendant's petition pursuant to N.C.G.S. § 14-208.12A for early termination of his requirement to register as a sex offender where defendant did not meet the statutory requirement of maintaining registration in a North Carolina county for at least ten years. Although he filed his petition almost thirteen years after initially registering in another state, the "initial county registration" in section 14-208.12A refers to initial registration in a North Carolina county, not initial registration in a county in any state.

Justice BARRINGER concurring.

Justice DIETZ joins in this concurring opinion.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 283 N.C. App. 411, 872 S.E.2d 838 (2022), affirming an order entered on 7 May 2021 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 20 September 2023.

Joshua H. Stein, Attorney General, by Bryan G. Nichols, Special Deputy Attorney General, for the State-appellee.

CarnesWarwick, by Amy Lynne Schmitz and Jonathan A. Carnes, for defendant-appellant.

NEWBY, Chief Justice.

In this case we determine whether N.C.G.S. § 14-208.12A permits removal of a registered sex offender from the North Carolina Sex Offender Registry (North Carolina registry) ten years after he initially registers in another state. The Court of Appeals has previously held that section 14-208.12A only permits removal of a sex offender from the North Carolina registry ten years after he initially registers in North Carolina. *See In re Borden*, 216 N.C. App. 579, 718 S.E.2d 683 (2011). Because the application of *In re Borden* is consistent with both this Court's duty to give effect to the meaning of N.C.G.S. § 14-208.12A and the purposes of the sex offender registry, we adopt the reasoning of *In re Borden* and affirm the Court of Appeals.

On 17 November 2000, defendant pled guilty to sexual exploitation of a child in Colorado pursuant to Colo. Rev. Stat. § 18-6-403 (1999). The trial court suspended defendant's sentence and placed him on probation. Defendant subsequently violated the terms of his probation. Accordingly, the trial court revoked defendant's probation and activated his sentence. Defendant served eight years in prison in Colorado. Upon his release, defendant registered with the Colorado Sex Offender Registry on 26 August 2008 as required by Colorado law. *See* Colo. Rev. Stat. § 16-22-103(1)(c) (West, Westlaw through 2023 Legis. Sess.).

In February 2020, defendant moved from Colorado to Florida, where he registered with the Florida Sex Offender Registry as required by Florida law. *See* Fla. Stat. § 943.0435 (2019). In October 2020, defendant moved to North Carolina. On 28 October 2020, defendant petitioned the trial court under N.C.G.S. § 14-208.12B requesting a judicial determination as to whether he must register in North Carolina as a sex offender. On 9 April 2021, the trial court issued an order requiring defendant to register as a sex offender in North Carolina. He did so on 12 April 2021.

On 14 April 2021, defendant filed a petition pursuant to N.C.G.S. § 14-208.12A seeking termination of his requirement to register as a sex offender in North Carolina. *See* N.C.G.S. § 14-208.12A(a) (allowing sex offenders to petition for early removal from the North Carolina

registry "[t]en years from the date of initial county registration" if several qualifications are met). Defendant filed this petition almost thirteen years after initially registering in Colorado. At the hearing on the petition, defendant argued that because ten years had passed since his initial registration in Colorado, he qualified for early termination in North Carolina. On 7 May 2021, the trial court denied defendant's petition. Relying on the Court of Appeals' decision in *In re Borden*, the trial court concluded that because defendant had not been registered as a sex offender in North Carolina for at least ten years, defendant did not meet the requirements for early termination. Defendant appealed.

On appeal, the Court of Appeals affirmed the trial court's denial of defendant's petition for early termination of registration. *State v. Fritsche*, 283 N.C. App. 411, 418, 872 S.E.2d 838, 844 (2022). Like the trial court, the Court of Appeals relied on *In re Borden* in reaching its determination. *See id.* at 413–15, 872 S.E.2d at 841–42. In *In re Borden*, the defendant similarly sought early termination of registration on the North Carolina registry pursuant to section 14 208.12A. *In re Borden*, 216 N.C. App. at 580, 718 S.E.2d at 684. The defendant argued that he was eligible for early termination because more than ten years had elapsed since his initial registration as a sex offender in Kentucky. *Id.* The Court of Appeals held that the plain meaning and purpose of N.C.G.S. § 14-208.12A requires that an offender be registered for at least ten years in North Carolina before being eligible for early termination and, therefore, the Court of Appeals denied the defendant's petition. *Id.* at 583, 718 S.E.2d at 686–87. Accordingly, in the present case, the Court of Appeals concluded that defendant did not satisfy the required period of registration in North Carolina for early termination. *Fritsche*, 283 N.C. App. at 414–15, 872 S.E.2d at 841–42.[1]

On 3 June 2022, defendant filed a petition for discretionary review with this Court. This Court allowed defendant's petition for discretionary review only as to the issue discussed below.[2]

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1. Defendant also argued that requiring him to remain on the North Carolina registry for ten years before being eligible for early termination violates the Equal Protection Clauses of the North Carolina Constitution and the Constitution of the United States. The Court of Appeals disagreed, concluding that the requirement is rationally related to the State's legitimate interest in maintaining public safety and protection. *Fritsche*, 283 N.C. App. at 418, 872 S.E.2d at 844.

2. Defendant also filed a notice of appeal based upon a constitutional question. This Court, however, allowed the State's motion to dismiss the appeal based upon a constitutional question. Defendant raised the same constitutional question as an issue in his petition for discretionary review. This Court denied review of that issue. We therefore do not consider the constitutional issue.

Here we consider whether the trial court erred in denying defendant's petition for early termination of registration on the North Carolina registry. Accordingly, we must determine whether the trial court erroneously interpreted the language of N.C.G.S. § 14-208.12A. Conclusions of law, such as issues of statutory interpretation, are reviewed de novo by this Court and are subject to full review. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

This Court neatly summarized the framework for analyzing matters of statutory construction in *In re R.L.C.*:

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of the statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007). In cases of ambiguous statutory language, we examine the language of the statute itself, the context, and what the legislation seeks to accomplish as the best indicators of the legislature's intent. *State v. Abshire*, 363 N.C. 322, 330, 677 S.E.2d 444, 450 (2009).

A sex offender who commits certain "reportable convictions" as defined in N.C.G.S. § 14-208.6(4) is "required to maintain registration with the sheriff of the county where the person resides." N.C.G.S. § 14-208.7(a) (2021). The registration requirement generally lasts "for a period of at least 30 years following the date of initial county registration." *Id.* Section 14-208.12A provides an exception to the thirty-year registration requirement and allows an offender to petition for early termination of registration "[t]en years from the date of initial county registration . . . ." N.C.G.S. § 14-208.12A.

The precise question we must answer is whether the word "county" in the relevant statutes refers to a county of any state or only one in North Carolina. Because the term "county" is subject to different interpretations, we look to the statutory language, its context, and legislative purpose.

The General Assembly passed section 14-208.12A as part of Article 27A: Sex Offender and Public Protection Registration Programs. Under Article 27A, "[c]ounty registry" is defined as "[t]he information compiled by the *sheriff of a county* in compliance with this Article." N.C.G.S. § 14-208.6(1b) (2021) (emphasis added). Additionally, "[s]heriff" is

defined as "[t]he sheriff of a county *in this State*." N.C.G.S. § 14-208.6(7) (2021) (emphasis added).

Because the definitions under Article 27A refer specifically to counties in North Carolina, "initial county registration" in section 14-208.12A must mean the first registration compiled by a sheriff of a county in the state of North Carolina. Moreover, the purpose of Article 27A aligns with this interpretation of "initial county registration." Article 27A states the purpose of the Sex Offender and Public Protection Registration Programs:

> The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest . . . . Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses . . . to register with law enforcement agencies . . . .

N.C.G.S. § 14-208.5 (2021); *see also State v. Bryant*, 359 N.C. 554, 560, 614 S.E.2d 479, 483 (2005) (explicitly recognizing the purposes of Article 27A as public safety and protection).

The legislature's purposes in protecting the public and ensuring public safety are not served if sex offenders can avoid registering or maintaining registry in North Carolina as a result of time spent on another state's sex offender registry. It is an offender's registration in North Carolina—not in other jurisdictions—that protects North Carolina citizens. *See In re Borden*, 216 N.C. App. at 583, 718 S.E.2d at 686 ("Allowing registered sex offenders to be removed from the sex offender registry without being on the registry for at least ten years in North Carolina contradicts the intent of the statutes to protect the public, maintain public safety, and assist law enforcement agencies and the public in knowing the whereabouts of sex offenders."). North Carolinians ought not be deprived of Article 27A's protections because the same protections were previously afforded to the citizens of another state.

Interpreting "initial county registration" in section 14-208.12A as requiring ten years of registration in North Carolina is further supported by the General Assembly's silence since the Court of Appeals decided *In re Borden* in 2011. Over the past twelve years, the General Assembly has made no attempts to clarify or amend section 14-208.12A in a manner contradictory to the Court of Appeals' reading. This silence from the legislature leaves us to conclude that the General Assembly takes no

issue with the Court of Appeals' interpretation of section 14-208.12A in *In re Borden* and lends further credence to our adoption of that interpretation today.

In sum, the trial court correctly applied *In re Borden* in interpreting "initial county registration" in section 14-208.12A as initial registration in North Carolina. As a result, the trial court properly denied defendant's petition for early termination of registration on the North Carolina registry. *In re Borden* provides an apt examination of section 14-208.12A, relying on sound principles of statutory construction in reaching its holding. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice BARRINGER concurring.

I join in my colleagues' opinion but write separately to note that I would not adopt legislative acquiescence. In my view, legislative intent cannot be gleaned from the General Assembly's silence following a court decision. Instead, it can only be gleaned from the legislature's affirmative acts. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 82–83 (2012) ("When government-adopted texts are given a new meaning, the law is changed; and changing written law, like adopting written law in the first place, is the function of . . . elected legislators and . . . elected executive officials and their delegates."). My concern is that legislative acquiescence vests lawmaking power in the judicial branch, rather than the legislative branch. *See id.*

Furthermore, legislative acquiescence "is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current [legislature] desires, rather than by what the law as enacted meant." *Johnson v. Transp. Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting).

> But even accepting the flawed premise that the intent of the current [legislature], with respect to the provision in isolation, is determinative, one must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of

> assurance that [legislative] failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

Id. at 671–72.

As I would not adopt legislative acquiescence, I respectfully concur.

Justice DIETZ joins in this concurring opinion.

Justice EARLS dissenting.

On 17 November 2000, Mr. Fritsche pled guilty in Colorado to Sexual Exploitation of a Child based on conduct that occurred when he was seventeen years old. Mr. Fritsche was initially released pending trial; however, he violated his pretrial release conditions when he picked up his younger brother from middle school and thus served eight years in prison. Since his release, Mr. Fritsche has become the father of two boys, who were ages nine and eleven at the time he filed his termination petition. Mr. Fritsche now asks this Court to reverse the trial court's and Court of Appeals' decisions requiring him to remain on the sex offender registry, in part so that he can participate in his children's lives without the restraints of the registry's requirements. Mr. Fritsche contends that the "most devastating" of these requirements prohibits him from attending many of his sons' school and sporting events.

This case requires the Court to determine what the words "initial county registration" mean under N.C.G.S. § 14-208.12A(a). *See* N.C.G.S. § 14-208.12A(a) (2021). Namely, whether those words mean "initial county" in North Carolina or if those words mean exactly what they say: the first county a person registers in. Because I believe that N.C.G.S. § 14-208.12A(a) allows a person to petition the superior court to be removed from the sex offender registry "[t]en years from the date of initial county registration," *see id.*, whether that initial county is in North Carolina or elsewhere, I dissent.

I. N.C.G.S. § 14-208.12A

At the outset, it is important to note that Mr. Fritsche has met all the requirements listed in N.C.G.S. § 14-208.12A(a1)(1), (2), and (3), and the only thing keeping him on the sex offender registry is this Court's interpretation of the words "initial county registration."

Subsection 14-208.12A(a) states that:

> Ten years from the date of *initial county registration*, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.

N.C.G.S. § 14-208.12A(a) (emphasis added). In addition, Subsection (a1) of the statute provides three requirements that must be met before a court may grant an individual's petition to be removed from the sex offender registry. N.C.G.S. § 14-208.12A(a1) (2021). First, the petitioner must "demonstrate[ ] . . . that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence." N.C.G.S. § 14-208.12A(a1)(1). Second, the statute requires that the "requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable . . . or required to be met as a condition for the receipt of federal funds by the State." N.C.G.S. § 14-208.12A(a1)(2). Lastly, the court must be "satisfied that the petitioner is not a current or potential threat to public safety." N.C.G.S. § 14-208.12A(a1)(3).

When interpreting legislative provisions, this Court looks first to the plain meaning of the words. *State v. Fletcher*, 370 N.C. 313, 326 (2017). If "the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *In re R.L.C.*, 361 N.C. 287, 292 (2007) (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387 (2006)). Under the relevant statute or elsewhere in Article 27A, which sets forth the Sex Offender and Public Protection Registration Programs, neither "initial" nor "county" are defined. *See* N.C.G.S. ch. 14, art. 27A; N.C.G.S. § 14-208.6 (2021); N.C.G.S. § 14-208.12A. However, these words are not ambiguous, and thus under our precedent, they must be given their plain meaning.

In *In re Borden*, the Court of Appeals interpreted the words "initial county registration" to mean "initial county registration in North Carolina." 216 N.C. App. 579, 583 (2011). But in doing so, the Court of Appeals deviated from the correct method of statutory interpretation, which required that the words "initial" and "county" be construed in accordance with their ordinary meaning. *See Fletcher*, 370 N.C. at 326. Instead, the Court of Appeals looked to N.C.G.S. § 14-208.12A's purpose, stating that the term "initial county" must refer to the initial county of

registration in North Carolina due to the statute's public safety goals. *In re Borden*, 216 N.C. App. at 583. However, the correct method of statutory interpretation required the Court of Appeals to interpret the term "initial" based on its ordinary meaning of "first," *Initial*, American Heritage Dictionary of the English Language (5th ed. 2011), and to interpret "county" based on its ordinary meaning as "[t]he largest territorial division for local government within a state," *County*, *Black's Law Dictionary* (11th ed. 2019); *see also Initial*, Merriam-Webster Dictionary (11th ed. 2019) (defining "initial" as "of or relating to the beginning . . . being at the beginning"). Thus, taking both terms together, "initial county" refers to the first territorial division of registration, regardless of whether that county is in North Carolina or another state. *See* N.C.G.S. § 14-208.12A(a). This reading of N.C.G.S. § 14-208.12A(a) is also in line with the laws of the rest of the country, as there is only one state, Louisiana, that requires the registration's duration requirement to begin running from the time of initial registration in that state. *See* La. Rev. Stat. Ann. § 15:544.

Moreover, even assuming arguendo that the statute was ambiguous and required the use of statutory construction, the Court of Appeals' analysis collapses the statute's ten-year requirement with subsection (a1)(3) of the statute, which states that in order to grant a termination petition, the court must be "otherwise satisfied that the petitioner is not a current or potential threat to public safety." N.C.G.S. § 14-208.12A(a1)(3). Specifically, the Court of Appeals noted that

> [a]llowing registered offenders to be removed from the sex offender registry without being on the registry for at least ten years in North Carolina contradicts the intent of the statutes to protect the public, maintain public safety, and assist law enforcement agencies and the public in knowing the whereabouts of sex offenders.

In re Borden, 216 N.C. App. at 583. While there is no doubt that the purpose of North Carolina's Sex Offender and Public Protection Registration Programs is to protect public safety and that this is an important governmental interest, *see* N.C.G.S. § 14-208.5 (2021), our rules of statutory construction state that a statute "may not be interpreted in a manner which would render any of its words superfluous," *State v. Geter*, 383 N.C. 484, 491 (2022) (quoting *State v. Morgan*, 372 N.C. 609, 614 (2019)). Yet, by determining that subsection (a) and subsection (a1)(3) of N.C.G.S. § 14-208.12A mean the same thing and serve the same purpose, the Court of Appeals' analysis imposes a redundant

requirement that a registrant show twice that they are not a threat to public safety. *See id.* Accordingly, this interpretation renders subsection (a1)(3)'s text superfluous. Thus, even if the Court of Appeals had been correct to proceed with statutory construction, its analysis is incorrect under our precedent and should be disregarded. *See id.*

The Court of Appeals in *In re Borden* also determined that interpreting "initial county registration" to mean "initial county registration in North Carolina" was consistent with the definitions provided in Article 27A. *In re Borden*, 216 N.C. App. at 583. In doing so, the court noted that under N.C.G.S. § 14-208.6, "county registry" is defined as "information compiled by the sheriff of a county in compliance with this Article," while "sheriff" is defined as "sheriff of a county in this State." *Id.*; *see* N.C.G.S. § 14-208.6(1b), (7) (2021). However, these definitions do not actually refer to or reference the words "initial county registration." *See* N.C.G.S. § 14-208.12A(a). Furthermore, other portions of Article 27A specifically include the modifier "North Carolina" or "this State," supporting that if the General Assembly had intended to insert "in North Carolina" after the words "initial county registration" it would have done so. *See*, *e.g.*, N.C.G.S. § 14-208.9(b) (2021) (using the modifier "this State"); N.C.G.S. § 14-208.12A(a) (referencing a conviction "that occurred in North Carolina").

II. The Adam Walsh Act

Additionally, to the extent that statutory construction of the General Assembly's intent was necessary, the proper course was to look directly to the text of the statute at issue which expressly states the General Assembly's intent to comply with the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), 34 U.S.C. § 20901.[1] *See* N.C.G.S. § 14-208.12A(a1)(2); *see also C Invs. 2*, *LLC v. Auger*, 383 N.C. 1, 8 (2022) (stating that "[l]egislative will must be found from the legislative language of the act" (cleaned up)). This is evident in its passing of N.C.G.S. § 14-208.12A and, more specifically, in determining the provisions a registrant must meet to be removed from the registry. Under subsection (a1)(2), a petition to terminate registration may be granted when

1. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Jacob Wetterling Act), which set minimum standards for state sex offender programs and conditions federal law enforcement funding on a state's adoption of sex offender registration laws. *Smith v. Doe*, 538 U.S. 84, 89–90 (2003). In 2006, Congress repealed the Jacob Wetterling Act and replaced it with the Adam Walsh Act, which is now codified at 34 U.S.C. § 20901.

> [t]he requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State.

N.C.G.S. § 14-208.12A(a1)(2). The Court of Appeals interpreted subsection (a1)(2) in *In re McClain* and determined that the section's purpose was to "bring [North Carolina's] program in line with the external federal standards" to receive federal funding. 226 N.C. App. 465, 468 (2013). Thus, any reading of N.C.G.S. § 14-208.12A that is inconsistent with the Adam Walsh Act is also inconsistent with the General Assembly's intent in passing the same.

The Adam Walsh Act was established "in response to the vicious attacks [against children] by violent predators" and to "protect the public from sex offenders and offenders against children" more generally. *Id.* In pertinent part, the Adam Walsh Act contains two registration requirements which provide context for the term "initial." The first is termed a "general" requirement, which describes what is required of a registrant to keep their registration current. This section provides:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. *For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.*

34 U.S.C. § 20913(a) (emphasis added). Next, the statute addresses a registrant's "initial registration" and discusses when an offender's first or initial registration must occur. 34 U.S.C. § 20913(b). Namely, the section provides that "initial registration" should occur (1) "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement;" or (2) "not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." *Id.* Both factors support that the term "initial" refers to the very first time an offender registers, regardless of what state that initial registration occurs in. Moreover, any interpretation that limits a person's initial registration to a particular state would be unreasoned because people are convicted of sex offenses in all jurisdictions.

A registrant's first registration is likely to occur in the same jurisdiction in which their offense took place as there is a short time frame for when initial registration must occur. *See id.*

Regarding the duration of a registration requirement, the Adam Walsh Act states that a tier I[2] sex offender's registration period may be reduced from fifteen years to ten years if they maintain a clean record.[3] 34 U.S.C. § 20915(a), (b)(1)–(3). North Carolina's statute, N.C.G.S. § 14-208.12A, is consistent with this—as it allows a court to terminate "the thirty-year registration requirement" "after ten years from the date of initial county registration"—if "[t]he petitioner demonstrates . . . that [they have] not been arrested for any crime that would require registration" under the statute. N.C.G.S. § 14-208.12A(a), (a1)(1).

Moreover, while the Adam Walsh Act requires a registrant to register, "[f]or initial registration purposes only, . . . in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence," 34 U.S.C. § 20913(a), it does not require a registrant to restart the minimum ten-year registration period each time they move, *see id.* Also, as evidenced by 34 U.S.C. § 20913(c), federal law seems to view the registration requirement as a single ongoing requirement that is not dependent on what state the registrant lives in. 34 U.S.C. § 20913(c). Namely, 34 U.S.C. § 20913 requires an offender to keep their registration current by maintaining registration in at least one jurisdiction. *Id.* This jurisdiction is one where the offender resides, is an employee, or is a student. 34 U.S.C. § 20913(a). However, this provision does not differentiate between the several states, and rather it suggests that under federal law, a registrant's registration is current so long as they are registered in a jurisdiction where they live, work, or study, regardless of the state. 34 U.S.C. § 20913(a)–(c).

> Our General Statutes also contemplate that an initial registration requirement could occur either in North Carolina or in another state. In pertinent part, N.C.G.S. § 14-208.12A(a) provides:
>
> If the reportable conviction is for an offense that occurred in North Carolina, the petition shall be filed

2. It was uncontested at the time of the termination of registration hearing that Mr. Fritsche was considered a tier I sex offender pursuant to federal law.

3. The now-repealed Jacob Wetterling Act also had a similar ten-year registration requirement. *See* 42 U.S.C. § 14071(b)(6)(A) (repealed 2006).

> in the district where the person was convicted of the offense.
>
> If the reportable conviction is for an offense that occurred in another state, the petition shall be filed in the district where the person resides.

N.C.G.S. § 14-208.12A(a). If the offense occurred out of state, the person must complete additional requirements to petition for termination from the registry. Namely, the person must do two things:

> (i) provide written notice to the sheriff of the county where the person was convicted that the person is petitioning the court to terminate the registration requirement and (ii) include with the petition at the time of its filing, an affidavit, signed by the petitioner, that verifies that the petitioner has notified the sheriff of the county where the person was convicted of the petition and that provides the mailing address and contact information for that sheriff.

Id. Both requirements are designed to inform the initial county of registration of the offender's intent to terminate the registration requirement. This raises an important question, if N.C.G.S. § 14-208.12A(a) only refers to the initial county of registration in North Carolina, why would the General Assembly include language referencing an initial registration that occurred outside of North Carolina? Instead, it is more logical that "initial county registration" refers to the first county a person registered in, regardless of what state that county was in. *See id.*

III. Conclusion

Mr. Fritsche's presence on the registry is accompanied by a variety of legal restrictions. Since moving to North Carolina, these restrictions have impacted his life, particularly his ability to parent his two sons. By requiring that Mr. Fritsche be registered with North Carolina's sex offender registry for ten years, despite having already served over ten combined years on the Colorado and Florida registries, Mr. Fritsche will have spent twenty-three years on a sex offender registry before he is eligible to petition a North Carolina court for termination. By that time, his sons will be nineteen and twenty-one years old, and he will have missed many, if not all, of their school and sporting events.

A twenty-three year registration period before being eligible for termination of the requirement is not what the North Carolina General Assembly intended. Instead, through the text of N.C.G.S. § 14-208.12A,

the legislature made clear that those who have been on the registry for ten years in any jurisdiction and meet the other requirements for removal from the registry should have their petitions granted. Because Mr. Fritsche (1) has now served fifteen years on the registry since his initial registration in 2008, *see* N.C.G.S § 14-208.12A(a); (2) has not committed another crime that would require registration, *see* N.C.G.S. § 14-208.12A(a1)(1); (3) "[t]he requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended," *see* N.C.G.S. § 14-208.12A(a1)(2); and (4) the trial court determined that Mr. Fritsche is not a current or potential threat to public safety, I would reverse the decision of the Court of Appeals.

STATE OF NORTH CAROLINA
v.
DARREN O'BRIEN LANCASTER

No. 240A22

Filed 15 December 2023

Indictment and Information—sufficiency—going armed to the terror of the public—act committed on a public highway—not an essential element

Defendant's indictment for the common law offense of going armed to the terror of the public was sufficient to confer jurisdiction upon the trial court, where the indictment alleged that defendant waved a firearm around in the parking lots of two different locations, including a private apartment complex. After overruling a prior case saying otherwise, the Supreme Court clarified that the crime of going armed to the terror of the public does not include as an essential element that the act occur on a public highway. Therefore, defendant's indictment was not fatally defective where the locations it mentioned did not constitute public highways.

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. 465 (2022), finding no error in part and vacating in part judgments entered on 14 September 2020 by Judge Joshua W. Willey Jr. in Superior Court, Craven County, and remanding the case for resentencing. Heard in the Supreme Court on 21 September 2023.

Joshua H. Stein, Attorney General, by Zachary K. Dunn, Assistant Attorney General, for the State-appellant.

Craig M. Cooley for defendant-appellee.

BERGER, Justice.

Upon conducting an *Anders* review, the Court of Appeals determined that the indictment charging defendant with going armed to the terror of the public was deficient. According to the Court of Appeals, the State's failure to allege in the indictment that the crime occurred on a public highway deprived the trial court of jurisdiction. We reverse.

I. Factual and Procedural Background

On 30 September 2019, officers with the Havelock Police Department responded to a call of an individual "waving a gun and firing rounds off kind of aimlessly in the parking lot" of an apartment complex located behind a local high school. The officers soon received another call that the same individual was at a separate nearby location "with a firearm and was yelling at a female." Upon their arrival at the second location, the officers located and detained defendant. The officers discovered a Hi-Point 9mm handgun in a nearby vehicle, and the vehicle's owner testified at trial that the gun belonged to defendant.

Defendant was indicted for multiple offenses, including two counts of going armed to the terror of the public. As is relevant to our consideration, the indictments alleged that he "unlawfully, willfully and feloniously did go armed to the terror of the public by causing a disturbance and waving a firearm around in the parking lot[s]" of the two locations.

Defendant's matter came on for trial on 14 September 2020, and after defendant waived his right to a jury trial, he was found guilty of possession of a firearm by a felon, injury to personal property, resisting a public officer, and one count of going armed to the terror of the public. The charges were consolidated and the trial court sentenced defendant to a minimum of fifteen months and a maximum of twenty-seven months in prison. Defendant appealed.[1]

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1. The Court of Appeals noted that it was "not apparent from the record that [d]efendant properly noticed his appeal," but that court nevertheless issued a writ of certiorari to remedy any jurisdictional question. *State v. Lancaster*, 284 N.C. App. 465, 466 n.1 (2022). Although the State has not argued that the Court of Appeals abused its discretion

At the Court of Appeals, defendant's counsel was unable to identify any errors in defendant's trial and instead submitted an *Anders* brief requesting that the Court of Appeals examine the record for any meritorious issues. *See Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals examined the record and identified what it contended was a meritorious issue related to the validity of the indictment charging defendant with going armed to the terror of the public.[2] Relying on its previous decision in *State v. Staten*, 32 N.C. App. 495 (1977), the Court of Appeals' majority concluded that the indictment was fatally defective and failed to confer jurisdiction upon the trial court because it "failed to allege" an essential element of the common law crime of going armed to the terror of the public, specifically, "that [d]efendant committed his act on a 'public highway.' " *State v. Lancaster*, 284 N.C. App. 465, 466 (2022). Accordingly, the Court of Appeals vacated the judgment convicting defendant of going armed to the terror of the public and remanded the matter for resentencing. *Id.*

In a separate opinion, Judge Griffin agreed the panel was bound by the Court of Appeals' previous decision in *Staten* but reasoned that the indictment's allegation "that the act was committed in the parking lot of an apartment complex" was sufficient. *Id.* at 471–72 (Griffin, J., concurring in part and dissenting in part). Accordingly, he concluded there was no error in the trial court's judgments. *Id.*

II. Analysis

The State appealed based upon the dissent, arguing that the indictment was sufficient because the common law crime of going armed to the terror of the public does not contain an element that the conduct occur about a public highway, and that even if such element exists, an apartment parking lot is connected to and therefore "about" a public highway. Defendant argues that the indictment was fatally defective because it failed to allege that (1) defendant's actions occurred about a

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in issuing this writ, "a writ of certiorari 'is not intended as a substitute for a notice of appeal.' " *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 573 (2023) (quoting *State v. Ricks*, 378 N.C. 737, 741 (2021)). This is so because "[i]f courts issued writs of certiorari solely on the showing of some error below, it would 'render meaningless the rules governing the time and manner of noticing appeals.' " *Id.* (quoting *Ricks*, 378 N.C. at 741).

2. It appears that neither defendant nor the State was given an opportunity to brief the issue identified by the Court of Appeals following its *Anders* review. Even where the argument and reasoning of the Court of Appeals may be sound, the better practice is to order supplemental briefing on the issue so identified. Such action permits full vetting of the issue and avoids potential prejudice to either party on appeal.

public highway, (2) defendant armed himself with an unusual and dangerous weapon, and (3) defendant acted with the purpose of terrorizing the people. We must, therefore, determine whether the indictment is fatally defective in light of our precedent that "[q]uashing of indictments and warrants is not favored." *State v. Abernathy*, 265 N.C. 724, 726 (1965).

"The sufficiency of an indictment is a question of law reviewed de novo." *State v. White*, 372 N.C. 248, 250 (2019).

"Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22. An "indictment is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses." N.C.G.S. § 15A-641(a) (2021).

"An indictment need not conform to any technical rules of pleading but instead must satisfy both statutory strictures and the constitutional purposes which indictments are designed to satisfy, i.e., notice sufficient to prepare a defense and to protect against double jeopardy." *In re J.U.*, 384 N.C. 618, 623 (2023) (cleaned up) (quoting *State v. Oldroyd*, 380 N.C. 613, 617 (2022)); *see also State v. Sturdivant*, 304 N.C. 293, 311 (1981) (stating that an indictment's "purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime").

Although earlier common law principles certainly conveyed that defective indictments implicated jurisdictional concerns, the General Assembly's adoption of the Criminal Procedure Act represented a sharp departure from the demands of technical pleading. *See Oldroyd*, 380 N.C. at 619 ("[T]he Criminal Procedure Act of 1975 . . . statutorily modernize[d] the requirements of a valid indictment."); *see also United States v. Cotton*, 535 U.S. 625, 630 (2002) (overruling the common law principle that a defective indictment deprives a court of jurisdiction and noting that the common law's "elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, 'the courts' statutory or constitutional *power* to adjudicate the case' " (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998))).

Since adoption of the Act, "[t]his Court has been consistent in retreating from the highly technical, archaic common law pleading requirements which promoted form over substance." *In re J.U.*, 384 N.C. at 622. "Instead, contemporary criminal pleading requirements

have been designed to remove from our law unnecessary technicalities which tend to obstruct justice." *Id.* at 623 (cleaned up) (quoting *State v. Williams*, 368 N.C. 620, 623 (2016)). After all, "it would not favor justice to allow [a] defendant to escape merited punishment upon a minor matter of form." *Sturdivant*, 304 N.C. at 311.

Thus, indictments and other criminal pleadings are

> sufficient in form for all intents and purposes if [they] express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality of refinement, if in the bill of proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C.G.S. § 15-153 (2021). Indictments simply must contain, as is relevant here, "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (2021).

As for the indictment at issue here, defendant first contends that the crime of going armed to the terror of the public includes an element that the criminal conduct occur on a public highway, and that the State's failure to allege this element deprived the trial court of jurisdiction. We disagree.

The General Assembly has provided that:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (2021). In other words, "the common law [which] has not been abrogated or repealed by statute or become obsolete is in full force and effect in this state." *State v. Vance*, 328 N.C. 613, 617 (1991). "The 'common law' referred to in N.C.G.S. § 4-1 is the common law of England

as of the date of the signing of the Declaration of Independence." *Id.* (citing *State v. Buckom*, 328 N.C. 313 (1991); *Hall v. Post*, 323 N.C. 259 (1988); *Steelman v. City of New Bern*, 279 N.C. 589 (1971)).

To determine whether the indictment in this case adequately charged defendant with going armed to the terror of the public, we must first identify the elements of the crime. Unlike crimes codified in our criminal statutes—the elements of which may be readily ascertained by a reading of the statutory text—the elements of common law crimes must be discerned through a reading of English common law and our precedent interpreting such. *See id.*

This Court's review of the common law crime of going armed to the terror of the public began nearly two centuries ago in *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843) (per curiam).[3] In *Huntly*, the defendant was charged with the offense of "riding or going about armed with unusual and dangerous weapons, to the terror of the people." *Id.* at 420. The defendant argued that because this crime was created by the statute of Northampton, a 1328 English statute, and because English statutes were no longer in effect in North Carolina, the allegations in his indictment—including riding on a public highway with said weapons to the terror of the people—constituted no crime at all. *Id.*

The statute of Northampton relied on by the defendant provided in relevant part that:

> [N]o man great nor small, of what condition soever he be, except the King's servants in his presence, and his ministers in executing the King's precepts, or of their office, and such as be in their company assisting them, . . . [shall] with force and arms, . . . go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure.

Statute of Northampton, 2 Edw. 3, ch. 3 (1328).

In rejecting the defendant's argument that this statute abrogated the common law crime of going armed to the terror of the public, this Court relied on *Sir John Knight's Case*, a 1686 English case in which the Chief Justice "declared . . . that the statute of Northampton was made

3. Citations and quotations to *State v. Huntly* herein reference the original James Iredell Reports, Volume III, published in 1843.

in affirmance of the common law." *Huntly*, 25 N.C. (3 Ired.) at 421; *see also Sir John Knight's Case*, 87 Eng. Rep. 75 (K.B. 1686). This Court thus determined that the statute of Northampton "did not *create* this offence, but provided only special penalties and modes of proceeding for its more effectual suppression." *Huntly*, 25 N.C. (3 Ired.) at 420. In so reasoning, this Court consulted Blackstone's Commentaries on the Laws of England:

> Blackstone states that "the offence of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is *particularly* prohibited by the statute of Northampton, upon pain of forfeiture of the arms, and imprisonment during the King's pleasure."

Id. at 420–21 (citation omitted) (quoting 4 William Blackstone, Commentaries *149). Having thus determined that this English common law crime remained in force despite the statute of Northampton, this Court then considered the argument that the crime diminished citizens' right to carry firearms, and it concluded with a succinct description of the crime itself:

> But although a gun is an "unusual weapon," it is to be remembered that the carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which *essentially* constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.

Id. at 422–23 (second emphasis added).

Over one hundred years after *Huntly*, this Court again addressed the crime of going armed to the terror of the public in *State v. Dawson*, 272 N.C. 535 (1968). In *Dawson*, four codefendants were charged with crimes stemming from their alleged conduct of firing gunshots into various homes, breaking and entering into homes, and defacing a home by painting "KKK" onto said property. *Id.* at 538–40. Among other offenses, the appealing defendant was charged with and convicted of "the common-law misdemeanor known as going armed with unusual and dangerous weapons to the terror of the people." *Id.* at 541.

In finding no error in the trial court's denial of defendant's motion to quash the indictment charging this crime, this Court recognized that *Huntly* "is still the law of North Carolina[,]" *id.* at 544, and stated that:

> The indictment . . . , although not as detailed and specific as the charge in *State v. Huntley* [sic], . . . is nevertheless sufficient. It charges all the essential elements of the crime, that is, that defendant (1) armed himself with unusual and dangerous weapons, to wit, pistols and rifles (2) for the unlawful purpose of terrorizing the people of Alamance County, and, (3) thus armed, he went about the public highways of the county (4) in a manner to cause terror to the people. While it would have been proper (as in *Huntley* [sic], *supra*) to enumerate acts or threats of violence committed by defendant while thus going armed, such specific averments are not required. Evidence of such acts, of course, was admissible as tending to prove the commission of the offense charged.

Id. at 549 (citations omitted).

Defendant contends that this language sets forth the elements of going armed to the terror of the public. However, the Court in *Dawson* was describing the specific evidentiary allegations contained in the defendant's indictment, not the general elements of the offense. The Court clearly stated earlier in the opinion that an individual is not allowed "to arm himself in order to prowl the highways *or other public places* to the terror of the people." *Id.* (emphasis added). As the Court noted without limiting the offense to public highways, the crime of going armed to the terror of the public has broad application:

> In this day of social upheaval one can perceive only dimly the tragic consequences to the people if either night riders or daytime demonstrators, fanatically convinced of the righteousness of their cause, could legally arm themselves, mass, go abroad, and display their weapons for the purpose of imposing their will upon the people by terror. Such weapons—unconcealed and "ready to be used on every outbreak of ungovernable passion"—would endanger the whole community.

Id.

Defendant's reading of *Dawson* would not only require that the crime occur about a public highway, but also that the only weapons

which would qualify to establish the crime are "pistols and rifles." Revolvers, shotguns, crossbows, flamethrowers, grenades, and other weapons would not qualify. In addition, such a reading would lead to an even more absurd result, that the crime could only occur in Alamance County. Just as one can commit the crime of going armed to the terror of the public while armed with unusual and dangerous weapons other than pistols and rifles, or in counties other than Alamance County, one can commit the crime in public locations other than highways. *See Dawson*, 272 N.C. at 549; *see also State v. Rambert*, 341 N.C. 173 (1995) (upholding conviction for going armed to the terror of the public and remanding for resentencing where crime occurred in a Piggly Wiggly parking lot).

The evidentiary allegations in the *Dawson* indictment led the Court of Appeals in another case to incorrectly state that *Dawson* had

> Enumerated the four essential elements to charge the common law offense of intentionally going about armed with an unusual and dangerous weapon to the terror of the people, namely: (1) armed with unusual and dangerous weapons, (2) for the unlawful purpose of terrorizing the people of the named county, (3) by going about the public highways of the county, (4) in a manner to cause terror to the people.

State v. Staten, 32 N.C. App. 495, 496–97 (1977).

The Court of Appeals' majority below recognized that this Court in *Huntly* described the crime "without any reference that the defendant *must* have acted while on a 'public highway' to be subject to criminal liability." *Lancaster*, 284 N.C. App. at 468 (quoting *Huntly*, 25 N.C. (3 Ired.) at 421–22). In fact, the majority expressly recognized that "it has long been understood that" the crime of going armed to the terror of the public, like the similar common law crime of affray, "can occur in locations other than along a public highway." *Id.* at 469. Despite this, the majority understood that because this Court has never addressed the Court of Appeals' decision in *Staten*, the panel was bound to follow that decision. *Id.* at 470; *see also In re Civ. Penalty*, 324 N.C. 373, 384 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

We now take this opportunity to overrule *Staten* and clarify the elements of the common law crime of going armed to the terror of the public. Although the Court of Appeals interpreted our decision in *Dawson* as imposing an "about a public highway" element, *see Staten*, 32 N.C.

App. at 496–97, this interpretation conflates this Court's recitation of the particular evidentiary facts set forth in the *Dawson* indictment with a recitation of the elements of the crime in general.

The Court of Appeals' erroneous statement in *Staten*, and defendant's argument in reliance thereof, is not just a misreading of *Dawson*—it is contrary to both the English history of this common law crime and our decision in *Huntly* interpreting such. The statute of Northampton did not restrict punishment for the offense of going armed to the terror of the public to only those offenses committed "about a public highway." To the contrary, the statute specifically provided that punishment was applicable to those who were armed "in fairs, markets," and any other public location. Statute of Northampton, 2 Edw. 3, ch. 3.

It is therefore no surprise that Blackstone's Commentaries on the Laws of England also fails to mention any requirement that this crime be committed "about a public highway." *See* 4 William Blackstone, Commentaries *149–50 ("The offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land . . . ." (emphasis omitted)).[4] As we stated in *Huntly*, "[i]t is the wicked purpose—and the mischievous result—which essentially constitute the crime." *Huntly*, 25 N.C. (3 Ired.) at 422–23.

Both the contemporary English history and our decision in *Huntly* confirm that the crime of going armed to the terror of the public does not require that the offensive conduct occur about a public highway. *See id.* at 423 ("[Defendant] shall not carry about this [gun] or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people."). Thus, the elements of the common law crime of going armed to the terror of the public are that the accused (1) went about armed with an unusual and dangerous weapon, (2) in a public place, (3) for the purpose of terrifying and alarming the peaceful people, and (4) in a manner which would naturally terrify and alarm the peaceful people.

With a proper understanding of the elements, we turn to defendant's arguments that the indictment charging him with going armed to

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4. The fourth volume of Blackstone's Commentaries was published in 1769. *See* Wilfrid Prest, William Blackstone: Law and Letters in the Eighteenth Century 246 (2008). As there is no indication that the common law altered this crime between 1769 and 1776, Blackstone's description of the crime reflects "the common law of England as of the date of the signing of the Declaration of Independence." *Vance*, 328 N.C. at 617.

the terror of the public was fatally deficient because it failed to allege the "unusual weapon" and "purpose" elements. Here, the indictment charged that on 30 September 2019, defendant "unlawfully, willfully and feloniously did go armed to the terror of the public by causing a disturbance and waving a firearm around in the parking lot of 326 McCotter Blvd Apartments, Havelock, North Carolina."

First, defendant contends that although "a firearm is a dangerous weapon, . . . there's nothing 'unusual' about a run-of-the-mill firearm." This argument is foreclosed by our precedent.

> It has been remarked, that a double-barrelled gun, or any other gun, cannot in this country come under the description of "unusual weapons," for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an "unusual weapon," wherewith to be armed and clad. . . . But although a gun is an "unusual weapon," it is to be remembered that the carrying of a gun per se constitutes no offence.

Huntly, 25 N.C. (3 Ired.) at 422–23. Thus, defendant's argument that a firearm does not constitute an unusual weapon is without merit.

Defendant next contends that the indictment was insufficient because it failed to allege that he "possessed the firearm for the 'purpose of terrorizing' the people of the named county." According to defendant, "simply possessing or waving a firearm doesn't automatically mean the specific 'purpose' of said possession or waving is to 'terrorize' the people of the named county."

However, "all that is required" for a sufficient indictment are "factual allegations *supporting* the elements of the crime charged," not "magic words" or a rote recitation of elements. *In re J.U.*, 384 N.C. at 624 (emphasis added). Here, both the element that defendant's conduct was done with the purpose of terrifying and alarming people, and the element that such conduct was done in a manner which would naturally terrify and alarm people, are "clearly inferable" from the allegations in the indictment that defendant caused a disturbance and waved a firearm around in the parking lot of an apartment complex. *See id.*

Defendant's attempt to compare these circumstances to a situation in which an individual lawfully exercises their constitutional right by "simply possessing" a firearm is inapposite. *See Huntly*, 25 N.C.

(3 Ired.) at 422–23. Defendant's argument on this point goes to proof at trial. Further, although one may be able to imagine circumstances under which "simply" waving a firearm is done without the purpose of terrorizing people, an indictment need only contain factual allegations which *support* the elements of the charged crime, not evidentiary allegations which conclusively establish the elements regarding an accused's mental state. *See* N.C.G.S. § 15A-924(a)(5) ("[Indictments must contain a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element . . . ."). Defendant's argument that the indictment was fatally deficient due to an omission of the "purpose" element is therefore without merit.

The indictment here adequately alleged facts supporting each element of the crime of going armed to the terror of the public. The indictment clearly appraised defendant of the conduct which was the subject of the accusation, *see* N.C.G.S. § 15A-924(a)(5), and provided "notice sufficient to prepare a defense and to protect against double jeopardy." *In re J.U.*, 384 N.C. at 623. Accordingly, there is no error in the indictment charging defendant with going armed to the terror of the public, and the decision of the Court of Appeals is reversed.

REVERSED.

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

STATE v. TUCKER

[385 N.C. 471 (2023)]

STATE OF NORTH CAROLINA
v.
RUSSELL WILLIAM TUCKER

No. 113A96-4

Filed 15 December 2023

Jury—selection—Batson challenge—prima facie case not established—newly discovered evidence—procedural bar

Defendant's motion for appropriate relief (MAR), in which defendant raised a *Batson* claim that the State exhibited purposeful discrimination during jury selection in his trial for first-degree murder, was procedurally barred pursuant to N.C.G.S. § 15A-1419 because defendant was in a position to adequately raise his claim on direct appeal and in prior post-conviction proceedings but failed to do so, and he failed to establish either good cause and actual prejudice or a fundamental miscarriage of justice to overcome the procedural bar. In particular, although defendant based his MAR on "newly discovered evidence" in the form of a continuing legal education handout listing permissible reasons to strike jurors and a statistical analysis of juror selection in North Carolina capital cases, the content of both items could have been discovered previously through reasonable diligence. The Supreme Court noted that any arguments related to pretext (step three of the *Batson* inquiry) had no place in the review of defendant's MAR since the trial court's determination during jury selection that defendant failed to establish a prima facie case of discrimination (step one of the *Batson* inquiry) rendered analysis of the State's reasons for its strikes (erroneously solicited by the trial court) unnecessary.

Justice EARLS dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 24 August 2020 by Judge R. Stuart Albright in Superior Court, Forsyth County, denying defendant's motions for appropriate relief. Heard in the Supreme Court 8 February 2023.

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

Elizabeth Hambourger, for defendant-appellant.

Ian A. Mance, Quintin D. Byrd, and Irving Joyner for North Carolina Association of Black Lawyers and North Carolina State Conference of the NAACP, amici curiae.

BERGER, Justice.

Through a series of post-conviction motions, defendant asserts that his conviction for first-degree murder and sentence of death should be set aside. Defendant argues that despite the trial court's finding that he failed to establish a prima facie case of purposeful discrimination in jury selection, he is nevertheless entitled to a new trial because newly discovered evidence, consisting of a continuing legal education handout and a statistical study, supports his claim pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). However, defendant failed to raise a *Batson* claim or otherwise argue purposeful discrimination on direct appeal from his original trial or in previous post-conviction proceedings. Thus, the question before this Court is whether review of defendant's *Batson* claim is procedurally barred pursuant to N.C.G.S. § 15A-1419. For the reasons set forth herein, we conclude that defendant's claim is barred and affirm the judgment of the Superior Court denying defendant's motion for appropriate relief.

I. Factual and Procedural Background

It is undisputed that defendant killed K-Mart security guard Travis Williams and shot two Winston-Salem police officers on December 8, 1994.[1] Defendant was indicted for first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. A Forsyth County jury found defendant guilty of first-degree murder, and defendant was sentenced to death upon the jury's recommendation. The State dismissed the assault charges.

Forsyth County Assistant District Attorneys Robert Lang and David Spence prosecuted the case for the State. During jury selection, which was conducted by Mr. Lang, defendant lodged *Batson* objections to the State's peremptory strikes against black prospective jurors Debra Banner, Thomas Smalls, and Wayne Mills. The voir dire transcript reveals

1. A more detailed account of the underlying facts of this case can be found in this Court's opinion at *State v. Tucker*, 347 N.C. 235, 239–40 (1997).

the following relevant exchanges between these prospective jurors, the trial court, and the State.

A. Voir Dire of Ms. Banner

Following inquiry by the trial court, Ms. Banner stated that she worked at Forsyth Medical Center and had not acquired sufficient leave time, which she referred to as PTO, to receive compensation when she missed work. Ms. Banner worked eight-hour shifts that ended at 11:00 p.m., and "nine o'clock [a.m. wa]s not [her] time" because she was not a morning person.[2] Ms. Banner further stated that she "prefer[red] not to be on [the jury]." The trial court clarified her response:

> THE COURT: Prefer not to serve I take it. Do you think that situation will prevent you or substantially impair you in performing your duties as a juror in this?
>
> MS. BANNER: Yes.
>
> THE COURT: Will it prevent you or substantially impair you from giving your full attention to this case?
>
> MS. BANNER: Yes, sir.
>
> THE COURT: The State want to make inquiry of this juror then?

The State chose not to challenge Ms. Banner for cause and made no further inquiry at that time. The Court then resumed its questioning of other prospective jurors.

The next interaction with Ms. Banner took place during the State's voir dire when Ms. Banner had fallen asleep in the jury box while other prospective jurors were being questioned.

> [THE STATE]: Come down to you, Ms. Banner. Wake up.
>
> MS. BANNER: I told you I didn't do well early.
>
> [THE STATE]: But you'd be at work now, wouldn't you?
>
> MS. BANNER: Yeah.

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2. The transcript of jury selection reveals that along with Ms. Banner, jurors Wayne Robinson and Katherine Shook also worked at Forsyth Medical Center. Similar to Ms. Banner, Mr. Robinson expressed concern about missing work to attend court due to a lack of paid time off. Mr. Robinson was excused for cause. Ms. Shook was excused using a peremptory challenge at the same time as Ms. Banner.

Neither the trial court nor defense counsel interjected to suggest Ms. Banner had not fallen asleep.

Thereafter, Ms. Banner acknowledged that she had no personal or moral objections to the death penalty, but her work and lack of paid time off would likely affect her ability to listen to the evidence and follow the trial court's instructions. In addition, it was revealed in questions directed to all the jurors that Ms. Banner did not own the residence in which she lived.

B. Voir Dire of Mr. Smalls

As with Ms. Banner, the transcript indicates that Mr. Smalls "nodded off" and "went to sleep" during jury selection. His responses to the initial questions from the trial court were unremarkable, but during questioning by the State, the following exchange occurred:

> [THE STATE]: It's vitally important that everybody know the State is very concerned about whether everybody can consider the death penalty and the defendant is concerned about whether everybody will automatically impose the death penalty and won't consider the option of life without parole so I'm sorry it gets lengthy but it has got to be done.
>
> Mr. Smalls, can you please tell me about your feelings about the death penalty.
>
> MR. SMALLS: I cannot give an answer to that.
>
> [THE STATE]: Let me ask you do you feel like it's a necessary part of the law?
>
> MR. SMALLS: I think it's a part of the law.
>
> [THE STATE]: Do you think it's a necessary part of the law?
>
> MR. SMALLS: I don't know.
>
> [THE STATE]: Do you have any personal, moral or religious or philosophical beliefs against the death penalty or capital punishment?
>
> MR. SMALLS: I believe in capital punishment.
>
> [THE STATE]: You do?
>
> MR. SMALLS: Yes.

[THE STATE]: Do you think that under some appropriate circumstances, and the judge will tell you what those circumstances are, that the death penalty is an appropriate punishment in some cases?

MR. SMALLS: I guess so. I don't know.

[THE STATE]: Do you belong to any churches or any organizations that oppose the death penalty?

MR. SMALLS: Yes, I'm a Christian.

[THE STATE]: There is a wide broad views in the church. Some churches oppose the death penalty, others feel it's appropriate and have taken a stand. Has your church taken a stand against the death penalty?

MR. SMALLS: I don't know. I can't speak for all of my church. I can only speak for myself.

[THE STATE]: Well that's what is most important. Do you feel that if the circumstances were appropriate that you could vote to impose the death penalty?

MR. SMALLS: I still don't know.

[THE STATE]: You'd have to wait to hear all the evidence?

MR. SMALLS: Yes, sir.

[THE STATE]: Let me ask you, Mr. Smalls, if the State—at the guilt/innocence phase—satisfies its burden to prove the defendant's guilt beyond a reasonable doubt based on one or both of the theories of first degree murder that I've talked about—premeditation and deliberation or felony murder— could you find the defendant guilty?

MR. SMALLS: I guess so.

[THE STATE]: If the law—if the State satisfied its burden and the judge instructed you and gave you the law with regards to the various elements of premeditation and deliberation and felony murder and the State proved those to you beyond a reasonable doubt, would you be able to find the defendant guilty?

MR. SMALLS: I guess so.

[THE STATE]: Having made that decision at the guilt/innocence if the jury determined unanimously that the defendant was guilty of first degree murder and we move on to the second stage and you were satisfied beyond a reasonable doubt that the death penalty was the appropriate punishment after going through the detailed instructions the Court will give you at that second stage, would you be able to vote to impose the death penalty?

MR. SMALLS: I'll have to wait. I'll have to wait until that time comes.

[THE STATE]: Do you feel—well, let me ask you are there some circumstances you feel where the death penalty is appropriate?

MR. SMALLS: Sometimes. Sometimes I think so.

[THE STATE]: Do you feel like you could be part of a jury that comes back and makes a recommendation of the death penalty to the Court in this case?

MR. SMALLS: I guess so.

[THE STATE]: When you say you guess so, does that mean—

MR. SMALLS: —If I have to.

[THE STATE]: If you have to?

MR. SMALLS: Yes. If there is no way out.

[THE STATE]: If there is no way out?

MR. SMALLS: Yes.

C. Voir Dire of Mr. Mills

When Mr. Mills was seated as a prospective alternate juror, the trial court questioned him on whether he had heard or seen anything about the case in the newspaper or from another source. Although Mr. Mills had not read about the case in the newspaper, he stated that he had "heard about it . . . [in] talk around the street." When the trial court asked Mr. Mills whether he had formed or expressed an opinion on the guilt or innocence of defendant based on what he heard, Mr. Mills responded

that he "didn't comment on it." When asked to clarify what he meant, Mr. Mills responded, "I didn't comment on it. When I heard it, I didn't comment on it." The trial court moved on to questions about the death penalty and life without parole and asked if Mr. Mills had any reservations about the death penalty, and Mr. Mills responded that he was not against it.

Mr. Mills responded to several of the State's questions with "yes" and "no" answers with no elaboration. Mr. Mills was specifically asked if he had been convicted of any criminal offense other than traffic offenses, and he replied, "No." Contrary to Mr. Mills' representation, the State had discovered in its pretrial research that he had been convicted of solicitation of prostitution.

D. Defendant's Objections

The State struck each of these prospective jurors using peremptory challenges, and defendant objected to each strike pursuant to *Batson*.

In attempting to establish a prima facie case of racial discrimination, defendant contended that Ms. Banner showed unwavering support for the death penalty, noting that "right down the line Ms. Banner answered yes, yes, yes, yes just like everybody else on that jury and even more so." Defendant argued that other jurors passed by the State were not as strong on the death penalty as Ms. Banner, because their responses only suggested that they "could consider" the death penalty or that "it was appropriate in some cases." Defendant further contended that even though Ms. Banner raised the issue of her lack of paid time off, in the end, Ms. Banner "was very clear that [she] understood her duty [as a juror] overrode [her work responsibilities]." Moreover, defendant argued that Ms. Banner "very candidly said she wouldn't hold [issues concerning her work schedule] against either party and she could be fair to both sides." Defendant stated that "no race[-]neutral reason" justified the use of the peremptory challenge against Ms. Banner.

Concerning Mr. Smalls, defendant contended even though Mr. Smalls "was a little more hesitant" on the death penalty questions than Ms. Banner, Mr. Smalls conveyed that he believed in capital punishment if it was appropriate under the circumstances. Defendant stated that there was "no race[-]neutral basis" for the State's peremptory strike on Mr. Smalls.

Before ruling on defendant's *Batson* objections to the State's peremptory strikes of Ms. Banner and Mr. Smalls, the State and defendant stipulated that defendant and the victim, Mr. Williams, were both black.

The parties also stipulated that of the two officers involved in the case, one was black and the other was white. The trial court further noted, and both defendant and the State agreed, that race was not an issue in the case.

The trial court determined that defendant had not established a prima facie case of purposeful discrimination. However, the trial court stated that it would "give the State the opportunity . . . to address the issue of whether or not the challenge . . . has been done on a race[-]neutral basis" in order to make a record for appeal. The State indicated that it would respond with its race-neutral explanations if ordered to by the trial court because such an order would not waive defendant's burden of establishing a prima facie case. The trial court stated that "I think this Court's ruling is correct. I don't think there is a prima facie case," but nonetheless asked the State to articulate its race-neutral reasons.

As to the peremptory strike for Ms. Banner, the State noted that Ms. Banner was sleeping during jury selection, which "fit in" with her prior comment that she "doesn't do well in the morning hours" due to her work schedule. The State also explained that Ms. Banner had stated that she preferred not to serve, that she had concerns about paid time off, and that her work schedule would make it difficult to work most of the night and then have to be in court. The State explained that because the case involved "a lot of important evidence, . . . we need a juror who is awake and aware and not worried about work."

In addition, the State considered Ms. Banner's work as a nurse problematic for her jury service because, in the State's opinion, "those who save lives are often hesitant to make a recommendation for death." The State also expressed concern that Ms. Banner showed a "lack of stake in the community," pointing to the fact that she was not a homeowner and was not registered to vote.

Regarding Mr. Smalls, the State explained that he "nodded off and went to sleep one time [and the State] saw him startle and wake up during the selection of the other jurors." This statement was not disputed by defendant or the trial court.[3] The State expressed concern regarding Mr. Smalls' body language and asserted that his responses were

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3. Our dissenting colleague's reliance on *Snyder v. Louisiana*, 552 U.S. 472 (2008) is misplaced for two reasons. First, contrary to our colleague's indication that deference is *only* warranted when a trial court makes findings regarding a juror's demeanor, *Snyder* states more broadly that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike." *Id.* at 479 (emphasis added). Second, unlike in *Snyder*, and as discussed in more detail herein, step

inappropriate because they were "middle of the road responses," and as a result, the State "didn't feel he was very strong on the death penalty." Specifically, the State recounted that Mr. Smalls said he did not know what he felt about the death penalty, then "put his head down and began talking to the floor," and "did not ever make eye contact" with prosecutors during the death penalty questions. Further, the State noted that Mr. Smalls "was often looking up" and was "mumbling and talking to himself." The State explained that Mr. Smalls' statement that he could consider the death penalty "if he had to" was inappropriate.

After the State's proffered reasons for exercising peremptory challenges for both Mr. Smalls and Ms. Banner, the trial court announced its finding that there were thirty-nine prospective jurors in the entire jury venire and that seven were black. Of the four black jurors that had been called by the clerk as potential jurors for the trial, two were excused using peremptory challenges and two were excused for cause.[4] Of the four peremptory strikes exercised by the State at that time, two were for white prospective jurors and two were for black prospective jurors. At the time the peremptory challenges were made, eleven jurors had been seated—nine were white and two were black.

The trial court found that "the questions and statements of the prosecuting attorney during jury selection do not tend to support an inference of discrimination," and that "each juror was examined substantially in the same format." The trial court found that there had not been "a

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one of *Batson* is not moot in this case. *See State v. Snyder*, 750 So.2d 832, 841 (La. 1999) (noting that the State offered race-neutral reasons before the trial court made a "finding as to whether defendant had made a prima facie showing of purposeful racial discrimination."). However, even though the trial court was not required to make findings regarding pretext because step one was not moot, the trial court stated that "the district attorney observed that [Mr. Smalls] nodded off to sleep at one time . . . ." Defendant did not object or otherwise argue to the contrary.

We also note that, despite the trial court's statement, our colleague implies that the prosecutor's observation that Mr. Smalls "nodded off" was untruthful. The fact that a juror "nodded off" seems highly relevant to his or her ability to serve, regardless of skin color. But according to our colleague, "it is more likely that [the prosecutor]'s choice of words evince [the prosecutor]'s reliance on the [CLE handout] by echoing the handout's language of 'obvious boredom [which] may show anti-prosecution tendencies.' " It is a remarkable feat indeed to extract this reading from the record as it exists in this case.

4. The trial court detailed on the record that two prospective black jurors, Mr. Leroy Robinson and Ms. Dorothy Nash, were excused for cause. Ms. Nash was removed for cause after she expressed unwavering opposition to the death penalty, and Mr. Robinson stated that he had prior knowledge of the case from media reports and had formed an opinion as to defendant's guilt or innocence. For clarity, we note that there are two jurors with the last name Robinson in the transcript: Wayne Robinson and Leroy Robinson; Mr. Leroy Robinson was identified as a black juror in the trial court's *Batson* findings.

repeated use of peremptory challenges" against black jurors such that a pattern of strikes against black jurors had arisen. Finally, the trial court found that there had "not been a disproportionate number of peremptory challenges" exercised to strike black jurors.

As such, the trial court found that "defendant ha[d] failed to raise an inference that the prosecuting attorney ha[d] . . . used the peremptory challenges to exclude [individuals] from the jury on account of race." The trial court did not characterize its findings as a full *Batson* hearing, and defendant did not raise the issue of pretext, nor was it ever discussed by the trial court.

As to Mr. Mills, the prospective alternate juror, defendant argued that Mr. Mills was the eighth black potential juror to enter the juror box and that there appeared to be no race-neutral reason to strike Mr. Mills. Defendant explained that Mr. Mills believed in the death penalty and stated that he could follow the law. Defendant also noted that the jury was all white.

The trial court concluded again that race was not an issue in this case and that "the demeanor of the questions and statements of the prosecuting attorney during jury selection did not tend to support an inference of discrimination in the use of [the] peremptory challenge." The trial court also found that the format for questions was "typically the same for each juror without regard to race" and that "there ha[d] not been a disproportionate number of peremptory challenges to strike black jurors in this case."

The trial court made additional findings that of the thirty-nine jurors initially called on 6 February 1996, seven were black. Of the seven black jurors, three were excused for cause and four were excused by the State's peremptory challenges. Of the forty-eight jurors called on 8 February 1996, eight were black, and one black juror was excused by consent for pretrial knowledge and contact.

At close of court on 12 February 1996, no additional black jurors had been called and twelve jurors had been seated for the trial. At that point, the State had exercised eleven peremptory challenges against prospective jurors—four were used against black jurors and seven were used against white jurors.

The trial court also addressed strikes used against prospective alternate jurors. The first alternate prospective juror called was white and was excused for cause. Mr. Mills was the second alternate prospective juror called. The trial court determined that defendant had not

established a prima facie case of discrimination in striking Mr. Mills, but again requested that the State provide its reasons for the challenge.

The State, pursuant to the trial court's request, explained that Mr. Mills had been untruthful about his criminal record. Even though the State had accepted other jurors with criminal convictions, the concern with Mr. Mills was "his failure to acknowledge the criminal court convictions" and "the untruthful answers given." In addition, Mr. Mills hesitated on the death penalty questions; gave answers which were mostly "monosyllabic;" appeared to be "smiling inappropriately on a number of occasions;" and seemed confused during questioning.

After the State provided its race-neutral reasons, the trial court reiterated that defendant had failed to establish a prima facie case of discrimination. With each of the three prospective jurors at issue, the trial court never characterized the proceeding as a full *Batson* hearing, nor was pretext argued or ruled upon.

E. Trial and Post Conviction Proceedings

A Forsyth County jury convicted defendant of first-degree murder based on a theory of premeditation and deliberation and under the felony murder rule. *Tucker*, 347 N.C. at 239. Upon completion of the sentencing phase, the jury recommended that defendant be sentenced to death. *Id.* at 239. Consistent with that recommendation, the trial court sentenced defendant to death. *Id.* at 239.

Defendant appealed, and this Court determined that "defendant received a fair trial and capital sentencing proceeding, free from prejudicial error." *Id.* at 247.[5] Defendant did not raise a *Batson* issue on direct appeal.

In addition, defendant did not raise a *Batson* issue in his initial motion for appropriate relief (MAR) or subsequent amendments thereto. Defendant filed an MAR on October 6, 1998, and filed an amendment to that MAR on January 13, 2000. Defendant's motions were denied on May 11, 2000. Later, defendant received newly appointed counsel who filed an MAR in 2001 styled as a Second Amended Motion for Appropriate Relief. After evidentiary hearings in 2004 and 2006, defendant's MAR was denied and this Court denied certiorari in *State v. Tucker*, 361 N.C. 575 (2007) (mem.).

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5. The Supreme Court of the United States denied certiorari in *Tucker v. North Carolina*, 523 U.S. 1061 (1998) (mem.).

In 2010, defendant filed an MAR in Forsyth County Superior Court pursuant to the Racial Justice Act (RJA). In 2008, defendant filed a petition for writ of habeas corpus in federal district court, and defendant amended this petition in 2016 and 2017. The federal court held defendant's federal habeas corpus proceedings in abeyance in 2010 while defendant's RJA claims were resolved.

In 2017, defendant filed another MAR and a second amendment to his RJA MAR. The State filed an answer in 2018, defendant replied in 2018, and defendant filed an amendment to his MAR in 2019. Then, in 2020, defendant, for the second time, amended his MAR.

In his 2017, 2019, and 2020 MARs, which are presently before the Court, defendant for the first time raised the *Batson* issue under a theory of newly discovered evidence. The alleged newly discovered evidence which provides the basis for defendant's most recent post-conviction filings are a continuing legal education (CLE) handout and a statistical study on jury selection in North Carolina assembled by law professors from Michigan State University, along with a corresponding affidavit submitted by the authors of the study. Defendant asked the MAR court to vacate his conviction and death sentence and order a new trial, asserting that newly discovered evidence allows him to overcome any procedural bar found in N.C.G.S. § 15A-1419. Defendant further asserted that his claims were not barred under this Court's decision in *State v. Burke*, 374 N.C. 617 (2020).

The CLE handout is a one-page handout entitled "BATSON Justifications: Articulating Juror Negatives." The CLE handout lists ten legally acceptable justifications for the use of peremptory challenges: (1) inappropriate dress; (2) physical appearance; (3) age; (4) attitude; (5) body language; (6) rehabilitated jurors or those who vacillate in answering the State's questions; (7) inappropriate, non-responsive, evasive, or monosyllabic responses; (8) communication difficulties, be it language barriers or difficulty understanding questions and the process; (9) unrevealed criminal history; and (10) any other signs of defiance, sympathy with the defendant, or antagonism to the State.

The statistical study was conducted by Catherine Grosso and Barbara O'Brien, two law professors at Michigan State University College of Law. *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012) [hereinafter Grosso & O'Brien, *A Stubborn Legacy*]. The professors reviewed data concerning jury selection in North Carolina capital

cases between 1990 and 2010. Pursuant to an affidavit from the professors proffered at the hearing on defendant's motion for appropriate relief, the study took less than one year to create as they "began data collection for the study in the fall of 2009 and completed it in the spring of 2010."[6]

Defendant advances two primary arguments in his most recent MAR and amendments. First, defendant contends that not only was the CLE handout newly discovered evidence, but that Mr. Lang used language from the handout as his race-neutral justification for striking Ms. Banner, Mr. Smalls, and Mr. Mills. Second, defendant argued that the MSU study and the authoring professors' affidavit established a pattern of race-based strikes by both prosecutors in this case. Defendant asserts that the purported history of discrimination in Forsyth County, allegedly established not by court rulings but by statistical evidence, shows a pattern of discrimination which must be present in this case also.

On 24 August 2020, the MAR court entered an order denying defendant's MARs. That order is the subject of our review here. The MAR court expressly stated the scope of the order was limited to the 2017 MAR, 2019 MAR, and 2020 MAR filed by defendant "based on alleged newly discovered evidence." The RJA MARs were assigned to a separate judge and were not considered by the MAR court.

The MAR court's comprehensive order makes several pertinent findings of fact before ultimately denying defendant's claims because defendant "failed to show good cause, actual prejudice, or a fundamental miscarriage of justice" sufficient to overcome the procedural bar of N.C.G.S. § 15A-1419. Specifically, the MAR court found that defendant failed to raise a *Batson* issue on direct appeal despite the fact that "the trial court identified the *Batson* issue as a possible issue on appeal and said so in the presence of the parties."[7]

In addition and contrary to defendant's argument, the MAR court held that *State v. Burke* cannot be read to prevent operation of the procedural bar in this case because *Burke* applied specifically to RJA MARs and "all of [d]efendant's RJA MARs are still pending and are beyond the scope of this [o]rder."

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6. Defendant also asserted that a similar study on juror data constituted newly discovered evidence. *See* Ronald F. Wright, et al., *The Jury Sunshine Project: Jury Selection as a Political Issue*, 2018 Ill. L. Rev. 1407 (2018). Our "good cause" analysis of the MSU study under N.C.G.S. § 15A-1419(c) applies equally to this study.

7. Defendant conceded that his counsel was not ineffective for failing to raise the *Batson* issue on direct appeal or in his initial post-conviction filings.

Defendant petitioned this Court for a writ of certiorari to review the order of the MAR court. This Court allowed review pursuant to N.C.G.S. § 7A-32(b) on three issues: (1) whether the CLE handout and the MSU study constitute newly discovered evidence of purposeful discrimination in jury selection under *Batson v. Kentucky*, (2) whether defendant was in an adequate position to raise his *Batson* claim before he had access to the CLE handout and the MSU study, and (3) whether this Court's decision in *State v. Burke* forecloses acceptance of the State's procedural bar argument.

II. Standard of Review

This Court reviews a lower court's order on motions for appropriate relief to determine "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720 (1982)). We review issues of law de novo. *State v. Biber*, 365 N.C. 162, 168 (2011).

III. Analysis

A. Procedural Bar

Section 15A-1419 of the North Carolina General Statutes provides a mandatory procedural bar for issues a party seeks to litigate in post-conviction proceedings. The procedural bar applies when any of the following circumstances are present:

> (1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. . . .
>
> (2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.
>
> (3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

> (4) The defendant failed to file a timely motion for appropriate relief as required by G.S. 15A-1415(a).

N.C.G.S. § 15A-1419(a) (2021). If any of these circumstances are present, "the court shall deny the motion . . . unless the defendant can demonstrate" that an exception applies. N.C.G.S. § 15A-1419(b) (2021); *see also State v. Murrell*, 362 N.C. 375, 402 (2008).

An exception to the procedural bar applies only if the defendant can demonstrate: (1) "[g]ood cause for excusing the ground for denial listed in subsection (a) of this section and . . . actual prejudice resulting from the defendant's claim," or (2) "[t]hat failure to consider the defendant's claim will result in a fundamental miscarriage of justice." N.C.G.S. § 15A-1419(b).

"[G]ood cause" exists under this section only if the defendant demonstrates "by a preponderance of the evidence that his failure to raise the claim or file a timely motion" was:

> (1) The result of State action in violation of the United States Constitution or the North Carolina Constitution including ineffective assistance of trial or appellate counsel;
>
> (2) The result of the recognition of a new federal or State right which is retroactively applicable; or
>
> (3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review.

N.C.G.S. § 15A-1419(c) (2021).

"[A]ctual prejudice," within the meaning of subsection (b), exists only "if the defendant establishes by a preponderance of the evidence that an error during the trial or sentencing" raises a "reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error." N.C.G.S. § 15A-1419(d) (2021).

"[A] fundamental miscarriage of justice," occurs only where:

> (1) The defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense; or

(2) The defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty.

N.C.G.S. § 15A-1419(e) (2021).

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

It is imperative, not only for the parties, but also for federal habeas review, that we strictly and regularly follow our post-conviction procedural requirements. *See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *see also Cnty. Ct. of Ulster Cnty., N.Y. v. Allen*, 442 U.S. 140, 148 (1979) (determining whether an independent and adequate state procedural ground was utilized by the state court which would bar the federal courts from addressing the issue on habeas corpus); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) ("We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review.").

1. Batson

We first address defendant's argument that the procedural bar of subsection 15A-1419(a) does not apply to his *Batson* claim because at the time of his direct appeal and initial MAR proceedings, he did not have access to the CLE handout or the MSU study and was therefore not "in a position to adequately raise the . . . issue." N.C.G.S. § 15A-1419(a). To do so, we begin with the essential tenets of *Batson* and the MAR court's application of those tenets to defendant's claim.

The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisian*a, 552 U.S. 472, 478

(2008) (quoting *United States v. Vasquez–Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)). "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

The North Carolina Constitution states that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. Const. art. I, § 26. Thus, the North Carolina Constitution specifically "bars race-based peremptory challenges." *State v. Nicholson*, 355 N.C. 1, 21 (2002) (citing *State v. Fletcher*, 348 N.C. 292, 312 (1998), *cert. denied*, 525 U.S. 1180 (1999)). "[O]ur courts have adopted the *Batson* test for reviewing the validity of peremptory challenges under the North Carolina Constitution." *State v. Campbell*, 384 N.C. 126, 133 (2023) (quoting *Nicholson*, 355 N.C. at 21).

"When a defendant raises a *Batson* objection, the trial court must engage in a three-step inquiry to evaluate the merits of the objection." *Id.* First, a defendant must "establish a *prima facie* case that the peremptory challenge was exercised on the basis of race." *State v. Cummings*, 346 N.C. 291, 307–08 (1997). "A defendant meets his or her burden at step one 'by showing that the totality of the relevant facts gives rise to [an] inference of discriminatory purpose.' " *Campbell*, 384 N.C. at 134 (quoting *Batson*, 476 U.S. at 94). A "prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson*, 476 U.S. at 97.

"Where the trial court rules that a defendant has failed to make a prima facie showing [at step one], our review is limited to whether the trial court erred in finding that the defendant failed to make a prima facie showing, even if the State offers reasons for its exercise of the peremptory challenges." *State v. Locklear*, 349 N.C. 118, 137 (1998) (first citing *State v. Hoffman*, 348 N.C. 548, 554 (1998); and then citing *State v. Williams*, 343 N.C. 345, 359 (1996), *cert. denied*, 519 U.S. 1061 (1997)). "[W]e do not consider at step one the State's *post facto* reply to the trial court's request for a step two response." *Campbell*, 384 N.C. at 136. Further, "[w]here 'the trial court clearly rule[s] there ha[s] been no prima facie showing' . . . this Court does 'not consider whether the State offered proper, race-neutral reasons for its peremptory challenge.' " *Id.* (quoting *State v. Hoffman*, 348 N.C. 548, 552 (1998)). Thus, a *Batson* inquiry concludes "when the trial court . . . determine[s] that defendant failed to make a prima facie showing." *Id.*

Although a step one showing by defendant may be mooted "when the trial court does not explicitly rule on whether the defendant made a *prima facie* case, and . . . the State [voluntarily] proceeds to the second prong of *Batson* by articulating its explanation for the challenge," *State v. Golphin*, 352 N.C. 364, 426 (2000), our precedent is clear that a prima facie showing by defendant is an important step in a *Batson* analysis. Thus, step one will not be rendered moot, and will therefore remain subject to review, when the trial court determines that the "*defendant failed to make a* prima facie *showing before the prosecutor articulated his reasons for the peremptory challenges*." *State v. Hoffman*, 348 N.C. 548, 551–52 (1998) (quoting *State v. Williams*, 343 N.C. 345, 359 (1996), *cert. denied*, 519 U.S. 1061 (1997)). In fact, we have expressly stated that it is error for a trial court to require a step two explanation in the absence of a prima facie showing by defendant. *See Campbell*, 384 N.C. at 136 ("Whatever the reason, the *Batson* inquiry should have concluded when the trial court first determined that defendant failed to make a prima facie showing.").

Only when the trial court determines that a defendant successfully established prima facie showing will the *Batson* inquiry proceeds to the second step. *Id.* at 134. There, "the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question." *Hernandez v. New York*, 500 U.S. 352, 358–59 (1991) (citing *Batson*, 476 U.S. at 97–98). "*Batson*'s requirement of a race-neutral explanation means an explanation other than race." *Id.* at 374 (O'Connor, J., concurring). "[E]ven if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three." *Johnson v. California*, 545 U.S. 162, 171 (2005).

In the third and final step of the *Batson* inquiry, "the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez*, 500 U.S. at 359 (citing *Batson*, 476 U.S. at 98). "No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause *unless it is based on race*." *Id.* at 375 (O'Connor, J., concurring) (emphasis added). At this step, the trial court must "determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019). "The ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." *Id.* at 2244 (cleaned up).

"[T]he job of enforcing *Batson* rests first and foremost with trial judges." *Id.* at 2243. Thus, "when a trial court rules that a defendant has

failed to demonstrate a prima facie case of discrimination, '[t]he trial court's ruling is accorded deference on review and will not be disturbed unless it is clearly erroneous.' " *Campbell*, 384 N.C. at 131–32 (alteration in original) (quoting *State v. Augustine*, 359 N.C. 709, 715 (2005)); *see also State v. Hobbs*, 374 N.C. 345, 349 (2020); *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Hernandez*, 500 U.S. at 364. "The ability of the trial judge to observe firsthand the reactions, hesitations, emotions, candor, and honesty of the lawyers and veniremen during voir dire questioning is crucial to the ultimate determination" of whether a prosecutor is acting with discriminatory purpose. *State v. Smith*, 328 N.C. 99, 127 (1991).

"Trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Campbell*, 384 N.C. at 131 (quoting *Batson*, 476 U.S. at 97). Just as judges may consider questions and statements of prosecutors when determining whether a prima facie case has been established by defendant at step one, judges may also consider plainly observable prospective juror conduct—such as falling asleep—which would justify the use of a peremptory strike. The law does not require that trial judges disregard evidence of such conduct in considering whether a prima facie case of discrimination has been established. "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *Id.* at 138 (quoting *State v. Alston*, 307 N.C. 321, 341 (1983)).

2. MAR Court Order

a. Mootness

The MAR court reviewed defendant's *Batson* argument in a thorough thirty-six-page order, making extensive findings of fact and conclusions of law. In accordance with our precedent, the MAR court first determined that because the trial court ruled that defendant failed to establish a prima facie case of purposeful discrimination *prior* to the trial court's request that the State articulate its race-neutral reasoning for striking Ms. Banner, Mr. Smalls, and Mr. Mills, step one of *Batson* was not moot. Relying on *Locklear*, the MAR court properly limited its review to step one. The MAR court further found that the hearing in the trial court was not a "full hearing" on defendant's *Batson* claim because pretext in the third step was never discussed by defendant at trial, nor did the trial court rule on any third-step issue of pretext.

In contrast with the finding of the MAR court, defendant argues, and the State concedes, that step one of the *Batson* inquiry is moot, citing

this Court's decision in *Hobbs*, 374 N.C. at 354. However, that understanding between the parties is immaterial as a stipulation to an issue of law is not binding upon the Court. *See Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 56 (1975) ("[T]heir misapprehension is immaterial for the stipulation was one of law and therefore not binding upon the court."); *Moore v. State*, 200 N.C. 300, 301 (1931) ("[W]hile the parties to an action or proceeding may admit or agree upon facts[,] they cannot make admissions of law which will be binding upon the courts."); *see also Rawlings v. Neal*, 122 N.C. 173 (1898); *Binford v. Alston*, 15 N.C. (4 Dev.) 351, 354 (1833). Thus, parties may not by agreement bind or otherwise compel this Court to adhere to an application of the law that is inconsistent with an interpretation articulated by this Court. After all, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The present case is readily distinguishable from those in which this Court has found step one of the *Batson* inquiry moot. In *Hobbs*, this Court relied on our decision in *State v. Robinson*, 330 N.C. 1, 17 (1991), where we held that it was "unnecessary to address the trial court's conclusion that defendant failed to make a prima facie case of discrimination because . . . the State *voluntarily* proffered explanations for each peremptory challenge." (Emphasis added.) Further, *Hobbs* expressly required us to review what had been characterized as "a full hearing on the defendant's *Batson* claim." 374 N.C. at 348. That is not the situation here.

Here, the *Batson* inquiry included a clear ruling that defendant had failed to establish a prima facie case of purposeful discrimination at step one. Unlike *Robinson*, the State did not thereafter "voluntarily" proceed to step two. Instead, the State was directed by the trial court to proffer its race-neutral reasons for striking the jurors to bolster the appellate record in the event that an appellate court overruled the trial court's step one determination. Moreover, the inquiry never proceeded to step three, and the trial court never characterized the inquiry as a "full hearing." Accordingly, this case is readily distinguishable from both *Hobbs* and *Robinson*.

We note that defendant relies on a 2020 report by the North Carolina Task Force for Racial Equity in Criminal Justice to argue that this Court should radically alter our *Batson* jurisprudence. The task force, chaired at the time of the report by Attorney General Joshua Stein and a member of this Court, Justice Earls, recommended that this Court enact several "administrative" rule changes, including elimination of the requirement for a prima facie showing in *Batson* altogether, "disallowing

strikes where race could be a factor, reconsidering commonly accepted 'race[-]neutral' justifications for strikes, and disallowing demeanor-based strikes."[8] N.C. Task Force for Racial Equity in Criminal Justice, Report 2020, at 102 (2020), *available at* https://ncdoj.gov/wp-content/uploads/2021/02/TRECReportFinal_02262021.pdf.

As is most relevant here, the task force's recommendation to abolish a defendant's burden at step one of *Batson* states openly what a member of that task force has thus far implied vis-à-vis an analytical framework that would see most step one determinations rendered moot on appeal. *See Campbell*, 384 N.C. at 139–43 (Earls, J., dissenting). We once again reject the notion that a trial court's clear determination that no prima facie case has been made should be swept aside on appellate review merely due to a trial court judge's erroneous attempt to preserve judicial resources by bolstering the appellate record.

When, as here, the trial court determines that a defendant has "failed to make a prima facie showing" of purposeful discrimination on the basis of race, the *Batson* inquiry concludes. *Campbell*, 384 N.C. at 135–36. For each of the potential jurors at issue here, the trial court clearly ruled that no prima facie showing of purposeful discrimination had been established. The *Batson* inquiry should have ended at that point, and it was error for the trial court to direct the State to place its race-neutral reasons on the record. *Id*. at 136. Therefore, the MAR court's findings of fact that the trial court ruled on step one prior to requesting the State's race-neutral reasons and that no full *Batson* hearing occurred support its conclusion of law that step one is not moot, and the MAR court properly limited its review of the trial court's *Batson* inquiry to step one.

b. Position to Adequately Raise

As noted above, defendant's *Batson* claim is barred if, upon a previous appeal or previous motion for appropriate relief, he was "in a position to adequately raise the . . . issue . . . but did not do so," and no exception to the bar applies. N.C.G.S. § 15A-1419(a)–(b). Subsection

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8. This Court does not question that racial discrimination has been and, in portions of society, continues to be a pervasive evil that deprives citizens of every race of their constitutional right to equal protection of the laws. Interestingly, however, the task force's recommendations would effectively eliminate the ability to peremptorily challenge any juror because an argument could be made that any challenge would qualify as a strike "where race could be a factor" – even when a juror falls asleep during jury selection. We reaffirm that, subject only to the commands of the Equal Protection Clauses of the United States Constitution and the North Carolina Constitution, "peremptory strikes . . . may be used to remove any potential juror for any reason—no questions asked." *Flowers*, 139 S. Ct. at 2238.

15A-1419(a)(3) " 'is not a general rule that *any* claim not brought on direct appeal is forfeited on state collateral review' [but rather] requires the reviewing court, instead, 'to determine whether the particular claim at issue *could* have been brought on direct review.' " *State v. Hyman*, 371 N.C. 363, 383 (2018) (emphasis added) (quoting *State v. Fair*, 354 N.C. 131, 166 (2001)). The MAR court found that: (1) "the trial court identified the *Batson* issue as a possible issue on appeal and said so in the presence of the parties;" (2) "[d]efendant was on actual notice that a *Batson* claim could be an appellate issue;" and (3) "despite being on actual notice that a *Batson* claim could be an appellate issue, [d]efendant failed to assert any *Batson* claim on direct appeal or in his 1998 MAR, 2000 MAR or 2001 MAR." Accordingly, the MAR court found "there was nothing that prevented [d]efendant from asserting a *Batson* claim on direct appeal or in one of his prior MARs."

The trial transcript shows that defendant promptly objected on *Batson* grounds to the State's peremptory challenges of both Mr. Smalls and Ms. Banner first and then Mr. Mills. The trial court ruled that defendant failed to establish a prima facie case of purposeful discrimination on the basis of race.

Defendant does not contest that he failed to raise a *Batson* claim in his direct appeal to this Court despite having raised a *Batson* objection at trial, receiving a ruling from the judge, and having the trial court note on the record that the issue may be the subject of review on appeal. *See Tucker*, 347 N.C. 235 (1997). Defendant was in an adequate position to raise a *Batson* claim on direct appeal but failed to do so. N.C.G.S. § 15A-1419(a)(3).

In addition, the same circumstances which would have allowed defendant to raise his *Batson* claim on direct appeal would have allowed defendant to raise a *Batson* claim in one of his prior MARs. Therefore, defendant was in an adequate position to raise, and in fact could have raised, his *Batson* claim on a previous MAR but failed to do so. N.C.G.S. § 15A-1419(a)(1). The MAR court's findings of fact support its conclusion that defendant was in a position to adequately raise the *Batson* issue previously but failed to do so. Thus, defendant's *Batson* claim is barred unless defendant can demonstrate an exception to this mandatory bar.

B. Exception to the Procedural Bar

Defendant argues the "good cause" exception found in subsection 15A-1419(b)(1) applies because the CLE handout and the MSU study at issue here were not available at his trial, and he was therefore prevented

from raising the claim on direct appeal. However, the bulk of defendant's argument ignores step one of the *Batson* inquiry and focuses on pretext at step three, which is not the pertinent issue as set forth above.

Because defendant offers the CLE handout and the MSU study as "newly discovered evidence" of purposeful discrimination and pretextual reasons proffered by the State in striking Ms. Banner, Mr. Smalls, and Mr. Mills, defendant's purported "newly discovered" evidence does not address his failure to establish a prima facie case at step one. The proper inquiry is whether this "evidence" constitutes "a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review," N.C.G.S. § 15A-1419(c)(3), and, if so, whether defendant can then demonstrate that the absence of this evidence caused "actual prejudice," i.e., "a reasonable probability" of a different step one outcome. N.C.G.S. § 15A-1419(b)(1), (d).

1. Good Cause

As noted,

> good cause may only be shown if the defendant establishes by a preponderance of the evidence that his failure to raise the claim or file a timely motion was:
>
> (1) The result of State action in violation of the United States Constitution or the North Carolina Constitution including ineffective assistance of trial or appellate counsel;
>
> (2) The result of the recognition of a new federal or State right which is retroactively applicable; or
>
> (3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review.

N.C.G.S. § 15A-1419(c).

However, the legislature specifically exempted from the definition of good cause "[a] trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim." *Id.* "[A] deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases." *Smith v. Murray*, 477 U.S. 527, 534 (1986).

When determining whether good cause exists to overcome a procedural bar, the question is whether, at the time of the procedural default, the claim was available at all. *Id.* at 537. Accordingly, for cause sufficient to overcome the procedural bar, it must exist beyond the control of counsel—it must not be subject to counsel's manipulation, but rather, truly unavailable.

a. CLE Handout

As an initial matter, we note that because review of the *Batson* issue here is limited to step one, the CLE handout listing various race-neutral reasons for peremptory challenges at step two is irrelevant. We can discern no possible scenario in which, had defendant possessed this CLE handout, it would have assisted defendant in carrying his burden at step one.[9] At most, this handout is "evidence" that a prosecuting attorney attended a CLE class on jury selection. Any argument related to a prosecutor's step two explanation at step one would be purely conjecture and speculation because mere possession of a CLE handout from a State Bar sanctioned CLE class does not raise an inference that a peremptory challenge was based on race. Nevertheless, we address whether defendant's acquisition of this CLE handout constitutes good cause, and whether his failure to previously acquire it resulted in actual prejudice.

> The MAR court found that the [CLE] handout could not be "newly discovered" because the information contained therein followed and was supported by established caselaw and defendant "by the exercise of reasonable diligence[ ] could have conducted legal research . . . to determine that the reasons contained in the [CLE] handout referenced established case law." The MAR court reviewed cases in which "race-neutral reasons or explanations" to exercise a peremptory challenge had been analyzed in prior court decisions. The trial court noted that the cases it had reviewed were similar "in form and substance to the list of reasons or explanations set forth on the [CLE] handout." The list of cases and the acceptable reason for striking a potential juror the MAR court provided is as follows:[10]
>
> > Knowledge of the case. *State v. Thomas*, 329 N.C. 423, 430–33 (1991); *State v. Thomas*, 350 N.C. 315, 333–35 (1999).

9. To the extent defendant raises an argument regarding pretext, such argument is properly considered at step three of *Batson* and is irrelevant to the trial court's determination at step one—which is why defendant did not make such an argument at trial.

10. To improve readability, this list has been slightly reformatted from the original MAR court's order.

Belief that criminal justice system operates unfairly before facts presented. *State v. Porter*, 326 N.C. 489, 499–502 (1990).

Inappropriate dress. *State v. Headen*, 206 N.C. App. 109, 116–17, *rev. denied*, 364 N.C. 607 (2010).

Reservations or doubts about the death penalty. *State v. Basden*, 339 N.C. 288, 297–98 (1994); *State v. Locklear*, 349 N.C. 118, 139–140 (1998); *State v. Rogers*, 355 N.C. 420, 444–46 (2002).

Physical appearance. *Purkett v. Elem*, 514 U.S. 765, 769 (1995); *State v. Barnes*, 345 N.C. 184, 210–13 (1997); *State v. Headen*, 206 N.C. App. 109, 116–17, *rev. denied*, 364 N.C. 607 (2010).

Age being too young or close to defendant's age, or a relative's age close to defendant's age. *State v. Jackson*, 322 N.C. 251, 255–57 (1988); *State v. Smith*, 328 N.C. 99, 125–27 (1990); *State v. Thomas*, 329 N.C. 423, 430–33 (1991); *State v. Barnes*, 345 N.C. 184, 210–13 (1997).

Attitude. *State v. Jackson*, 322 N.C. 251, 255–57 (1988) (including, among other reasons, citation of another case where lack of eye contact was a race-neutral reason); *State v. Sanders*, 95 N.C. App. 494, 501–03, *rev. denied*, 325 N.C. 712 (1989); *State v. Porter*, 326 N.C. 489, 499–502 (1990) (including, among other reasons, excessive eye contact with defense counsel and failure to make eye contact with the prosecutor); *State v. Barnes*, 345 N.C. 184, 210–13 (1997) (including, among other reasons, failure to maintain eye contact with the prosecutor); *State v. Locklear*, 349 N.C. 118, 139–40 (1998); *State v. Rogers*, 355 N.C. 420, 444–46 (2002).

Body language. *State v. Jackson*, 322 N.C. 251, 255–57 (1988); *State v. Barnes*, 345 N.C. 184, 210–11 (1997).

History of unemployment or unsteady employment. *State v. Sanders*, 95 N.C. App. 494, 501–03, *rev. denied*, 325 N.C. 712 (1989); *State v. Porter*, 326 N.C. 489, 499–502 (1990); *State v. Barnes*, 345 N.C. 184, 210–13 (1997).

> Rehabilitated jurors and those that vacillate in answering questions. *State v. Robinson*, 330 N.C. 1, 17–20 (1991).
>
> Unstable/lack of a stake in the community. *State v. Sanders*, 95 N.C. App. 494, 501–03, *rev. denied*, 325 N.C. 712 (1989); *State v. Thomas*, 329 N.C. 423, 430–33 (1991); *State v. Barnes*, 345 N.C. 184, 210–13 (1997); *State v. Thomas*, 350 N.C. 315, 333–35 (1999).
>
> Inappropriate or inconsistent juror responses. *State v. Smith*, 328 N.C. 99, 125–27 (1990); *State v. Peterson*, 344 N.C. 172, 176–77 (1996).
>
> Communication difficulties/lack of attention. *State v. Jackson*, 322 N.C. 251, 255–57 (1988); *State v. Robinson*, 330 N.C. 1, 17–20 (1991); *Hernandez v. New York*, 500 U.S. 352, 356–72 (1991) (plurality opinion); *State v. Caporasso*, 128 N.C. App. 236, 243–44, *appeal dismissed*, 347 N.C. 674 (1998).
>
> Criminal history or relative's criminal history. *State v. Sanders*, 95 N.C. App. 494, 501–03, *rev. denied*, 325 N.C. 712 (1989); *State v. Porter*, 326 N.C. 489, 499–502 (1990); *State v. Robinson*, 330 N.C. 1, 17–20 (1991); *State v. Burge*, 100 N.C. App. 671, 674 (1990), *rev. denied*, 328 N.C. 272 (1991); *State v. Peterson*, 344 N.C. 172, 176–77 (1996); *State v. Locklear*, 349 N.C. 118, 139–140 (1998); *State v. Rogers*, 355 N.C. 420, 444–46 (2002).
>
> Antagonism to the State or sympathy with defendant. *State v. Jackson*, 322 N.C. 251, 255–57 (1988); *State v. Porter*, 326 N.C. 489, 499–502 (1990); *State v. Burge*, 100 N.C. App. 671, 674 (1990), *rev. denied*, 328 N.C. 272 (1991); *State v. Thomas*, 329 N.C. 423, 430–33 (1991); *State v. Barnes*, 345 N.C. 184, 210–13 (1997); *State v. Rogers*, 355 N.C. 420, 444–46 (2002).

The MAR court also determined that the CLE handout provided

> accurate and correct statements of law of both the United States Supreme Court and the North Carolina appellate courts concerning appropriate race-neutral and constitutionally permissible reasons to exercise a peremptory challenge when such facts arise in a

> particular case, as well as handwriting[11] that identifies when it would be improper to exercise a peremptory challenge. There is nothing inherently wrong . . . with a handout containing accurate statements of the law regarding permissible and impermissible reasons to exercise a peremptory challenge. Moreover, such a handout containing accurate statements of the law should be expected when attending a CLE class on jury selection.

A review of the cases cited by the MAR court reveals that the MAR court correctly found that the CLE handout does little more than restate, in a list format, the established caselaw reviewing legally permissible reasons to exercise a peremptory challenge of a potential juror. In reaching its conclusion that the CLE handout was not evidence of racial discrimination, the MAR court reasoned that

> when any attorney or judge attends a CLE o[r] CJE on a particular legal subject, it is expected that accurate and correct statements of the law on a particular subject will be given to the attendee. Similarly, any handout on a particular legal subject should contain accurate and correct statements of the law.

Additionally, the MAR court explained that "[t]here is nothing wrong or improper with knowing legally permissible and impermissible reasons to exercise peremptory challenges," noting that trial preparation requires that attorneys understand "legally permissible and impermissible reasons to exercise peremptory challenges," and that a lawyer or judge who fails to obtain the requisite number of CLE or CJE hours each year could be subject to disciplinary action by the State Bar. In fact, the MAR court noted that the Capital Case Law Handbook, published by the UNC School of Government, "includes a list of cases that identify appropriate race-neutral reasons to exercise peremptory challenges," and that a UNC School of Government handout from a 2017 CJE seminar entitled Capital Case Management for Superior Court Judges "contains a list of race-neutral reasons for exercising peremptory challenges as well as accurate and correct statements of law on this subject." We agree with the MAR court that "when any attorney or judge attends a CLE or CJE seminar on a particular legal subject, it is expected that accurate and

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11. The handwriting referenced appears on the CLE handout provided in Defendant's Appendix. It reads "[d]on't use gender/race reasons in NC." It also states "may be expanded to othe[r] 'cognizable Equ[al] Prot[ection] Clause protected class.' "

correct statements of the law on a particular subject will be given to the attendee," and that mere knowledge of the state of the law under *Batson* does not raise any inference of discriminatory intent.

Further, acknowledging defendant's admission that "there are good reasons to strike almost anyone from jury service," the MAR court determined that "the [CLE] handout sets forth reasons that are race-neutral and are therefore 'good reasons' to exercise peremptory challenges . . . in a particular case."

The MAR court further concluded that "by an exercise of reasonable diligence," defendant could have obtained the CLE handout through a public records request to the entity that provided the continuing legal education, the North Carolina Conference of District Attorneys. Accordingly, the MAR court concluded that the CLE handout was "not newly discovered, and [d]efendant's claim to the contrary is meritless."

As the MAR court correctly observed, trial preparation requires that attorneys understand a host of legal issues, including reasons why an attorney may and may not strike a juror. The CLE handout simply displayed legally permissible reasons for exercising peremptory challenges. It defies logic and common sense that an educational tool from a CLE sanctioned by the State Bar would be sufficient to establish a prima facie showing of purposeful discrimination at step one when the material merely contains an accurate rendering of the law.

Taking defendant's argument to its logical conclusion, a prima facie showing of purposeful discrimination could be shown simply by alleging that an attorney researched the law on *Batson*, or that he or she had a section in a trial notebook on defenses to *Batson* objections. Defendant's assertion that the CLE handout is evidence of racial animus on behalf of the State is meritless at best.

Defendant further argues that because he presented evidence that "his prosecutors used the [CLE] handout not only in his case, but in at least two others," *State v. Lyons*, 343 N.C. 1 (1996) and *State v. White*, 131 N.C. App. 734 (1998), the CLE handout constitutes newly discovered evidence of a pattern of racial discrimination. This argument fails not only for the reasons set forth above, but also because our appellate courts have held that the trial courts in those cases properly denied the defendants' *Batson* challenges. *See Lyons*, 343 N.C. at 14; *White*, 131 N.C. App. at 741. "[O]nce an appellate court has ruled on a question, that decision becomes the law of the case and governs both in subsequent proceedings in a trial court and on subsequent appeal." *Weston*

v. Carolina Medicorp, Inc., 113 N.C. App. 415, 417 (1994) (citing *Transp., Inc. v. Strick Corp.*, 286 N.C. 235 (1974)).

Defendant essentially asked the MAR court to overrule both the trial courts involved in these cases and the appellate courts that affirmed *Batson* denials. Correctly noting that no Superior Court judge has the authority to overrule either the trial courts which denied those defendants' *Batson* challenges or the appellate courts that affirmed those denials, the MAR court properly rejected this request.

The MAR court's findings of fact are supported by competent evidence and further support the conclusion of law that defendant cannot show good cause based on the CLE handout. Because defendant could have conducted legal research and arrived at a proper understanding of the legally recognized justifications set forth in the CLE handout on his own "through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review," we hold that defendant has failed to demonstrate good cause pursuant to subsection 15A-1419(b)(1). Defendant's meritless argument regarding the CLE handout does not provide relief from the mandatory procedural bar.

It is worth noting here that the CLE handout is readily distinguishable from the discriminatory manual at issue in *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005). In that case, the Supreme Court of the United States addressed, among other issues associated with the claims, a "specific policy of systematically excluding blacks from juries." 545 U.S. at 263. The district attorney's office there had adopted a manual entitled "Jury Selection in a Criminal Case" which detailed "the reasoning for excluding minorities from jury service" and which placed explicit "emphasis on race." *Id.* at 264, 266. Specifically, the manual advised prosecutors that minorities frequently empathize with defendants. *See id.* at 306 (Thomas, J., dissenting). The Court ultimately determined that "when the evidence on the issues raised is viewed *cumulatively* its direction is too powerful to conclude anything but discrimination." *Miller-El II*, 545 U.S. at 265 (emphasis added).

In reaching its conclusion, the Court considered the surrounding circumstances, which included the following: (1) the strikes of 10 of 11 black prospective jurors—one of whom was "ideal;" (2) the fact that prosecutors marked the race of each juror on their juror cards; (3) the explanations given by prosecutors, which did not hold up and were at odds with the evidence; (4) the jury shuffles of the State; (5) the disparate questioning of black and white jurors; and (6) the use of the manual which sought to exclude minorities from the jury. *Id.* at 265–66.

Here, the CLE handout does not include or establish evidence of an intent to exclude minorities from juries. The CLE handout merely contained accurate statements of legally permissible reasons to exercise peremptory challenges, not a prosecutorial training manual advocating race-based strikes. The CLE handout here is not only not newly discovered evidence under subsection 15A-1419(c); it is not "evidence" that raises an inference of impermissible race-based peremptory challenges at step one. We therefore agree with the MAR court that defendant "suffered no prejudice from failing to have" the CLE handout because "even if [d]efendant had the [CLE] handout . . . there would not have been a different result" at step one.

b. Jury Selection Study

Defendant contends that the MSU study was previously unavailable evidence that shows the prosecutor violated *Batson*. Again, however, the lack of a full *Batson* hearing in the trial court has narrowed the scope of our review, and the issue is whether this study constitutes newly discovered evidence that provides a "reasonable probability" of a different result at step one. As previously noted, to qualify as newly discovered evidence sufficient to overcome the mandatory procedural bar, the MSU study must contain "a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review." N.C.G.S. § 15A-1419(c)(3).

As an initial matter, the MAR court "reviewed and considered" the MSU study and found that it "was created for [d]efendant in preparation to file a previous MAR, specifically [d]efendant's 2010 RJA MAR." The authors' admission that the purpose of the study was to "evaluate the potential for statistical evidence to support claims under . . . the RJA," Grosso & O'Brien, *A Stubborn Legacy* at 1533, and defendant's statement in his reply brief in support of his 2018 MAR that the study "was conducted in preparation for filings under the Racial Justice Act," support the MAR court's finding that the MSU study was created to assist capital defendants, including this defendant, preparing to file under the RJA.

The MAR court noted that the study took less than one year to create, which is borne out by the affidavit of Professors Catherine Gross and Barbara O'Brien who noted that "[w]e began data collection for the study in the fall of 2009 and completed it in the spring of 2010." The MAR court found that "nothing prevented [d]efendant from preparing a substantially similar study or analysis to use on direct appeal or in one

of his prior MARs covering the years immediately preceding his direct appeal or prior MARs." Further, the MAR court correctly concluded that the study was "not newly discovered" but "newly created."

We agree with the MAR court that allowing defendant to label such a study as "newly discovered evidence" sufficient to overcome a procedural bar would effectively allow defendant to "manufacture[ ] a mechanism to file an infinite number of MARs." Indeed, historical information concerning juror strikes in other cases, to the extent it may be relevant at step one, was readily obtainable by defendant.[12] Mere review of relevant files or transcripts of capital proceedings in preparation for trial could have yielded for defendant the same or similar data utilized in the MSU study. Put another way, defendant's attorney, investigator, or someone acting at their direction could have reviewed the Clerk of Court's files from capital murder trials in Forsyth County and compiled the information defendant now contends is newly discovered. That gathering such information may have been difficult or time consuming does not change its character. The data was in existence and could "have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review," N.C.G.S. § 15A-1419(c)(3), and in time to present at trial. Counsel for defendant certainly understood that *Batson* issues might arise in a capital trial—and defendant's various postconviction counsel certainly knew *Batson* objections were made at trial.

Further, defendant argues that peremptory strike data from cases tried subsequent to his conviction may be considered retrospectively as evidence establishing a prima facie case of purposeful discrimination. We reject this argument because such data has no bearing on defendant's *Batson* claim. While a defendant is certainly entitled to bring the trial court's attention to a number of relevant factors when attempting to establish a prima facie case at step one, including historical evidence, *see Hobbs*, 374 N.C. at 350, an appellate court's consideration of facts not yet in existence at the time of the trial court's step one ruling would pervert our well-established standard that such a ruling "is accorded deference on review and will not be disturbed unless it is clearly erroneous." *Campbell*, 384 N.C. at 131–32 (quoting *State v. Augustine*, 359 N.C. 709, 715 (2005)); *see also Alston*, 307 N.C. at 341 ("An appellate court is not required to, and should not, assume error by the trial judge when

12. The State correctly notes that while historical evidence and statistical information may be relevant evidence at step one, the issue here "is not relevance or admissibility, but is solely the question of whether such a study constitutes newly discovered evidence allowing for overcoming the procedural bar."

none appears on the record before the appellate court" (quoting *State v. Williams*, 274 N.C. 328, 333 (1968))). A trial court's lack of precognition cannot render its step one ruling clearly erroneous, and in this context, evidence from future cases which did not exist at the time of a trial court's step one ruling cannot establish actual prejudice.

Further, even if the prospective data in the MSU study could have some bearing on our analysis, and even if the historical data in the MSU study could not have been discovered through the exercise of reasonable diligence, the MAR court correctly concluded that this study could not afford defendant relief because the study was unreliable and fatally flawed. The MAR court reached this determination after it examined each of the Forsyth County cases used in the MSU study and found that the study inaptly imputed racial motives to peremptory strikes for cases in which *Batson* arguments had not been made or *Batson* violations had not been found. In other words, the MSU study assumed racial animus in cases in which defendants did not make any such claim, or in which the trial court or appellate courts did not make or sustain any such findings.

The MAR court discussed the following cases included in the MSU study: (1) *State v. Hooks*;[13] (2) *State v. Larry*;[14] (3) *State v. Little*;[15] (4) *State v. Moore*;[16] (5) *State v. White*;[17] (6) *State v. Moseley*;[18] (7) *State v. Murrell*;[19] (8) *State v. Thibodeaux*;[20] (9) *State v. Frogge*;[21] (10) *State v. Moses*;[22] and (11) *State v. Woods*.[23]

Specifically, regarding *State v. Larry* and *State v. Hooks*, cases in which *Batson* challenges were denied by the trial courts and not raised on appeal, the MAR court found

> the MSU [s]tudy has no authority to overrule the *Hooks* and *Larry* trial courts that specifically found

13. *State v. Hooks*, 353 N.C. 629 (2001).

14. *State v. Larry*, 345 N.C. 497 (1997).

15. This case remained pending at the time of the MAR court's order.

16. *State v. Moore*, 335 N.C. 567 (1994).

17. *State v. White*, 355 N.C. 696 (2002).

18. *State v. Moseley*, 336 N.C. 710 (1994).

19. *State v. Murrell*, 362 N.C. 375 (2008).

20. *State v. Thibodeaux*, 352 N.C. 570 (2000), *cert. denied*, 531 U.S. 1155 (2001).

21. *State v. Frogge*, 345 N.C. 614 (1997).

22. *State v. Moses*, 350 N.C. 741 (1999).

23. *State v. Woods*, 345 N.C. 294 (1997).

> there were no Batson violations. . . . [T]he part of the MSU study that relies on the *Hooks* and *Larry* cases as evidence that race was a significant factor in exercising peremptory challenges and therefore are also evidence of a *Batson* violation in the instant case is materially contradicted by the unambiguous record, unreliable, fatally flawed and meritless . . . .

Next, the MAR Court addressed the examination of *State v. Little* in the MSU study and determined that although that case remains pending, the defendant in *Little* was tried and convicted more than 10 years after defendant in the instant case was tried and convicted—many years after Mr. Lang had left the Forsyth County District Attorney's Office. The MAR court reasoned that

> other than a similar job title, job description and the same employer, the MSU study fails to show any "demonstrable nexus between" the act of the prosecutor allegedly using race as a basis to exercise peremptory challenges in the *Little* case and Rob Lang nor any "causal connection between the conduct [of the other prosecutor's alleged bad act] and the injury [of Rob Lang exercising peremptory challenges in the instant case]" to show that Rob Lang allegedly violated *Batson* in the instant case.

(Alterations in original.)

Ultimately, the MAR court concluded that even though *Little* was a Forsyth County case, "it is so remote in time to the *Tucker* trial that absent said nexus or causal connection, there is no meaningful probative value." In addition, the MAR court determined that defendant could not rely on the *Little* case to show a *Batson* violation in the instant case because "the part of the MSU [s]tudy that relies on *Little* as evidence that race was a significant factor in peremptory challenges . . . is materially contradicted by the unambiguous record, unreliable and fatally flawed."

The remaining cases used in the MSU study—*Moore*, *White*, *Moseley*, *Murrell*, *Thibodeaux*, *Frogge*, *Moses*, and *Woods*—involve defendants *who did not raise a* Batson *issue on appeal*. Thus, the MAR court correctly concluded that the "MSU [s]tudy has no authority to raise a *Batson* claim on behalf of the [r]emaining [d]efendants that failed to do so in their respective cases" and it "has no authority to overrule any of [the] appellate courts ultimately finding no error" in these cases.

The MAR court expressed that the MSU study's reliance on these cases was legally problematic "because [as] trial courts never had the opportunity to make a *Batson* ruling, not only is the three step *Batson* inquiry . . . meaningless, but the standard of review that deference be given to the rulings of the trial courts obviously does not apply"; thus, "by ignoring and effectively bypassing the caselaw" the MSU study essentially "allows [d]efendant to create his own standard of review."

As succinctly put by the MAR court, the use of cases

> (1) where trial courts have already specifically ruled there were no *Batson* violations, which rulings were never appealed to a higher court or otherwise reversed by a higher court, or (2) where no *Batson* claim was ever raised at the trial level to begin with, in a statistical analysis like the MSU [s]tudy as credible evidence of a *Batson* violation in the instant cases is misleading and manipulative.

We agree with the MAR court that the MSU study is fundamentally flawed and lacks relevance because it purports to establish purposeful racial discrimination in jury selection by utilizing cases in which *Batson* arguments were not made, *Batson* violations were not found, and/or appellate courts determined that *Batson* violations did not exist. As such, the study has no probative value. The use of the MSU study as evidence of racial animus where courts have neither weighed in nor found *Batson* violations by the State is at best a manipulation of data, and at worst, an attempt to use misleading statistics to circumvent established rules of appellate review in the courts of this State.

Among its many fatal flaws, the MSU study suffers from a lack of relevance and causation which cannot be ignored. The connection between the data utilized in the MSU study and the prosecutor's voir dire in the instant case is attenuated at best. Defendant cites the MSU study and argues that because black jurors were struck in prior Forsyth County capital trials, "race was the deciding factor" in the treatment of black jurors in defendant's case.

But researchers armed with information have great power and discretion. Interpretation of data may often be more art than science, and conclusions may often prove to be misleading. Biases and preconceptions can distort objective truths, and the maxim that "statistics don't lie, but statisticians do" should run through the mind of every discerning attorney and judge. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2345 (2021) (describing how the "use of statistics" can be "highly

misleading" and how "a distorted picture" can be created by "statistical manipulation"). A healthy skepticism ensures that one is not misled by conclusions that do not reflect reality. The reality here is that the MSU study used data to proclaim racial disparities when *Batson* violations were not alleged or found. As previously noted, the law of a case is the province of the courts and may not be altered by agreement of the parties or academic interpretation of data.

Fundamentally, defendant seeks to use "evidence" of other purported wrongs to show that the prosecutor acted in conformity therewith in the present case. However, it is not the prosecutor's own alleged prior wrongs that defendant seeks to show, but rather the alleged prior wrongs of North Carolina prosecutors at large. At a bare minimum, our law requires some nexus with the alleged wrongful act, and no demonstrable nexus is present here.

The MAR court observed that the MSU study "identifies alleged bad acts during jury selection of prosecutors working in different offices across North Carolina . . . and imputes these bad acts during jury selection to the prosecutor in the instant case." Further, the MAR court emphasized that "[n]o prosecutors are . . . identified by name" in the study. Defendant's argument amounts to a contention that because two professors from Michigan State issued a study asserting that North Carolina prosecutors struck black jurors at higher rates than other jurors in certain cases, race must have been a deciding factor in selecting jurors in these cases—regardless of prior rulings to the contrary. Therefore, according to defendant, because Mr. Lang is a prosecutor in North Carolina, he must have used race as a deciding factor in selecting the jury in defendant's trial here. This attenuated "connection" is wholly insufficient to establish purposeful discrimination in the selection of jurors in defendant's case.

As is of ultimate importance here, the ability to obtain similar data and create a similar study was within the control of defendant or his counsel. Good cause can only be shown when the claim cannot be made due to circumstances outside defendant's control—in other words, what cannot be accomplished "through the exercise of reasonable diligence in time to present the claim." N.C.G.S. § 15A-1419(c). Because obtaining then existing data and creating such a study could have been achieved with reasonable diligence, the MAR court correctly concluded that the MSU study is "newly created" not newly discovered evidence. Thus, defendant cannot overcome the procedural bar of section 15A-1419.

We also share the MAR court's concerns that allowing this "newly created" evidence or clever statistical manipulation to be treated as

"newly discovered" allows a defendant to manufacture all manner of studies to continue to seek review of his conviction. This directly contradicts one of the purposes of our post-conviction review—finality. *See* N.C.G.S. § 15A-1415, Official Commentary (2021).

Defendant contends that this concern is "a fiction" because he is "indigent and incarcerated." However, those factors did not preclude appointed counsel from petitioning courts for necessary funds to assist in his defense and did not inhibit the production of the MSU study here. As defendant notes, the MSU study was "undertaken in order to evaluate the potential for statistical evidence to support claims under . . . the RJA." Grosso & O'Brien, *A Stubborn Legacy* at 1533. Thus, every time an academic takes an interest in the law of our State or the case of a particular defendant, or class of defendants, additional post-conviction studies could be generated.

Moreover, "a deliberate, tactical decision not to pursue a particular claim" until a third-party has interpreted already available evidence in a manner most favorable to the defendant "is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases." *Murray*, 477 U.S. at 534. Here, the raw data used to construct the study could have been discovered by defendant's exercise of reasonable diligence. To the extent that the MSU study analyzed and presented previously existing data in a manner that defendant now believes is more persuasive for his claim, it fails to qualify as newly discovered evidence. The "factual predicate" contemplated by section 15A-1419(c) is either available or unavailable to a defendant—it is not a matter of creative packaging.

Finally, we note that this case is not the first instance in which this Court has addressed this study. *See State v. Robinson*, 368 N.C. 596 (2015) (remanding to the trial court to grant the State a continuance to adequately respond to the defendant's submission of the study in support of his RJA MAR); *see also State v. Richardson*, 385 N.C. 101, 192–201 (2023) (affirming the trial court's exclusion of the MSU study as evidence supporting the defendant's burden at step one of *Batson*, after the State objected to its admission and the prosecutor characterized "it as 'one of the most ridiculous studies [he had] seen in [his] entire life' " (alterations in original)). Neither case involved the circumstances here—a defendant submitting the study as "newly discovered evidence" of a *Batson* violation in a non-RJA MRA—and neither case impacts our rejection of the study here.

Defendant's argument is unrelated to actual innocence and would permit review ad infinitum with the only potential limitation being the imagination and ingenuity of clever attorneys. Such an interpretation of our post-conviction statutes runs counter to the express intent of the legislature. We decline to adopt a rule which would encourage contrived means of overcoming a procedural bar which could ultimately bog down our criminal justice system in a cycle of unending post-conviction review.

Accordingly, we agree with the MAR court and hold that because of the many flaws in the MSU study and its lack of relevance to defendant's argument, it cannot establish evidence of purposeful discrimination in the case at bar, and it does not constitute newly discovered evidence sufficient to overcome the procedural bar.

c. Case Law

Good cause may also be established as "[t]he result of the recognition of a new federal or state right which is retroactively applicable." N.C.G.S. § 15A-1419(c). Defendant contends that he was not in an adequate position raise his *Batson* claim earlier "because at the time of his direct appeal and original post-conviction proceedings, North Carolina law imposed an impossibly high bar on *Batson* claimants."

Specifically, defendant argues that until *State v. Waring*, 364 N.C. 443 (2010), North Carolina used the "sole factor" test, requiring *Batson* claimants to prove that racial discrimination in jury selection was the sole factor in a particular strike. In making this argument, defendant points us to *State v. Davis*, 325 N.C. 607 (1989), *State v. Wright*, 189 N.C. App. 346 (2008), and *State v. White*, 131 N.C. App. 734 (1998).

The MAR court addressed defendant's contention that there has been a change in the law of North Carolina regarding *Batson*, specifically, a shift from a requirement that race be a "sole" factor to a requirement that race be only a "substantial" factor. The MAR court determined that "[r]egardless of which standard applies" nothing prevented defendant from making his *Batson* claim on direct appeal or in his prior MARs. In the alternative, the MAR court found that defendant's failure to raise a *Batson* issue on direct appeal constituted error on his part which precludes him from claiming prejudice now. Defendant's argument fails for the reasons stated by the MAR court and because defendant's claim does not bear out in our precedent. *Waring* did not change the law in this State—it merely reaffirmed it.

In *Waring*, the defendant argued that the trial court had applied the wrong legal standard by stating that the "defendant failed to show

that the State's challenge was 'based solely on the fact that she was an African-American female.' " 364 N.C. at 480. This Court declared that the proper test was whether race was a significant factor in a peremptory challenge. *Id.* The trial court had also expressed that the defendant needed to show that the State's challenge of a juror was "*motivated* by discriminatory purposes." *Id.* at 480. The Court went on to hold that "the trial judge applied the correct legal standard," as the trial court's statements demonstrated that it applied the correct standard but misspoke in using the word "solely" at one point. *Id.* at 480–81. In that case, this Court did not announce a new standard; it upheld the same one that had been, and still remains, the law. Therefore, there is no new state right available to defendant which is sufficient to overcome the procedural bar of section 15A-1419.

In *State v. Hobbs*, this Court detailed the *Batson* analysis, citing with approval to this Court's decision in *State v. Quick*, 341 N.C. 141 (1995), while also noting that any suggestion that race be the "sole" reason for striking a juror is incorrect and that the proper inquiry is whether "race was significant in determining who was challenged and who was not." *Hobbs*, 374 N.C. at 352, n.2 (quoting *Waring*, 364 N.C. at 480).

Defendant uses *State v. Davis*, 325 N.C. 607, 617 (1989), as an example demonstrating a prior standard used in *Batson* cases. To do so, defendant amplifies the word "solely," which appears in the opinion exactly one time. *Id.* at 617. That case did not turn on whether race must be the sole or substantial factor in exercising a peremptory challenge to violate *Batson*. Rather, *Davis* was resolved with a straightforward *Batson* analysis where this Court considered whether "[t]he relevant facts and circumstances in the record . . . establish[ed] a prima facie case of racial discrimination against black citizens during jury selection." *Id.* at 620. This Court concluded that a prima facie case of discrimination had not been established. *Id.* While this Court did use the word "sole" in that case, we nevertheless correctly applied the law as it has been and remains to this day under *Batson*—race as a significant factor.

Defendant's reliance on *State v. Wright*, 189 N.C. App. 346 (2008), *writ denied*, *rev. denied*, 667 S.E.2d 280 (2008), suffers from the same defect as his reliance on *Davis*. In *Wright*, the Court of Appeals addressed "whether the trial court erred by finding the State had not engaged in purposeful discrimination when the State did not provide a race-neutral explanation for each African-American whom it had removed from the jury by peremptory challenge." *Id.* at 346–47. This case addressed the State's failure to provide race-neutral reasons for its strikes, and the word "solely" appeared exactly one time in language quoted from the

trial court which the Court of Appeals never substantively addressed. *Id.* at 350. Accordingly, this case does not support defendant's contention that our State courts employed a different *Batson* standard that recently changed with *Waring*.

However, *State v. White*, 131 N.C. App. 734 (1998), lends some support to defendant's argument. In that case, the Court of Appeals undoubtedly applied a "sole" factor analysis to the *Batson* inquiry, finding that "[w]hile race was certainly a factor in the prosecutor's reasons for challenging" the prospective jurors, the challenge was not "solely" based on race and thus did not contravene *Batson*. *Id.* at 740. To the extent *White* departed from this Court's precedent, it is an anomaly that pales in comparison to the overwhelming weight of this Court's *Batson* jurisprudence. Our precedent makes clear that the test is and has been whether race is a significant factor, as we restated in *Waring* and *Hobbs*. Therefore, defendant has failed to show a new state right that is retroactively applicable to him. There has been no new standard announced to conjure up a new right for defendant, and neither the trial court nor the MAR court followed an incorrect standard of requiring that race be the sole reason for the strike.

For the reasons stated herein, defendant has failed to establish good cause, as he has failed to establish the recognition of a new federal or state right which is retroactively applicable, and he has failed to show that he has "newly discovered" evidence that could not have been discovered through the exercise of reasonable diligence in time to present the claim previously. N.C.G.S. § 15A-1419(c).

2. Prejudice

Even if defendant had established good cause, he must also demonstrate actual prejudice to overcome the procedural bar. N.C.G.S. § 15A-1419(b). "[A]ctual prejudice may only be shown if the defendant establishes by a preponderance of the evidence that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error." N.C.G.S. § 15A-1419(d). Defendant has failed to carry his burden.

At the outset, we reiterate that there is no error, as we hold that defendant failed to show that either the CLE handout or the MSU study qualify as newly discovered evidence sufficient to overcome a procedural bar, so there cannot be actual prejudice. However, even so, we conclude that defendant cannot show "that a different result would have occurred" with the CLE handout or the MSU study.

Regarding the CLE handout, defendant references the transcripts of jury selection alongside the handout to argue that "[t]he prosecutors' use of the cheat sheet in [defendant]'s trial demonstrates that the State violated *Batson*. Use of this document is evidence of pretext and thus evidence of purposeful discrimination." Here, as we have previously noted, we are concerned with the trial court's determination at step one of the *Batson* inquiry. Defendant's argument, however, goes to steps two and three of a *Batson* inquiry—the prosecutor's reasons justifying the peremptory strikes and whether they show pretext and purposeful discrimination. There is no reasonable probability that the trial court would have reached a different step one determination had defendant possessed the CLE handout at trial.

In addition, defendant cannot show that a different result would have occurred with a comparative analysis across different cases like the MSU study. The Supreme Court of the United States has recognized that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial." *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008). Such is the case here. As stated above, the study is flawed in many respects and lacks relevance to defendant's case such that any attempted comparative use is improper.

While historical evidence of purposeful discrimination in jury selection within a jurisdiction may be relevant, that is not the nature of the evidence proffered by defendant here. Generally, to show discrimination, a defendant may present any of the following:

> • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
>
> • evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
>
> • side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
>
> • a prosecutor's misrepresentations of the record when defending the strikes during the Batson hearing;
>
> • relevant history of the State's peremptory strikes in past cases; or

> • other relevant circumstances that bear upon the issue of racial discrimination.

Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019) (first citing *Foster v. Chatman*, 136 S. Ct. 1737 (2016); then citing *Snyder*, 552 U.S. 472; then citing *Miller-El II*, 545 U.S. 231; and then citing *Batson*, 476 U.S. 79).

In *Flowers*, the Supreme Court of the United States looked to a history of discriminatory strikes by the prosecutor in Flowers' multiple prior trials. *Id.* at 2245. This involved an analysis of the same prosecutor and same defendant; not an analysis of different cases and different prosecutors as we have here.

There may be instances where discrimination in peremptory strikes in other cases are potentially relevant. *See Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 345 (2003); *Flowers*, 139 S. Ct. at 2243. In *Miller-El I*, the Supreme Court of the United States considered statistics of disparate questioning along racial lines of potential jurors. 537 U.S. at 345. However, in that case, the comparison was based on another case with the "precise line of disparate questioning" by one of "the same prosecutors who tried" the case before the Court, where the Texas Court of Criminal Appeals had found a *Batson* violation. *Id.* The U.S. Supreme Court also considered "historical evidence of racial discrimination by the District Attorney's Office." *Id.* at 346. This evidence included a history where assistant district attorneys "received formal training in excluding minorities from juries." *Id.* at 347.

The present case is readily distinguishable. Here, discrimination was not found by a court in the other cases used in the MSU study, and in many cases *Batson* objections were never raised by the respective defendants. Again, this study seeks to circumvent the authority of the courts to evaluate *Batson* claims and potentially have superior court judges overrule prior determinations by their colleagues. This is plainly impermissible. *See State v. Woolridge*, 357 N.C. 544, 549 (2003) (explaining that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action" (cleaned up)). Moreover, the superior court does not have the authority to overrule or disregard decisions of this Court or the Court of Appeals.

Further, there has been no indication in the record that the prosecutors in this case or in the State or county were "trained" to exclude minorities or in any way were operating under a policy which sought to

exclude minorities. Defendant's argument amounts to a contention that the MSU study conclusively establishes a prima facie case of purposeful discrimination any time the State uses a peremptory challenge against any prospective black juror. This argument is plainly contrary to law, and there is no reasonable probability that the trial court would have reached a different step one determination if defendant possessed the MSU study at trial.

3. Fundamental Miscarriage of Justice

"A defendant raising a claim of newly discovered evidence of factual innocence or ineligibility for the death penalty . . . may only show a fundamental miscarriage of justice by proving by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty." N.C.G.S. § 15A-1419(e). Under this exception to the procedural bar, a fundamental miscarriage of justice occurs if a defendant shows new, credible evidence demonstrates that he or she would not have been found guilty or eligible for the death penalty. The plain language of the statute requires an assertion of factual innocence by defendant,[24] or an allegation that defendant is ineligible for the death penalty. Defendant here alleges neither.

Thus, the procedural bar of section 15A-1419 applies and defendant has not satisfied an exception to the same. Accordingly, the MAR court properly concluded that defendant's *Batson* claim was procedurally barred.

4. State v. Burke

Defendant also urges this Court to hold that our decision in *State v. Burke*, 374 N.C. 617 (2020), forecloses application of the procedural

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24. Under federal law, the miscarriage of justice exception to a federal procedural bar is interpreted as an "actual innocence" exception. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) (addressing a federal law procedural bar of federal habeas review and describing the miscarriage of justice exception as an "actual innocence" exception). In discussing the path to successfully allege that a fundamental miscarriage of justice exception applies, the Supreme Court of the United States has opined that where a constitutional violation is alleged, it must reflect on the defendant's innocence of the crime or show an insufficient basis for a death sentence in order to overcome a procedural bar. *Schlup v. Delo*, 513 U.S. 298, 316 (1995) ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.").

bar in the present case. The MAR court held that *Burke* does not prevent a procedural bar in this case because *Burke* applied specifically to RJA MARs, and "all of [d]efendant's RJA MARs are still pending and are beyond the scope of this Order."

In *Burke*, we addressed the defendant's MARs pursuant to the North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1215 (codified at N.C.G.S. § 15A-2012(b) (repealed 2012)). 374 N.C. at 619. Reversing the trial court, we held that "[t]he alleged procedural bars are negated by the language of the RJA" and that "the trial court abused its discretion by summarily denying the claims." *Id.* at 619 (first citing North Carolina Racial Justice Act § 1, 2009 N.C. Sess. Laws at 1215; and then citing *State v. McHone*, 348 N.C. 254, 258 (1998)). Pursuant to the RJA, this Court looked at the evidence presented by the defendant "that race was a significant factor in jury selection, sentencing, and capital charging decisions in the relevant jurisdictions at the time of [the defendant's] trial and sentencing" and determined that "[i]n light of the evidence and arguments presented by defendant, the trial court's denial of his claims without a hearing was an abuse of discretion." *Id.* at 619–20.

To find the entitlement to an evidentiary hearing, this Court looked specifically to the statutory provisions of the Racial Justice Act. *Id.* at 619. The defendant's MARs there were styled as an RJA MAR and an amendment to the RJA MAR, and this Court considered both under the RJA. *Id.* Thus, our holding in *Burke* was plainly limited to the RJA context.

Here, defendant has filed numerous post-conviction motions. The MAR court's order at issue here was expressly limited to the 2017 MAR, the 2019 MAR, and the 2020 MAR based on alleged newly discovered evidence. Defendant's RJA MARs, however, were assigned to another superior court judge. The 2010 RJA MAR and its supplemental filings remain pending in the Superior Court division and were not addressed by the court below. Thus, this Court's review is limited to the MARs addressed by the MAR court. The MAR court correctly concluded that the MARs at issue here are not RJA MARs like those in *Burke*, and the present case is not controlled by this Court's decision in *Burke*. As such, defendant's argument that *Burke* allows him to overcome the procedural bar under section 15A-1419 is without merit.

Further, the RJA specifically addressed the relief available to defendants sentenced to death.

> If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial

> division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant *resentenced to life imprisonment without the possibility of parole.*

North Carolina Racial Justice Act § 1, 2009 N.C. Sess. Laws at 1214 (emphasis added).

Resentencing is not the remedy defendant requests here. Instead, defendant seeks to have his conviction vacated and a new trial ordered—the appropriate remedy for a violation of *Batson*. Thus, it is plainly apparent that the claim advanced by defendant and addressed by the MAR court below was not an RJA claim.

IV. Conclusion

Because defendant was in a position to adequately raise his *Batson* claim in his prior appeal and previous post-conviction proceeding and failed to do so, defendant's MAR is procedurally barred under section 15A-1419. Defendant has failed to establish that he qualifies for a statutory exception to the mandatory procedural bar, and his argument that *Burke* is applicable to the present case is unavailing. The order of the MAR court is affirmed.

AFFIRMED.

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

Justice EARLS dissenting.

In 1996, Mr. Tucker, who is African American, was tried capitally, convicted of first-degree murder, and sentenced to death by an all-white jury. While the case before us turns on the applicability of N.C.G.S. § 15A-1419(a)(1) and (3)'s procedural bar, this Court's holding ultimately determines whether a trial court may reach the merits of Mr. Tucker's *Batson v. Kentucky* claim and review the serious allegations Mr. Tucker makes regarding the jury selection procedures in his case. *See* 476 U.S. 79 (1986). Namely that prosecutors Lang and Spence relied on a *Batson* "cheat sheet" to provide pretextual race-neutral reasons for the peremptory strikes that removed all qualified African American venire

members from Mr. Tucker's jury. Because I believe that Mr. Tucker's motion for appropriate relief (MAR) is not barred pursuant to N.C.G.S. § 15A-1419(a)(1) and (3) and thus, should go forward, I dissent.

The MAR at issue was filed on 31 October 2017 and amended twice, once in 2019 and again in 2020. To make his *Batson* claim, Mr. Tucker relied on two new pieces of evidence: (1) a handout included in Mr. Tucker's prosecutorial file titled "Batson Justifications: Articulating Juror Negatives" (Batson Justifications Handout); and (2) a statistical study conducted by Michigan State University College of Law (MSU Study), which analyzed juror strike patterns in North Carolina from 1990 to 2010. Neither piece of evidence was available to Mr. Tucker during his direct appeal or a previous MAR filing. In the 2019 amendment to his MAR, Mr. Tucker also raised the change to our State's *Batson* standard as a reason for his newly filed *Batson* claim. This new standard was adopted in *State v. Waring*, which was decided in 2010. 364 N.C. 443 (2010). Accordingly, this development in our *Batson* caselaw was not available to Mr. Tucker at the time of his direct appeal or a prior MAR filing.

While it is true that N.C.G.S. § 15A-1419(a)(1) and (3) bar a claim that could have been raised on direct appeal or during an earlier MAR but was not, this statute only applies to claims where the defendant was in a "position to adequately raise" the claim in those previous filings. Because Mr. Tucker did not have access to the Batson Justifications Handout or the MSU Study and because the change to North Carolina's *Batson* standard had not occurred at the time of his direct appeal or prior MAR filing, he was not in a "position to adequately raise" his *Batson* claim on direct appeal or in an earlier MAR. Thus, I do not believe his *Batson* claim is subject to section 15A-1419(a)(1) and (3)'s procedural bar.

I. *Batson v. Kentucky* and Race-Based Discrimination in Jury Selection

Both the North Carolina and United States Constitutions prohibit the use of race-based peremptory strikes. *Batson*, 476 U.S. 79; *State v. Locklear*, 349 N.C. 118, 136 (1998). While *Batson* is the seminal case regarding the use of racially-discriminatory peremptory challenges, prior to that decision, the United States Supreme Court had been attempting to eradicate race-based discrimination in jury selection for over a hundred years. In 1879, the United States Supreme Court invalidated statutes that excluded African Americans from serving as jurors because those statutes violated the Equal Protection Clause. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). Despite this effort, racial discrimination in jury selection continued through the use of laws that appeared

racially neutral on their face but as applied, barred African Americans from serving on juries. For example, North Carolina instituted "laws requiring that jurors: (1) had paid taxes the preceding year; (2) were of good moral character; and (3) possessed sufficient intelligence." *State v. Robinson*, 375 N.C. 173, 177 (2020) (citing *State v. Peoples*, 131 N.C. 784, 788 (1902)).

Moreover, while *Batson* articulated a standard by which to determine race-based jury selection, it did not put an end to this type of discrimination, and following *Batson*, some prosecutors were trained on ways to circumvent *Batson*'s requirements. For example, in Pennsylvania, these methods were taught via a recorded training session by a Philadelphia assistant district attorney, *see* Brief for Digenova et al. as Amicus Curiae Supporting Petitioner at 6, *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (No. 14-8349), while in Dallas, Texas, these tactics were taught through the use of a training manual. *See Miller-El v. Cockrell*, 537 U.S. 322, 334 (2003) (discussing a training manual, which evidenced a "formal policy to exclude minorities from jury service"). Ultimately, these training tools, like the Batson Justifications Handout at issue in Mr. Tucker's case were used by prosecutors to "deceive judges" as to the prosecution's "true motivations" for striking a juror. Brief for Digenova et al. as Amicus Curiae Supporting Petitioner at 8, *Foster*, 136 S. Ct. 1737 (No. 14-8349).

In *Batson*, the United States Supreme Court laid out a three-step process for evaluating whether a prosecutor's use of peremptory challenges violated the Equal Protection Clause. 476 U.S. at 96–98.

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358–59 (1991) (citing *Batson*, 476 U.S. at 96–98). *Batson*'s first step is satisfied if the defendant submits "evidence sufficient to permit the trial judge to draw an inference that discrimination occurred." *State v. Hobbs*, 374 N.C. 345, 350 (2020) (quoting *Johnson v. California*, 545 U.S. 162, 170 (2005)). The prima facie showing at step one "is not intended to be a high hurdle," *id.* (quoting *Waring*, 364 N.C. at 478), and so long "as a defendant provides evidence from which the court can infer a discriminatory purpose" a defendant will have met the prima facie standard, *id.* Importantly, and as this Court

stated in *Hobbs*, at this step "the burden on the defendant . . . is one of production, not of persuasion," and "the defendant is not required to persuade the court conclusively that discrimination has occurred." *Id.* at 351.

To make this showing, "a defendant may rely on all relevant circumstances," *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (cleaned up), including historical evidence of discrimination in a jurisdiction. *See*, *e.g.*, *Miller-El*, 537 U.S. at 346; *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). In addition, our caselaw has identified a non-exhaustive list of factors that must also be considered at step 1, those are:

> the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

Hobbs, 374 N.C. at 350 (quoting *State v. Quick*, 341 N.C. 141, 145 (1995)).

If the required prima facie showing is met, then "the analysis proceeds to the second step where the State is required to provide race-neutral reasons for its use of a peremptory challenge." *Id.* at 352 (citing *Flowers*, 139 S. Ct. at 2243). If the reasons provided are race-neutral on their face, then the Court proceeds to *Batson*'s third and final step. *Id.* at 353. At this step, the defendant is required to show purposeful discrimination. *Waring*, 364 N.C. at 475. Here, the trial court "must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Flowers*, 139 S. Ct. at 2244. This inquiry requires the court to determine whether the State's peremptory strikes were "motivated in substantial part by discriminatory intent." *Id.* (quoting *Foster*, 136 S. Ct. at 1754).

II. Batson Justifications Handout and the MSU Study

A. Mr. Tucker's Trial

Mr. Tucker was tried for capital murder in Forsyth County in 1996. Robert Lang and David Spence, both of whom were Forsyth County Assistant District Attorneys, prosecuted his case. Jury selection began

on 6 February 1996. In 1995, a few months prior to the beginning of jury selection, prosecutor Lang attended a training session for capital prosecutors known as "Top Gun II." Those in attendance were provided with a handout titled "Batson Justifications: Articulating Juror Negatives," which provided prosecutors with a list of reasons to use when defending peremptory strikes of African American jurors pursuant to a *Batson* challenge. The following list of reasons were included in the handout:

1. Inappropriate Dress - attire may show lack of respect for the system, immaturity, or rebelliousness

2. Physical Appearance - tattoos, hair style, disheveled appearance may mean resistance to authority.

3. Age - Young people may lack the experience to avoid being misled or confused by the defense.

4. Attitude - air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.

5. Body Language - arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.

6. Rehabilitated Jurors, or those who vacillated in answering D.A.'s questions.

7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.

8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.

9. Unrevealed Criminal History re: voir dire on "previous criminal justice experience."

10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

This handout was placed in the prosecution's trial notebook behind a tab titled "jury selection." The bottom of the handout also contains a handwritten note stating "Don't use gender/race reasons in NC may be expanded to othe[r] cognizable Equ. Prot. Clause protected class."

Lang conducted voir dire in Mr. Tucker's case and used peremptory strikes to remove all five qualified African American venire members. Defense counsel objected to all five strikes under *Batson*. After hearing Lang's justifications for each strike, the trial court found there was no purposeful discrimination. However, a comparison of the justifications Lang provided, and the Batson Justifications Handout, suggests that Lang read from the handout when defending his use of peremptory strikes. For example, Lang used the word "inappropriately" on more than one occasion. He also described one prospective juror as "confused" and stated the juror exhibited "monosyllabic" responses. Lang also referred to that same juror as being "very difficult" and having "absolutely horrible [body language]." Lang defended his strikes against one venire member by stating they "did not ever make eye contact with me" and another by stating he "was untruthful about his criminal record." Based on this information, even the State concedes that "the prosecutors in [Mr. Tucker's] case articulated some justifications similar to the 'Top Gun' training document as part of their rationale for particular juror strikes."

Accordingly, in his most recent MAR, Mr. Tucker argued that the reasons Lang gave for striking prospective jurors were pretextual, for if they had not been, Lang would not have needed to resort to those reasons listed in the handout. *See Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) (stating that when the prosecution's proffer is pretextual, it "gives rise to an inference of discriminatory intent").

B. Discovery of the Batson Justifications Handout

After Mr. Tucker's initial trial and prior to the beginning of his post-conviction proceedings, North Carolina passed a law requiring post-conviction discovery in capital cases to include "the complete files of law enforcement and prosecutorial agencies involved in the investigation of the crimes or the prosecution of the defendant." N.C.G.S. § 15A-1415(f) (1997). However, Mr. Tucker's post-conviction counsel stated they never received the Batson Justifications Handout that was part of the prosecution's file. To support this assertion, Mr. Tucker has provided signed affidavits to this effect. Accordingly, no *Batson* claim was raised on direct appeal, in Mr. Tucker's initial MAR, or in any subsequent amendments to that MAR.

On 2 September 2010, Mr. Tucker filed a MAR pursuant to the North Carolina Racial Justice Act (RJA). *See* North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214. While no further litigation has taken place in state court on Mr. Tucker's RJA claim, litigation did proceed on another Forsyth County defendant's case, Errol Duke

Moses. The discovery granted in Mr. Moses's case included the prosecution's files in many Forsyth County cases, including Mr. Tucker's. On 14 December 2015, Mr. Tucker's current counsel was appointed. Shortly thereafter, counsel for Mr. Moses provided Mr. Tucker's attorneys with portions of Mr. Tucker's prosecution files, which were obtained as part of the discovery process in Mr. Moses's case. This was the first time that Mr. Tucker's attorneys were provided with the prosecution's Batson Justifications Handout. Because this evidence was not discovered until 2015, it was not available to Mr. Tucker during his direct appeal or prior MAR filing.

C. Completion of the MSU Study

The results of the MSU Study demonstrated a pattern of discriminatory peremptory strikes in Forsyth County. Namely, the data showed that African American venire members were struck at a rate 2.25 times higher than other venire members. The MSU Study also reviewed four of prosecutor Spence's Forsyth County cases, and based on those findings, Mr. Tucker alleges that in the aggregate, Spence had struck 62% of African American prospective jurors but only 20% of white prospective jurors. This constituted a strike ratio of 3 to 1, which was significantly higher than the average for Forsyth County or North Carolina state capital cases. The data also showed that only one of Spence's trials had more than one African American juror, and two of his cases, including Mr. Tucker's had all-white juries.

This study did not begin until 2009, and data collection was not completed until 2010. Furthermore, the research article detailing the study's findings was not published until 2012. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012) (hereinafter "Race in Jury Selection"). Accordingly, Mr. Tucker did not have access to this evidence at the time of his direct appeal or at the time he filed a prior MAR.

III. MAR Court's Order

In June 2020, Judge R. Stuart Albright denied Mr. Tucker's *Batson* claim, stating that the Batson Justifications Handout and the MSU Study could not be used to support a *Batson* claim because they were not evidence of racial discrimination. Moreover, Judge Albright concluded that Mr. Tucker's claim was procedurally barred pursuant to N.C.G.S. § 15A-1419 because Mr. Tucker had been in a "position to adequately raise" his *Batson* claim on direct appeal or in a prior MAR but did not. *See* N.C.G.S. § 15A-1419(a)(1), (3) (2021).

A. Mootness of *Batson*'s Prima Facie Case Requirement

In its order denying Mr. Tucker's MAR, the MAR court determined that the prima facie case requirement pursuant to *Batson* had not been met and thus the court's analysis was limited to *Batson*'s first step. This was legal error.

In *Hernandez v. New York*, the United States Supreme Court relied on principles used in the employment discrimination context and explained that "where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." 500 U.S. at 359 (cleaned up). In doing so, the Court unambiguously noted that this "same principle applies under *Batson*." *Id.* Thus, once a prosecutor has provided the trial court with a race-neutral explanation "for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id.*

Our Court has affirmed this principle on numerous occasions, beginning in 1991 with *State v. Thomas*, 329 N.C. 423 (1991). *See also Waring*, 364 N.C. at 478; *State v. Bell*, 359 N.C. 1, 12 (2004); *State v. Williams*, 355 N.C. 501, 550–51 (2002); *Hobbs*, 374 N.C. at 354; *State v. Robinson*, 330 N.C. 1, 17 (1991). And there is good reason for this. "Imagine, for example, that when ordered to provide . . . race-neutral reasons for [their] peremptory challenges, [a] prosecutor . . . [states] . . . that [they] struck one of the jurors because of [their] race." *State v. Campbell*, 384 N.C. 126, 141 (2023) (Earls, J., dissenting). It would be absurd, "in light of this blatant racial discrimination," to say that a trial court is not obligated to review this statement for purposeful discrimination pursuant to *Batson*'s third step simply because the defendant failed to make a prima facie showing of racial discrimination. *Id.* Thus, when a prosecutor provides what they purport to be race-neutral reasons for the use of a peremptory challenge, a trial court must be required to consider whether those statements establish purposeful discrimination.

While the majority attempts to distinguish two of the cases which reaffirm this long-standing principle, there are two problems with this approach. First, in matters pertaining to the United States Constitution, our Court may not grant North Carolinians fewer protections than the federal Constitution provides. *Arizona v. Evans*, 514 U.S. 1, 8 (1995). By determining that a prima facie showing is not moot, despite the prosecution having offered race-neutral reasons for the use of peremptory strikes and the trial court having ruled on the use of those strikes, this

Court has effectively removed a portion of a criminal defendant's protections arising under the federal Equal Protection Clause. *See Hernandez*, 500 U.S. at 358–59. Moreover, a closer look at both *Robinson* and *Hobbs* exposes the inadequacies of the majority's argument. Namely, that Mr. Tucker's case is more similar to *Robinson* and *Hobbs* than it is different.

In *Robinson*, the defendant objected to peremptory challenges used to remove a black juror, and each time the State voluntarily provided a reason for each of its challenges. 330 N.C. at 16. On appeal, our Court determined that because the State had voluntarily provided explanations for each peremptory challenge, there was no need for this Court to determine whether the prima facie standard had been met. *Id.* at 17. Instead, we "proceed[ed] . . . as if the prima facie case had been established." *Id.* In Mr. Tucker's case, the MAR court's order reflects the voluntary nature of the prosecution's proffered reasons for each peremptory strike. At no time was the prosecution ordered to provide reasons for its peremptory strikes, instead the court "g[ave] counsel for the State the *opportunity* to be heard." (Emphasis added.)

Furthermore, in *Hobbs*, our Court noted that "[w]here the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, and the trial court has ruled [on these reasons], completing *Batson*'s third step, the question of whether a defendant has initially established a prima facie case of discrimination becomes moot." 374 N.C. at 354. Thus, while the majority attempts to distinguish *Hobbs* from Mr. Tucker's case based on the presence of a "full hearing," *Hobbs* does not stand for the proposition that mootness only occurs when a full hearing is present. Instead, *Hobbs* stands for exactly what it says: in cases where the State has provided reasons for the use of its peremptory strikes and the trial court has ruled on these reasons, the reviewing court should proceed as if a prima facie case has already been established. *Id.* Accordingly, because the prosecution in Mr. Tucker's case provided reasons for the use of their peremptory challenges and the trial court ruled on these reasons, this Court should proceed as if a prima facie case has been established. *See Robinson*, 330 N.C. at 17.

The majority's discussion of a 2020 report by the North Carolina Task Force for Racial Equity in Criminal Justice is irrelevant when considered in light of our precedent in *Robinson* and *Hobbs*. *See Robinson*, 330 N.C. at 17; *Hobbs*, 374 N.C. at 354. Moreover, this case does not turn on whether *Batson*'s first step is moot. The question of mootness only speaks to whether a reviewing court can proceed to step three of *Batson* and determine whether purposeful discrimination is present. *See Hernandez*, 500 U.S. at 358–59 (citing *Batson*, 476 U.S. at 96–98); *see*

also Hobbs, 374 N.C. at 354. Importantly, the question of mootness does not render evidence of racial discrimination irrelevant or cause it to disappear. Instead, if a prima facie case is not moot, the reviewing court is required to determine whether *Batson*'s first step has been met, and if so, it must remand to the trial court for further consideration.

As noted above, *Batson*'s prima facie case requirement mandates that a defendant provide "relevant circumstances [that] raise an inference that the prosecutor used" their peremptory challenges to exclude jurors on "account of their race." *Batson*, 476 U.S. at 96. A prima facie showing is not a high bar, *Hobbs*, 374 N.C. at 350, and as will be discussed in more detail below, the Batson Justifications Handout, along with the MSU Study, "raise an inference" that the prosecution's peremptory challenges were based on race, *see Batson*, 476 U.S. at 96. This is especially true when these new pieces of evidence are reviewed alongside the prosecution's strike pattern in Mr. Tucker's case, which resulted in all five qualified African American venire members being removed from the jury. *See Flowers*, 139 S. Ct. at 2243 (stating that "statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case" can be used to support a claim of racial discrimination).

B. Batson Justifications Handout and the MSU Study as Evidence of Racial Discrimination

1. The Batson Justifications Handout

The MAR court equated the Batson Justifications Handout to "accurate and correct" statements of law. This finding came even though the handout does not contain any reference to case names or case citations. However, the MAR court's benign characterization of the *Batson* Justifications Handout ignores the controlling legal standard under Batson, America's history of race-based discrimination in jury selection, and the focus of Mr. Tucker's *Batson* claim.

Mr. Tucker does not argue that the reasons provided for striking black jurors in his case could not have been permissible in other cases. Instead, he only argues they were not permissible in his case. Under *Batson*, what matters is whether the reasons given by the prosecutor are the true reasons for the strike. *See Hernandez*, 500 U.S. at 365 ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed."). This is determined by the facts and circumstances of each particular case and not by whether our Court or the United States Supreme Court has determined those reasons were not

pretextual in other cases. *Id.* Indeed, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror," *Batson*, 476 U.S. at 106 (Marshall, J., concurring), and it is this premise that Mr. Tucker's *Batson* claim addresses.

Namely, Mr. Tucker claims that the Batson Justifications Handout was used as a sort of "cheat sheet"[1] to simulate race-neutral reasons for striking African American jurors, when in fact those reasons were pretextual. Thus, the Batson Justifications Handout is an important piece of substantive evidence supporting Mr. Tucker's *Batson* claim. *See Miller-El*, 545 U.S. at 266 (finding a *Batson* violation where the prosecutor's training materials advocated for racially-based strikes).

Additionally, America has a long history of excluding African Americans from jury service. *See Pena-Rodrigez v. Colorado*, 137 S. Ct. 855, 867 (2017) ("In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial."). The Batson Justifications Handout cannot be divorced from its historical context, and characteristics like those included in the handout have previously been used to exclude African Americans from juries. In recognition of this issue, Washington State has instituted General Rule 37, which pertains to jury selection, and states that "allegations that [a] prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers" have "historically been associated with improper discrimination in jury selection." Wash. Gen. R. 37(i). Thus, "[i]f any party intends to offer one of these reasons or a similar reason as justification for a peremptory challenge," the court must be given "reasonable notice" such that the juror's behavior can be verified. *Id.* If the juror's purported behavior is not verified, then the reason given for the peremptory challenge will be invalidated. *Id.* Indeed, as the United States Supreme Court explained, while defendants are harmed when the right to a jury trial is compromised by racial discrimination, "racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflexive of, historical prejudice.' " *Miller-El*, 545 U.S. at 237–38 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994)).

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1. *See State v. Augustine*, 375 N.C. 376, 382 (2020) (quoting the trial court's order describing the prosecution's use of a "cheat sheet" to respond to *Batson* objections).

Moreover, in *Strauder v. West Virginia*, 100 U.S. 303 (1879), the United States Supreme Court overturned a state statute that restricted jury service to whites. Yet, during the Jim Crow era, local officials circumvented the intended effect of this holding by imposing vague requirements for jury service, such as intelligence, experience, and good moral character. *See Norris v. Alabama*, 294 U.S. 587 (1935). As applied, these requirements precluded African Americans from serving on juries. In *Norris*, the Court invalidated one of those laws after a jury commissioner testified that no African Americans had ever served on a jury in that county because:

> [he did] not know of any [African American person] in Morgan County . . . who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude.

Id. at 598–99. The Court found it "impossible to accept such a sweeping characterization" and reversed the conviction at issue. *Id.* at 599. Today, the exclusion of African Americans from juries may be less overt, but there remains the "practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad of legitimate influences." *Miller-El*, 545 U.S. at 238. Mr. Tucker's case exemplifies the difficulty of making this determination.

A prosecutor's "outright prevarication" is not the only relevant consideration in jury discrimination cases and sometimes "[a] prosecutor's own conscious or unconscious racism" may play a role in the prosecution's proffered reasons for striking a juror. *Batson*, 476 U.S. at 106 (Marshall, J., concurring). As relevant here, racism whether conscious or unconscious can lead a prosecutor "easily to the conclusion that a prospective black juror is 'sullen' or 'distant,' a characterization that would not have come to mind if a white juror had acted identically." *Id.* This concern is undoubtedly elevated in cases where a prosecutor is accused of relying on a preprinted list of acceptable strike reasons rather than providing the trial court with the true reason for their peremptory strike. The contents of the Batson Justifications Handout illustrate this notion.

Accordingly, United States Supreme Court precedent, as well as our Court's own precedent, allow a defendant to "rely on all relevant

circumstances" to support their claims for racial discrimination. *Flowers*, 139 S. Ct. at 2245 (cleaned up); *see also Hobbs*, 374 N.C. at 356 ("A defendant may rely on all relevant circumstances to support a claim of racial discrimination in jury selection." (cleaned up)). However, the benign classification the MAR court assigned the Batson Justifications Handout ignores this mandate. Specifically, it shows that the MAR court failed to consider all the relevant circumstances Mr. Tucker raised to support his claim of racial discrimination, namely the history of African American jury exclusion and its relationship to the creation of the Batson Justifications Handout contained in the prosecution's trial notebook. Thus, the MAR court's finding that the Batson Justifications Handout was not evidence of racial discrimination was erroneous. Indeed, an analysis of prosecutor Lang's proffered reasons for striking three prospective jurors at Mr. Tucker's trial, Thomas Smalls, Wayne Mills, and Debra Banner, supports that he relied on the Batson Justifications Handout when providing the trial court with reasons for his strikes.

a. Thomas Smalls

Mr. Smalls was one of the black venire members prosecutor Lang struck during jury selection. At the time of Mr. Tucker's trial, Mr. Smalls was sixty years old, employed, married, and had been living in Forsyth County for forty years. He also had an adult son that was a police detective in South Carolina. When asked about his views on the death penalty, Mr. Smalls stated that he "believe[d] in capital punishment."

Lang's reasons for striking Mr. Smalls mirrored the Batson Justifications Handout. Lang stated, "Your Honor, with regard to Mr. Smalls, juror number three, we felt we had appropriate justification. Number one, his body language and number two, his responses which were inappropriate." Lang's responses appear to have been taken verbatim from the handout. Lang also noted that Mr. Smalls "did not ever make eye contact with [him]," which is a justification stated in the handout under the heading "attitude."

At one point, Lang also described Mr. Smalls's body language as "absolutely horrible" but failed to explain his rationale for this finding. Lang also characterized Mr. Smalls as "very difficult." This language is similar to that in the handout, which suggested that jurors the prosecution wanted to strike should be characterized as "resistan[t] to authority," having an "air of defiance," or being "non-responsive" and "evasive." Furthermore, while Lang stated that Mr. Smalls had "nodded off" during jury selection, the record does not show the trial court made any determinations regarding Mr. Small's demeanor. *See Snyder*, 522 U.S. at 479 ("Deference is especially appropriate where a trial judge has

made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however the record does not show that the trial judge actually made a determination regarding [the juror's] demeanor." Accordingly, "we cannot presume that the trial judge credited the prosecutor's assertion").[2] Thus, rather than Mr. Smalls having "nodded off," it is more likely that Lang's choice of words evince Lang's reliance on the Batson Justifications Handout by echoing the handout's language of "obvious boredom [which] may show anti-prosecution tendencies." This supports that race may have been significant in Lang's decision to challenge Mr. Smalls.[3]

Indeed, Lang's explanations become more "difficult to credit" when Mr. Smalls is compared to white jurors who the prosecution passed despite possessing the same qualities that supposedly made Mr. Smalls an "unattractive juror." *See Foster*, 136 S. Ct. at 1750; *see also Miller-El*, 545 U.S. at 241 ("More powerful than . . . bare statistics . . . are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."). This is particularly evident in the area of death penalty reservations, which Lang cited as a reason for striking Mr. Smalls. Although it is true that when asked if he could impose the death penalty Mr. Smalls stated, "I guess so," "I don't know," and "I think so," Mr. Smalls also expressed unequivocal support for the death penalty, noting he "believe[d] in capital punishment." Despite this, Lang struck Mr. Smalls while passing white prospective jurors Alan Cubbedge, Robin Dillinger, and Louise Hester, all whose death penalty reservations were stronger and more apparent than Mr. Smalls's.

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2. While the majority suggests that *Snyder*, 522 U.S. at 479, stands for the proposition that we are required to defer to the trial court even in cases where that court does not make any findings regarding a juror's demeanor, this assertion is unreasoned. For it is impossible to give deference to a finding that was never made.

3. Although the trial court repeated prosecutor Lang's assertion, noting that "the district attorney observed that [Mr. Smalls] nodded off to sleep," the trial court did not state that it witnessed Mr. Smalls nod off to sleep, nor did it make a finding of fact to this effect, or state that it agreed with the prosecutor's assessment. Thus, "we cannot presume that the trial judge credited the prosecutor's assertion" regarding Mr. Small's demeanor. *See Snyder*, 552 U.S. at 479. Moreover, even if we were to assume for the sake of argument, that Mr. Smalls did nod off, this does not change the evidence in this case, which suggests Lang relied on the Batson Justifications Handout, a racially discriminatory cheat sheet, when providing reasons for his peremptory strike of Mr. Smalls. Under *Batson*, a constitutional violation occurs when race "was significant in determining who was challenged and who was not." *Miller-El*, 545 U.S. at 252. There is no requirement that race be the sole reason for a peremptory strike. *Id.* Accordingly, based on the record before us, including the evidence supporting Lang's use of the Batson Justifications Handout, it is not a "remarkable feat" to conclude that race may have been "significant" in Lang's decision to challenge Mr. Smalls. *See id.*

For example, when asked if he could "be part of a jury of twelve . . . that . . . makes a recommendation of death," Mr. Cubbedge stated he "supposed" so. But when asked if he could be the foreperson who signed the jury sheet and wrote the word "death" on the recommendation sheet, Mr. Cubbedge noted he did not think he "would feel very comfortable with that." Furthermore, when white prospective juror Robin Dillinger was asked about her feelings regarding the death penalty she expressed that she was "not sure if [she was] for it or against it." Similarly, Lang passed white juror Louise Hester, who stated that while she believed in capital punishment, she did not "know if [she] could make that decision for somebody to face that or not." Thus, when Lang's reasons for striking Mr. Smalls are compared to the Batson Justifications Handout and when Mr. Smalls's purported traits are compared to those of white jurors the State passed, it is evident that race may have played a substantial role in Lang's peremptory challenge of Mr. Smalls.

b. Wayne Mills

The prosecutors in Mr. Tucker's case also struck black prospective juror Wayne Mills, who at the time of Mr. Tucker's trial had lived in Forsyth County his entire life. Mr. Mills also disclosed that he was married, had a young daughter, and had held the same job for the preceding seventeen and a half years. The reasons Lang gave for striking Mr. Mills also appear to have been read from the Batson Justifications Handout. Lang expressed that Mr. Mills had used "monosyllabic" responses, had been "smiling inappropriately on a number of occasions," and had "appeared somewhat confused during the questioning."

Not only was the term "monosyllabic" taken directly from the Batson Justifications Handout, it also does not accurately reflect Mr. Mills's behavior. While Mr. Mills gave one-word answers when appropriate, in other circumstances he responded with longer answers. For example, when asked if it was "correct" that his name was Wayne Mills, Mr. Mills responded with "Yes." Yet when asked if he had prior knowledge of Mr. Tucker's case from reading or hearing about the case in the media, Mr. Mills noted, "I very seldom read the newspaper. I'm usually pretty busy at work."

In reference to Lang's assertion that Mr. Mills was smiling inappropriately, the word "inappropriate" appears to have been taken verbatim from the Batson Justifications Handout. What is more, because the trial court's findings are devoid of any suggestion that Mr. Mills engaged in "inappropriate" smiling, we cannot presume the trial court agreed with Lang's assertion. *See Snyder*, 552 U.S. at 479 (providing that deference

is only appropriate where the trial court has made a determination concerning a juror's demeanor). Additionally, the only evidence in the record suggesting that Mr. Mills may have been confused is that he asked the trial court to repeat a lengthy question about capital sentencing instructions. However, asking that one question be repeated is not evidence of confusion, particularly when after having repeated the question, Mr. Mills answered it without issue.

As with prospective juror Smalls, when a side-by-side comparison is conducted of Mr. Mills and white jurors Lang passed, Lang's reasons for striking Mr. Mills appear pretextual. First, the record shows that many white venire members, such as Michael Calcutt, Raymond Marshall, Kelly Richardson, and Lester Hutchins, also responded to Lang's questions with "monosyllabic" or "yes, no" answers. Second, at least two white prospective jurors expressed "confusion" on the record. Namely, after hearing information related to the capital sentencing scheme, prospective juror Don Caldwell asked if he could ask a clarifying question. Moreover, prospective juror Kelly Richardson admitted to being confused regarding her views on the death penalty and expressly stated, "I'm just real confused about that issue."

Lang also noted Mr. Mills not being registered to vote as a reason for striking him. However, several white prospective jurors, such as Lester Hutchins, Raymond Marshall, Winfrey Poindexter, David Porterfield, and Wilma Walker, all of whom were not registered to vote at the time Mr. Tucker's jury selection took place, were passed by the State. Additionally, Lang purported to have struck Mr. Mills, in part, because he "hesitated on death penalty questions." But this assertion is not supported by the record. Namely because the only exchange which could evidence "hesitation" involved Mr. Mills: (1) stating that he believed in the death penalty; (2) asking for Lang to repeat the following question: "Do you think or have you ever had a personal belief or religious belief in opposition to the death penalty"; and (3) once the question was repeated, unequivocally answering "no." Additionally, as noted above, the prosecution passed many white venire members who expressed uncertainty regarding the death penalty.

Lastly, while Lang stated he also struck Mr. Mills based on his being untruthful about his prior criminal record, Lang passed Wesely Hine, a white prospective juror who had also been untruthful about his criminal record. Despite significant questioning from the prosecution, including being asked whether he had "been to court for any reason," Mr. Hine did not disclose his prior criminal charge. Accordingly, when Lang's proffered reasons are compared with the Batson Justifications Handout, it

becomes apparent that he may have relied on it and provided the trial court with pretextual reasons for striking Mr. Mills. Moreover, side-by-side juror comparisons also support that Lang's reason for striking Mr. Mills may have been based on race.

c. Debra Banner

Lang's reasons for striking Ms. Banner also support that his use of peremptory challenges was based on race. At the time of Mr. Tucker's trial, Ms. Banner had lived in Forsyth County all her life, was married, and had children there. She had also been employed at the local hospital for the preceding nine years. Despite this, Lang described Ms. Banner as lacking a stake in the community and cited this as a reason for striking her.

Moreover, despite having passed many white jurors who were not registered to vote, Lang purported that he struck Ms. Banner for this same reason. Lang also expressed he struck Ms. Banner because she was a health care professional, and "[i]t ha[d] been [his] experience that those who save lives are often hesitant to make a recommendation for death." However, the State passed another medical professional, Brenton Sharpe, who was a pharmacist working exclusively with cancer patients. Mr. Sharpe expressed having direct contact with these patients, and agreed it was his job to "save [his patient's] lives or to make what life they had left as comfortable as possible." In contrast, Ms. Banner was a nursing assistant whose tasks involved feeding patients, turning them, and checking their vital signs. Most of her patients were elderly or had suffered a stroke. Based on Ms. Banner's and Mr. Sharpe's job duties, it stands to reason that if Lang was truly concerned that Ms. Banner's medical work would have made it more difficult for her to recommend a death sentence, he would have also challenged Mr. Sharpe, whose own characterization of his work as saving lives likely provided an even stronger reason to strike. What is more, Lang did not ask Ms. Banner if her work would preclude her from voting for a death sentence. *See Snyder*, 552 U.S. at 481–83 (noting that a prosecutor's justification for striking a juror was "suspicious" where the "prosecution did not choose to question [the juror] more deeply about this matter"). Yet, Lang asked Mr. Sharpe, "Do you think that since you're in that field of medical assistance that it would make it difficult for you to be on a jury that may end up facing the death penalty . . . as punishment?" *See Flowers*, 139 S. Ct. at 2248 (stating that a prosecutor's "dramatically disparate" questioning of black and white prospective jurors can "supply a clue" for racially discriminatory intent).

Moreover, Ms. Banner's support for the death penalty was stronger than Mr. Sharpe's, and she expressed no doubts or hesitation during

Lang's questioning on the topic. In contrast, when asked whether he had any deep moral, religious, or philosophical opposition to the death penalty, Mr. Sharpe noted he felt his "conscience would be at issue." Lang also claimed that he struck Ms. Banner because she indicated her work schedule posed a hardship to serving on the jury. Yet, at the same time, Lang passed white jurors who also expressed hardship. First, Mr. Cubbedge noted that he ran a jewelry store and was concerned about losing business due to his absence from work. This was especially true given his absence from work had already cost the store "a good bit of business," and he worried that if he were chosen to serve, the store would "lose a good bit of money." He also agreed that his work situation would cause him to "give less than [his] full attention" to Mr. Tucker's trial. Wesley Hine also explicitly stated he did not want to serve on Mr. Tucker's jury, while juror Brooke Burr expressed that her work and childcare situation posed such a hardship that she would only serve if forced to do so. Ms. Burr noted "if I'm forced to stay, I would say I could be fair but it's really a hardship."

Regarding Ms. Banner's expression of hardship, Lang stated he was concerned that due to working second shift at the hospital, Ms. Banner would not be "awake or aware" and that she would be "worried about work." However, Lang did not appear to share this concern for Mr. Sharpe who admitted to getting poor sleep due to having a baby at home. Similarly, Lang did not seem concerned that Mr. Cubbedge had expressed he would be distracted by work if he was asked to serve.

In *Snyder*, the United States Supreme Court found that the prosecution's purported reliance on a prospective black juror's expression of hardship was pretextual. *Snyder*, 552 U.S. at 482. In doing so, the Court noted that while an expression of hardship might cause a juror to favor a "quick resolution," it did not necessarily dictate how a juror would vote. *Id*. In fact, the desire for a quick resolution could cause a juror to favor the "outcome that other jurors agreed with, which might in many cases, be a favorable outcome for the prosecution." *Id*.

Lastly, while Lang asserted that Ms. Banner fell asleep during voir dire, the trial court made no finding that this occurred. *See id*. at 479. While the record may support that Ms. Banner had been "sleepy," the Batson Justifications Handout that Lang relied on throughout jury selection directs prosecutors to reference a juror's "obvious boredom" as a race-neutral reason for striking them. Thus, taking this information together with Lang's other justifications for striking Ms. Banner shows that race was likely a substantial factor in Ms. Banner's strike.

2. The MSU Study as racial discrimination

The MSU Study compiled data from capital trials in North Carolina to analyze whether race played a role in prosecutorial strikes. *Race in Jury Selection* at 1542–47. Based on this study, Mr. Tucker alleges that, in Forsyth County, where his trial took place, Forsyth County prosecutors struck African American venire members 2.25 times more than other prospective jurors. Moreover, the study reviewed four Forsyth County capital trials involving the same prosecutor involved in Mr. Tucker's case, David Spence. According to Mr. Tucker's MAR, that data showed that prosecutor Spence's use of strikes constituted a strike ratio of 3 to 1.

The United States Supreme Court and our Court have stated that trial courts must consider historical evidence of discrimination. Specifically, in *Flowers*, the Court stated that "relevant history of the State's peremptory strikes in past cases" and any "other relevant circumstances that bear upon the issue of discrimination" can, *inter alia*, be used to prove racial discrimination pursuant to *Batson*. 139 S. Ct. at 2243. Our Court reiterated this principle in *Hobbs*, stating that "a court must consider historical evidence of discrimination in a jurisdiction." 374 N.C. at 351.

Despite having the benefit of *Batson* and its progeny before it, the MAR court rejected the MSU Study, determining it could not be evidence of racial discrimination because our courts had not found a *Batson* violation in the cases the study reviewed. The court also criticized the study as "unreliable, fatally flawed and meritless" for the same reason. However, in making its determination, the MAR court placed an impermissibly high burden on Mr. Tucker. Essentially, rather than interpret the study as "relevant history of the State's peremptory strikes" or as evidence of "relevant circumstances that can bear upon the issue of discrimination," the trial court determined it was invalid simply because its findings contradicted our Court's holdings. The majority makes the same mistake.

But whether a defendant can meet the legal requirements of *Batson* is a separate and distinct question from whether a jurisdiction or a particular prosecutor has a history of disparately using peremptory strikes to remove people of color from the jury. And that evidence of strike patterns from other trials is relevant under *Batson* and *Hobbs*, regardless of whether those defendants could meet *Batson*'s legal requirements. *Flowers*, 139 S. Ct. at. 2243 (explaining that "relevant history of the State's peremptory strikes in past cases" can be used to show racial discrimination); *Hobbs*, 374 N.C. at 351("[A] court must consider historical evidence of discrimination in a jurisdiction."). Moreover, under this logic it would be impossible for any defendant to rely on any study detailing the disparate use of peremptory challenges against people of

color in North Carolina. Namely, because since *Batson* was decided, our courts have only once found a substantive *Batson* violation. *See State v. Clegg*, 380 N.C. 127, 162 (2022). This stands in stark contrast to every state appellate court located in the Fourth Circuit. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1957, 1961 (2016). Accordingly, it was legal error for the MAR court to disregard the MSU Study and determine it was not evidence of racial discrimination.

IV. Procedural Bar Pursuant to N.C.G.S. § 15A-1419(a)(1) and (3)

Without citing any caselaw, the majority asserts that because (1) "the trial court identified the *Batson* issue as a possible issue on appeal and said so in the presence of the parties," and (2) "[d]efendant was on actual notice that a *Batson* claim could be an appellate issue," this means Mr. Tucker was in adequate position to raise his *Batson* claim on direct appeal or a prior MAR. However, N.C.G.S. § 15A-1419(a)(1) and (3) and our caselaw interpreting that provision do not establish that a defendant who knows that an issue might be relevant on appeal is required to raise it or risk losing that claim forever. Instead, the text of the statute expressly provides that when a defendant "was in a position to adequately raise the ground or issue underlying the present motion [either on direct appeal or in a previous MAR] but did not do so" that MAR is procedurally barred. N.C.G.S. § 15A-1419(a)(1), (3).

Yet our Court has indicated that this is not a general rule, and the correct analysis requires a reviewing court "to determine whether the particular claim could have been brought on direct review [or in a previous MAR]." *State v. Hyman*, 371 N.C. 363, 383 (2018) (quoting *State v. Fair*, 354 N.C. 131, 166 (2001)). This Court has further acknowledged that for a claim to be subject to N.C.G.S. § 15A-1419's procedural default, the record in the case must contain "sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question." *Id.* In part, this requires our Court to determine whether the record at trial would have allowed Mr. Tucker to make a viable *Batson* claim. *Id.* at 384.

Thus, the majority's and the MAR court's conclusion that Mr. Tucker's claim is procedurally barred because he was in a "position to adequately raise" the claim on direct appeal or in a prior MAR contradicts the standard articulated in *Hyman*, which provides that a claim is only subject to N.C.G.S. § 15A-1419's procedural default if the record contains "sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim." 371 N.C. at 383.

A. Batson Justifications Handout

Prior to the discovery of the Batson Justifications Handout, the record in Mr. Tucker's case, as it pertained to *Batson*, was sparse and only included the jury selection transcript as well as the trial court's ruling following the defense's objections pursuant to *Batson*. However, now, and through the discovery of the Batson Justifications Handout, a reviewing court can make the "factual and legal determinations necessary to allow a proper resolution" of Mr. Tucker's *Batson* claim.

The MAR court determined that prior to trial or before Mr. Tucker's direct appeal, the defense could have obtained prosecutor Lang's continuing legal education record and learned that he had attended the Top Gun II seminar. And thus, according to the MAR court, Mr. Tucker could have raised his *Batson* claim at an earlier time. Additionally, because the MAR court equated the handout's contents to "accurate and correct statements of law" regarding the *Batson* standard, which had been previously explained by our appellate courts and the United States Supreme Court, it concluded that the contents of this handout were available to Mr. Tucker either on direct appeal or at the time of his previous MAR filing. Namely, the MAR court asserted that to obtain the information contained in the Batson Justifications Handout, Mr. Tucker "by exercise of reasonable diligence, could have conducted legal research," the same way the MAR court had.

However, this reasoning misses the premise of Mr. Tucker's *Batson* claim, which depends not only on Lang attending the Top Gun II training session and receiving the Batson Justifications Handout but also on Lang using this handout to defend his strikes of African American jurors in Mr. Tucker's case. The fact that Lang attended the training does not alone indicate that he relied on the handout while prosecuting Mr. Tucker. However, the handout's presence in the prosecution's trial notebook, along with the transcripts from voir dire, provide Mr. Tucker with a strong argument that the prosecution relied on the handout and provided pretextual reasons for striking jurors in violation of *Batson*. *See Snyder*, 552 U.S. at 485 ("The prosecution's proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent."). Thus, until Mr. Tucker found the handout in the prosecution's file, thereby linking its use to his case, Mr. Tucker was not in a position to adequately raise his *Batson* claim on direct appeal or in a previous MAR.

B. The MSU Study

The MAR court also found that Mr. Tucker could have presented the MSU Study during a prior MAR filing, because "[d]efendant, by the

exercise of reasonable diligence, could have had a substantially similar study to use in his direct appeal or in one of his prior MARs." To reach this conclusion, the MAR court made several assumptions: (1) that the study was completed for Mr. Tucker; (2) that Mr. Tucker had control over when the study was completed; and (3) that Mr. Tucker had the resources to complete this study or a "substantially similar study" prior to his direct appeal or a previous MAR filing. However, none of these assumptions are supported by the record.

First, the MSU Study was not completed for Mr. Tucker. Instead, in their published law review article, the study's authors explained that the study was "undertaken in order to evaluate the potential for statistical evidence to support claims under . . . the RJA." *Race in Jury Selection* at 1533. Thus, while the evidence contained in this study may be helpful to Mr. Tucker and others seeking to bring *Batson* claims, the MSU Study was not created for Mr. Tucker or any other specific capital defendant. Second, Mr. Tucker did not have control over when the MSU Study was completed. The RJA was passed in 2009, *see* North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214, and "prohibited capital punishment if race was a significant factor in the decision to seek or impose the penalty," *Robinson*, 375 N.C. at 176. The authors of the MSU Study clearly stated in the article's introduction that the MSU Study was intended to ascertain whether statistical evidence could support RJA claims, and thus the RJA's passing was at least in part the inspiration for this study. *Race in Jury Selection* at 1533. Thus, it follows that the earliest the MSU Study could have begun was in 2009 when the RJA was passed. *See* North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214.

Additionally, the MSU Study was the result of a joint effort between Michigan State University College of Law and various sources of funding. *Race in Jury Selection* at 1531 n.1. Thus, the willingness of these sources to complete the MSU Study also dictated the MSU Study's timing and completion. Third, because the MSU Study required funding from various sources and Mr. Tucker is incarcerated and indigent it is difficult to understand how Mr. Tucker could have completed this study on his own. Interestingly, absent from the MAR court's order is any discussion on how Mr. Tucker could have raised the money to complete this study on his own, or how Mr. Tucker alone could have completed the statistical analysis necessary for the MSU Study.[4]

4. In their affidavit, the MSU Study's authors, Catherine Grosso and Barbara O'Brien, provided an overview of their methodology, which required obtaining and reviewing strike patterns by race in 173 proceedings.

Ultimately, the MSU Study was not published until July 2012 and thus was not available to Mr. Tucker during his direct appeal or his previous MAR. *See Race in Jury Selection* at 1531. Accordingly, Mr. Tucker was not in an adequate position to raise his *Batson* claim on either direct appeal or in a prior MAR filing. *See* N.C.G.S. § 15A-1419(a)(1), (3).

C. Change in Our Court's Interpretation of *Batson*

Lastly, Mr. Tucker's claim is not procedurally barred because under North Carolina law, as it existed prior to 2010, Mr. Tucker's claim would have been subject to an impossibly high standard that most claimants could not meet. Prior to 2010, our law required a showing that race was the "sole" factor for the use of a peremptory strike. *See, e.g.*, *State v. Davis*, 325 N.C. 607, 617 (1989). The difficulty of meeting this standard is illustrated by the Court of Appeals' opinion in *State v. White*, 131 N.C. App. 734 (1998), in which the prosecutor stated in open court that he was striking two African American jurors, in part, because they were "[b]oth black females." *Id.* at 739. Despite this direct evidence of racial discrimination, the Court of Appeals noted that "[w]hile race was certainly a factor in the prosecutor's reasons for challenging [the two jurors]," it could not find that the peremptory strike was solely based on race. *Id.* at 740.

In 2010, in *Waring*, our Court rejected the sole factor test. 364 N.C. 443. In doing so, it explained that "[a]s stated in *Miller-El*, the third step in a *Batson* analysis is the less stringent question whether the defendant has shown 'race was *significant* in determining who was challenged and who was not.' " *Id.* at 480 (quoting *Miller-El*, 545 U.S. at 252). This standard was later reaffirmed in *Hobbs*, where this Court reiterated the standard from *Miller-El* and noted that it was an incorrect statement of law to suggest "a strike is only impermissible if race is the sole reason." 374 N.C. at 352 n.2. This means that prior to 2010, Mr. Tucker's appellate and post-conviction counsel would have had no choice but to review Mr. Tucker's case under the sole factor test, which would have been difficult, if not impossible, for Mr. Tucker to meet. Thus, until 2010, when this Court provided the correct legal standard under which to bring a *Batson* claim, Mr. Tucker's claim was not viable and he was not in a position to adequately raise his *Batson* claim. *See Hyman*, 371 N.C. at 384; *see also* N.C.G.S. § 15A-1419(a)(1), (3).

V. Conclusion

"[R]acial discrimination in jury selection offends the Equal Protection Clause." *Batson*, 476 U.S. at 85 (citing *Strauder*, 100 U.S. 303). When this type of discrimination is present, "defendants are harmed" because their

right to a jury trial is compromised. *Miller-El*, 545 U.S. at 238. But as the United States Supreme Court stated over thirty-seven years ago in *Batson*, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." 476 U.S. at 87. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* Moreover, a prosecutor's use of these same racially discriminatory procedures jeopardizes the integrity of our courts. *Miller-El*, 545 U.S. at 238. Thus, it is of paramount importance for both the defendant and our state that our courts reach the merits of a *Batson* claim whenever they have the opportunity to properly do so.

"In reality, the finding of a *Batson* violation does not amount to an absolutely certain determination that a peremptory strike was the product of racial discrimination." *Clegg*, 380 N.C. at 162. Instead, "the *Batson* process represents our best" perhaps "imperfect[ ] attempt at drawing a line in the sand establishing the level of risk of racial discrimination that we deem acceptable or unacceptable. If a prosecutor provides adequate legitimate race-neutral explanations for a peremptory strike, we deem that risk acceptably low. If not, we deem it unacceptably high." *Id.* In Mr. Tucker's case, the risk is unacceptably high.

Mr. Tucker did not have access to the Batson Justifications Handout or the MSU Study at the time of his direct appeal or his prior MAR filing. Moreover, the change in our caselaw, which provided Mr. Tucker with the opportunity to make a "viable" racial discrimination claim pursuant to *Batson*, did not occur until 2010. *See Hyman*, 371 N.C. at 384. Thus, without the discovery of new evidence and the change to our *Batson* standard, first articulated in *Waring*, Mr. Tucker was not in a "position to adequately raise" a *Batson* claim on direct appeal or during a previous MAR filing. Because of this, N.C.G.S. § 15A-1419(c) and (d) are inapplicable, and Mr. Tucker is not required to show good cause or actual prejudice for his claim to proceed.[5] Accordingly, I would hold Mr. Tucker's claim is not procedurally barred and remand to the trial court for consideration of the merits of Mr. Tucker's *Batson* claim.

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5. In reaching the fundamental miscarriage of justice exception to N.C.G.S. § 15A-1419's procedural bar, the majority suggests that if Mr. Tucker were innocent his claims would not be barred. However, a defendant is not required to be innocent to claim *Batson*'s protections. Instead, a defendant whether guilty or innocent, must only show that "race was significant in determining [which jurors were] challenged and [which were] not." *Miller-El*, 545 U.S. at 252; *see also Flowers*, 139 S. Ct. at 2244 ("The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.' ").

STATE OF NORTH CAROLINA
v.
JAHZION WILSON

No. 187A22

Filed 15 December 2023

Homicide—first-degree—felony murder—jury instruction on lesser-included offense—no evidentiary support

In defendant's prosecution for first-degree murder under the felony murder theory (and under no other theory) based on attempted robbery with a dangerous weapon—where the victim was found deceased from a gunshot wound with approximately two hundred dollars of loose cash and a bloodied iPhone on or near his body—the trial court properly denied defendant's request for a jury instruction on second-degree murder as a lesser-included offense, because the evidence of the underlying felony was not in conflict. Defendant's own statements that he planned to sell a cell phone and not rob the victim could not, alone, create a conflict in the evidence; a witness's statement that defendant planned to buy a cell phone, not sell one, did not negate any element of the underlying felony; and the loose cash found near the victim's body did not negate the evidence that defendant attempted to rob the victim with a dangerous weapon.

Justice EARLS dissenting.

Justice RIGGS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2021) from the decision of a divided panel of the Court of Appeals, 283 N.C. App. 419, 873 S.E.2d 41 (2022), finding no error after an appeal from a judgment entered on 13 June 2019 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. Heard in the Supreme Court on 7 November 2023.

Joshua H. Stein, Attorney General, by Marissa K. Jensen, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by David W. Andrews, Assistant Appellate Defender, for defendant-appellant.

NEWBY, Chief Justice.

In this case we consider whether the trial court properly denied defendant's request for a jury instruction on second-degree murder as a lesser-included offense of first-degree murder under the felony-murder theory. When the State charges a defendant with first-degree murder only under the felony-murder theory, our cases have held that the defendant may be entitled to a jury instruction on second-degree murder as a lesser-included offense. But in such a scenario, the defendant is only entitled to an instruction on second-degree murder if the evidence of the underlying felony is in conflict and the evidence would support second-degree murder. To create a conflict in the evidence supporting the underlying felony, a defendant must identify evidence other than his own statements denying his involvement in the criminal offense. In the present case, we conclude that there is not a conflict in the evidence supporting the underlying felony of attempted robbery with a dangerous weapon. Accordingly, defendant was not entitled to an instruction on second-degree murder. The decision of the Court of Appeals is modified and affirmed.

On 16 January 2018, defendant was indicted for attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and first-degree murder. Regarding the first-degree murder charge, the State proceeded solely on a theory of felony murder based on attempted robbery with a dangerous weapon.

At trial the State's evidence tended to show the following. On 18 June 2017, which was Father's Day, officers from the Charlotte-Mecklenburg Police Department responded to a shooting and potential robbery at the Arbor Glen Apartments in Charlotte, North Carolina. According to officer testimony, the officers found Zachary Finch deceased from a gunshot wound with approximately two hundred dollars of loose cash and a bloodied iPhone on or near his body. Although officers did not locate either the firearm or the discharged bullet, they found a shell casing at the scene of the crime. The forensic pathologist and medical examiner confirmed that Finch was killed by a gunshot wound. At that time, however, the officers did not identify any suspects.

Later that day, officers learned from Finch's parents that Finch had arranged to purchase a cell phone via the "LetGo" app. According to Finch's mother, Finch was supposed to purchase the cell phone from "a dad with his two kids." The officers subsequently obtained records from LetGo, however, and they eventually discovered that Finch had arranged to buy the cell phone from defendant.

Officers interviewed defendant, who was fifteen years old at the time, on 20 July 2017, and the State entered a transcript and recording

of that interview into evidence. Notably, defendant did not testify at his trial, and this interview is the only account of the incident from defendant's perspective.

According to defendant's statements to the interviewing officer, defendant had arranged to sell a cell phone to Finch through LetGo. Defendant recounted that after agreeing with Finch to meet at the Arbor Glen Apartments, he went to meet Finch with his friends, "Tink" and Demonte "Monte" McCain.[1] Defendant explained that because he did not know Finch, and because he had experienced bad transactions in the past, defendant "didn't really trust [the transaction]." As such, defendant told the interviewing officer that he asked Tink to speak with Finch. In exchange, defendant said that he promised to "break[ ] [Tink] off" sixty dollars—that is, to give Tink a portion of the money he received. Defendant stated that when Finch arrived, Finch spoke with Tink about the price of the cell phone and the SIM card. According to defendant, however, after Tink and Finch spoke for several minutes, the "deal went wrong." Defendant recounted that Tink pointed a gun at Finch, who turned to run away because "he was fixin[g] to get robbed by . . . Tink." Defendant stated that Tink shot one time, striking and killing Finch. Defendant then told the interviewing officer that after the incident, he, Tink, and Monte ran to Tink's sister's house.

Throughout the police interview, the interviewing officer asked defendant several times if he knew that Tink went to the transaction armed with a firearm. Defendant initially denied it, but he eventually admitted to the interviewing officer that, prior to the meeting with Finch, he knew Tink was bringing a gun to the meeting. Similarly, the interviewing officer asked defendant if he brought a firearm to the meeting with Finch. Again, defendant initially denied that he brought a firearm, but he eventually admitted to bringing one of Tink's guns with him. Defendant also stated that Monte brought a firearm to the transaction.

Additionally, the interviewing officer asked defendant whether he was going to actually sell Finch the cell phone. Defendant maintained that he planned to sell the cell phone, but he also revealed to the interviewing officer that Tink had proposed robbing Finch. Defendant said that he tried to dissuade Tink, telling him, "[Y]ou ain't got to rob him just sell him the phone." But when the interviewing officer asked if he

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1. The evidence tended to show that Monte was not part of any arrangement with defendant and/or Tink. In fact, defendant expressly stated to the interviewing officer that "[Monte] was never in"—i.e., Monte was never part of the arrangement. Rather, according to defendant's statements, Monte coincidentally was in the area at this time.

knew that Tink was going to rob Finch, defendant replied, "I didn't know for sure if [Tink] was gonna rob him[,] but he had talked about it, yes." Defendant clarified, however, that there was no plan to shoot Finch.

In addition, the State called Ashanti Gatewood, who was defendant's girlfriend in the summer of 2017, to testify. Gatewood testified that defendant called her after the events of 18 June 2017 and told her that "he just shot and robbed somebody." The State also called defendant's friend, Travis Moore, to testify. Two portions of Moore's testimony are pertinent to this appeal. First, Moore testified that defendant planned to buy a cell phone, not sell one. Second, Moore testified that defendant told him "that he killed somebody around . . . Father's Day."

Defendant did not put on any evidence at trial. Prior to the jury charge, however, defendant requested that the trial court instruct the jury on second-degree murder as a lesser-included offense of first-degree murder. The trial court denied defendant's request and instructed the jury on first-degree murder under the felony-murder theory, attempted robbery with a dangerous weapon, and conspiracy with Monte to commit robbery with a dangerous weapon. The trial court further instructed the jury that it could find defendant had committed the criminal acts himself or by acting in concert with another. The jury found defendant guilty of attempted robbery with a dangerous weapon and first-degree murder based upon the felony-murder rule.[2]

On appeal, defendant argued, among other things, that the trial court erred by failing to instruct the jury on second-degree murder as a lesser-included offense of first-degree murder. *State v. Wilson*, 283 N.C. App. 419, 421, 873 S.E.2d 41, 44 (2022). The Court of Appeals' majority found no error in defendant's trial. It relied on this Court's statement in *State v. Gwynn* that "when the [S]tate proceeds on a first-degree murder theory of felony murder only, the trial court must instruct on all lesser-included offenses if the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder." 362 N.C. 334, 336, 661 S.E.2d 706, 707 (2008) (internal punctuation omitted) (quoting *State v. Millsaps*, 356 N.C. 556, 565, 572 S.E.2d 767, 773 (2002)), *construed in Wilson*, 283 N.C. App. at 435–38, 873 S.E.2d at 51–53. Focusing on the second part of the test, the Court of Appeals' majority concluded that defendant was not entitled to a second-degree murder instruction because "there [was] no evidence in the record from which a rational juror could find

2. The jury acquitted defendant of conspiracy with Monte to commit robbery with a dangerous weapon.

[d]efendant guilty of second-degree murder and not guilty of felony murder." *Wilson*, 283 N.C. App. at 436, 873 S.E.2d at 52 (determining that whether the evidence supporting the underlying felony was in conflict was "irrelevant").

The dissent, in contrast, relied on this Court's statement in *Gwynn* that "the trial court should not instruct on lesser-included offenses if the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder." 362 N.C. at 336, 661 S.E.2d at 707 (internal punctuation omitted) (quoting *Millsaps*, 356 N.C. at 565, 572 S.E.2d at 774), *construed in Wilson*, 283 N.C. App. at 440–44, 873 S.E.2d at 55–57 (Stroud, C.J., concurring in part and dissenting in part). The dissent reasoned that if *any* evidence supported the contention that defendant did not attempt to rob Finch, then defendant was entitled to an instruction on second-degree murder as a lesser-included offense. *Wilson*, 283 N.C. App. at 442, 873 S.E.2d at 56. According to the dissent, defendant's statements that he intended to sell the phone and not rob Finch amounted to "conflicting evidence" that "present[ed] a question of credibility and weight of the evidence [that] must be resolved by a jury."[3] *Id.* at 443, 873 S.E.2d at 56. The dissent also reasoned that the error was prejudicial notwithstanding defendant's conviction of attempted robbery with a dangerous weapon because, in essence, the jury's only options were to convict or acquit defendant outright. *Id.* at 444–45, 873 S.E.2d at 57. Defendant appealed to this Court based on the dissent at the Court of Appeals.[4]

The issue here is whether the Court of Appeals erred in holding that defendant was not entitled to an instruction on second-degree murder. We review decisions of the Court of Appeals for errors of law. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). When determining

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3. The dissent at the Court of Appeals emphasized that defendant was acquitted of a conspiracy to commit robbery with a dangerous weapon, stating "it appear[ed] the jury believed at least some of defendant's account of events or was not fully convinced by the State's evidence regarding a plan to commit robbery." *Id.* at 443–44, 873 S.E.2d at 57. The dissent at this Court also adopts this reasoning. We note, however, that the conspiracy charge alleged a conspiracy between defendant and Monte, who does not appear to have been a part of the arrangements between defendant and Tink. Therefore, defendant's acquittal of the conspiracy charge with Monte does not inform whether defendant and Tink planned to rob Finch.

4. *See* N.C.G.S. § 7A-30(2) (2021), *repealed by* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-134.pdf. The repeal of N.C.G.S. § 7A-30(2) only applies to cases filed with the Court of Appeals on or after 3 October 2023. *See* Current Operations Appropriations Act § 16.21(e).

whether the evidence is sufficient for the submission of a lesser-included offense, we view the evidence in the light most favorable to the defendant. *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994).

"[A] defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *State v. Palmer*, 293 N.C. 633, 643–44, 239 S.E.2d 406, 413 (1977). When determining whether a defendant is entitled to an instruction on a lesser-included offense, the first determination is "whether the lesser offense is, as a matter of law, an included offense of the crime for which [the] defendant is indicted." *State v. Thomas*, 325 N.C. 583, 590, 386 S.E.2d 555, 559 (1989). Then the court must determine whether the evidence supports a conviction of the lesser-included offense. *Id.* at 591, 386 S.E.2d at 559. Specifically, when the State charges first-degree murder but proceeds only under the felony-murder theory, the trial court must instruct on all lesser-included offenses if (1) the evidence supporting the underlying felony is "in conflict," and (2) the evidence would support a lesser-included offense of first-degree murder. *Gwynn*, 362 N.C. at 336, 661 S.E.2d at 707 (quoting *Millsaps*, 356 N.C. at 565, 572 S.E.2d at 773).

For evidence to be "in conflict," there must be evidence that tends to negate the State's positive evidence as to the elements of the crime. *Thomas*, 325 N.C. at 594, 386 S.E.2d at 561. "Such conflicts may arise from evidence introduced by the State, or the defendant. They may [also] arise when only the State has introduced evidence." *Id.* (citations omitted). In order to identify a conflict in the evidence, however, the defendant must rely on more than his own statements denying his involvement in the crime. *See, e.g.*, *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled on other grounds by* 317 N.C. 193, 344 S.E.2d 775 (1986); *State v. Thomas*, 350 N.C. 315, 347, 514 S.E.2d 486, 506 (1999). Indeed,

> [t]he determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . . and there is *no evidence to negate these elements other than defendant's denial that he committed the offense*, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Millsaps, 356 N.C. at 560, 572 S.E.2d at 771 (emphasis added) (quoting *Strickland*, 307 N.C. at 293, 298 S.E.2d at 658). Because "the underlying

felony constitutes an element of first-degree murder" when the State proceeds under the felony-murder theory, *id.* at 560, 572 S.E.2d at 770, the same standard applies when considering if there is a conflict in the evidence of the underlying felony.[5]

If there is a conflict in the evidence supporting the underlying felony, the evidence must then also support a lesser-included offense of first-degree murder. *Gwynn*, 362 N.C. at 336, 661 S.E.2d at 707. To warrant a lesser-included offense instruction, the evidence must "permit the jury *rationally* to find defendant guilty of the lesser offense and to acquit him of the greater." *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771 (emphasis added). When the State charges first-degree murder but proceeds only under the felony-murder theory, the "defendant is entitled to a second-degree murder instruction only if evidence also tend[s] to show that the murder was not committed in the course of the commission of a felony." *State v. Wilson*, 354 N.C. 493, 506, 556 S.E.2d 272, 281 (2001), *overruled on other grounds*, 356 N.C. at 567, 572 S.E.2d at 775.

If there is a conflict in the evidence and the evidence supports an instruction on a lesser-included offense, the trial court must give an instruction on the lesser-included offense. *Gwynn*, 362 N.C. at 336, 661 S.E.2d at 707. With these principles in mind, we turn to the present case.

We start by describing the relevant crimes. As noted, defendant was tried for first-degree murder under the felony-murder theory with attempted robbery with a dangerous weapon as the underlying felony. Defendant insists he was entitled to an instruction on second-degree murder as a lesser-included offense.

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5. Contrary to the dissent's assertion, this rule does not clash with *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382 (1980). There, the United States Supreme Court observed how the defendant's statements contradicted the State's evidence. *Id.* at 629–30, 100 S. Ct. at 2385–86. It then made this observation: "As the State has conceded, absent the statutory prohibition on such instructions, this testimony would have entitled petitioner to a lesser included offense instruction on felony murder *as a matter of state law*." *Id.* at 630, 100 S. Ct. at 2386 (emphasis added); *see also id.* at 630 n.5, 100 S. Ct. at 2386 n.5. Read in context, the Court's statement was not a declaration of a universal rule applicable to all states. Rather, it was simply a summary of Alabama's law and how it applied to the facts of that case. As the Court itself observed, "the [s]tates vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction," *id.* at 636 n.12, 100 S. Ct. at 2389 n.12, and it did not purport to hold that a defendant is always entitled to a lesser-included offense instruction when his statements contradict the State's evidence. Therefore, nothing in *Beck* casts doubt on this Court's rule that a defendant must identify more than his own statements denying his involvement in a crime to create a conflict in the evidence.

"The crime is first-degree murder," and felony-murder is a theory that the State may use to pursue a conviction. *Millsaps*, 356 N.C. at 560, 572 S.E.2d at 770. Felony murder is a murder "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, *robbery*, kidnapping, burglary, or *other felony committed or attempted with the use of a deadly weapon*." N.C.G.S. § 14-17(a) (2021) (emphasis added). *See generally State v. Juarez*, 369 N.C. 351, 354, 794 S.E.2d 293, 297 (2016) (observing that the felony-murder theory is "the legislature's deliberate policy choice to hold individuals accountable for deaths occurring during the commission of felonies, regardless of whether the murder was intentional or unintentional" (internal quotation marks omitted) (quoting *State v. Bell*, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994))).

In this case, attempted robbery with a dangerous weapon is the felony underlying felony murder. Under our laws, if an individual intends to commit a crime and performs an overt act beyond mere preparation for that purpose but falls short of completing the criminal offense, he is guilty of attempting the crime. *State v. Melton*, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018). Specifically, "[a]n attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about th[at] result." *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987); *cf.* N.C.G.S. § 14-87(a) (2021) (criminalizing robbery with a firearm or other dangerous weapon).

Second-degree murder is "the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Thibodeaux*, 352 N.C. 570, 582, 532 S.E.2d 797, 806 (2000) (quoting *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997)); *see also* N.C.G.S. § 14-17(b) (2021). Malice may be established in several ways: (1) express hatred, ill-will, or spite; (2) commission of an inherently dangerous act in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief; or (3) a condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. *State v. Coble*, 351 N.C. 448, 450–51, 527 S.E.2d 45, 47 (2000). Malice may also be established by the use of a deadly weapon to inflict a wound that proximately results in death. *Id.* at 451, 527 S.E.2d at 47.

For each of these offenses, "[h]e who actually perpetrates the crime . . . by his own hand" is guilty of the crime. *State v. Small*, 301 N.C. 407, 412, 272 S.E.2d 128, 132 (1980), *superseded in part by statute*, An Act to Abolish the Distinction Between Accessories Before the Fact

and Principals and to Make Accessories Before the Fact Punishable as Principal Felons, ch. 686, § 1, 1981 N.C. Sess. Laws 984, 984 (codified as amended at N.C.G.S. § 14-5.2). But furthermore, a person may be guilty if he "acts in concert" with the crime's principal perpetrator. *Id.* Indeed,

> [i]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose or as a natural and probable consequence thereof.

State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (internal punctuation omitted) (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)). In other words, a person who works together with another to bring about a criminal objective may be convicted of the same crime as the one who actually perpetrates the criminal act.

Although sharply divided, this Court ruled that, as a matter of law, second-degree murder is a lesser-included offense of first-degree murder, even when the State proceeds under the felony-murder theory. *Thomas*, 325 N.C. at 592–93, 386 S.E.2d at 560. This Court did so despite second-degree murder having essential elements that are not essential elements of first-degree murder when pursued under the felony-murder theory. *See id.* at 600–05, 386 S.E.2d at 564–68 (Mitchell, J., dissenting) (reasoning that, under a definitional test, second-degree murder is not a lesser-included offense of first-degree murder when pursued under the felony-murder theory because it has two different essential elements: (1) malice and (2) an intentional act that proximately causes the victim's death). Nevertheless, because the dissent below did not draw this holding into question and the State did not seek discretionary review, we turn our attention to the issue at hand: whether, under *Gwynn*, the evidence supported a second-degree murder instruction in this case. *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 . . . specifically set out in the dissenting opinion as the basis for that dissent . . . .").

Under the framework set out in *Gwynn*, we must first determine if the evidence of the underlying felony of attempted robbery with a dangerous weapon is "in conflict." *Gwynn*, 362 N.C. at 336, 661 S.E.2d at 707. At the outset, we note that the State presented positive evidence as to each element of attempted robbery with a dangerous weapon. First,

the evidence showed that defendant and Tink discussed the idea of robbing Finch before meeting him. Defendant and Tink also agreed to split the money between them. Thereafter, defendant armed himself with one of Tink's weapons, and both he and Tink went armed with firearms to meet Finch. Defendant's statements indicated that Tink pointed his gun at Finch at the meeting in order to rob him. Furthermore, Gatewood's testimony that defendant admitted to "sho[oting] and robb[ing] somebody" and Moore's testimony that defendant admitted to "kill[ing] somebody" suggest that defendant was personally involved in the attempted robbery with a dangerous weapon. Defendant, however, proffers three arguments as to why the evidence is in conflict. Each is unavailing.

First, defendant insists that Travis Moore's statement that defendant planned to buy a cell phone, not sell one, creates a conflict in the evidence. Defendant, however, does not explain how this discrepancy creates a conflict in the evidence supporting attempted robbery with a dangerous weapon. At most, it creates a conflict as to what object of Finch's personal property may have been the target of the attempted robbery: his money or his cell phone. Even viewing this discrepancy in the light most favorable to defendant, we hold that it does not negate any element of attempted robbery with a dangerous weapon, and therefore it does not create a conflict in the evidence.

Second, defendant argues that the loose cash found on or near Finch's body creates a conflict in the evidence. According to defendant, this fact suggests that defendant did not have the specific intent to rob Finch. This argument, however, ignores the fact that attempted robbery with a dangerous weapon is an inchoate crime, meaning the attempted crime is not completed. *Inchoate*, *Black's Law Dictionary* (11th ed. 2019) (defining "inchoate" as "[p]artially completed or imperfectly formed; just begun"). Defendant therefore did not need to complete the robbery to be guilty of attempted robbery with a dangerous weapon. Thus, the presence of the cash on or near the victim's body does not negate evidence that defendant attempted to rob Finch with a dangerous weapon, and therefore it does not create a conflict in the evidence.

Third, defendant's principal argument is that his statements that he planned to sell his cell phone rather than rob Finch create a conflict in the evidence supporting the underlying felony of attempted robbery with a dangerous weapon. This Court's precedents foreclose defendant's argument. *E.g.*, *Millsaps*, 356 N.C. at 560, 572 S.E.2d at 771; *Thomas*, 350 N.C. at 347, 514 S.E.2d at 506 ("[T]he only evidence offered by defendant to negate first-degree murder was his own testimony denying his involvement in the crime, *which alone does not tend to negate premeditation*

and deliberation." (emphasis added)).[6] Defendant's statements that he planned to sell the cell phone and not rob Finch are, in essence, the same as a denial that he was involved in Tink's scheme to rob Finch. Therefore, his statements alone do not create a conflict in the evidence supporting attempted robbery with a dangerous weapon.

Defendant, however, invites this Court to distinguish *Thomas*, arguing that case involved a "blanket denial of guilt" whereas "[his] statements were far more than mere denials." According to defendant, "his statements negated a specific element of the State's theory of acting in concert." We do not agree. In *Thomas*, the defendant was charged with first-degree murder based on premeditation and deliberation and the felony-murder theory. 350 N.C. at 325, 514 S.E.2d at 493. The defendant, who testified at trial and admitted to being at the victim's home on the night of the murder, gave a detailed account of the night's events. *Id.* at 327, 514 S.E.2d at 494. According to his testimony, the defendant drove another individual "to a 'white dude's house' to settle a drug debt." *Id.* The defendant stated, however, "that when he left the house . . . , [the other individual] stayed behind, and [the victim] was still alive." *Id.* Clearly, the defendant's statements in *Thomas* were far more than "blanket denials of guilt." Thus, the holding in *Thomas* is applicable to the present case.

Because there was not a conflict in the evidence, we need not proceed to the next step of the *Gwynn* analysis to consider whether the evidence would support a lesser-included offense of first-degree murder. Defendant was not entitled to an instruction on second-degree murder as a lesser-included offense. Therefore, the trial court did not err in refusing to give the jury an instruction on second-degree murder. The decision of the Court of Appeals is modified and affirmed.

MODIFIED AND AFFIRMED.

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6. Although there are cases from this Court where we found that a defendant's statements generated a conflict in the evidence, *see, e.g.*, *Thomas*, 325 N.C. at 595–98, 386 S.E.2d at 562–63; *State v. Camacho*, 337 N.C. 224, 231–33, 446 S.E.2d 8, 12–13 (1994), those cases were abrogated by our subsequent holdings in *Thomas*, 350 N.C. at 347, 514 S.E.2d at 506 (1999), and *Millsaps*, 356 N.C. at 560, 572 S.E.2d at 771 (2002).

Justice EARLS dissenting.

Under deep-seated principles and long-standing precedent, a defendant is "entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *State v. Palmer*, 293 N.C. 633, 643–44 (1977). We have minted special rules when the State prosecutes a defendant for first-degree felony murder. In those cases, a trial judge must instruct the jury on a lesser-included offense if (1) the evidence of the underlying felony is "in conflict" and (2) the evidence would support a lesser-included offense of first-degree murder. *State v. Gwynn*, 362 N.C. 334, 336 (2008).

The majority here stops after the first step. As it defines it, a conflict exists—and triggers a lesser-included offense instruction—if evidence "tends to negate the State's positive evidence as to the elements of the crime." But not all evidence counts, says the majority. More specifically, a defendant's "own statements denying his involvement in the criminal offense" do not raise a conflict in the evidence. Applying that rule to Mr. Wilson's case, the majority finds no evidentiary conflict that required a lesser-included offense instruction.

I disagree with the majority's artificially truncated rule. In practice, it threatens unfair and impractical results. It also clashes with the principles animating our lesser-included offense jurisprudence. In my view, the evidence was "in conflict" on Mr. Wilson's specific intent to rob Mr. Finch. *See id*. Because of that conflict, I would proceed to *Gwynn*'s second step and find that, since second-degree murder is a lesser-included offense of first-degree murder, the trial court should have instructed jurors on that crime.

I. What did the State need to prove to convict Mr. Wilson of first-degree felony murder?

To convict Mr. Wilson of felony murder—a species of first-degree murder—the State had to prove that Mr. Finch's "killing took place while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies." *State v. Richardson*, 341 N.C. 658, 666 (1995). In this case, the "enumerated" felony was attempted robbery with a dangerous weapon. Attempted robbery is an inchoate crime—a defendant need not complete the offense to have committed it. Even so, the State had to prove that Mr. Wilson specifically intended to "unlawfully deprive" Mr. Finch of his "personal property by endangering or threatening his life with a dangerous weapon." *State v. Allison*, 319 N.C. 92, 96 (1987). Intent established, the State had to also show that Mr. Wilson performed

an "overt act" beyond mere preparation that was "calculated to bring about" the planned crime. *Id.*

The parties focus on Mr. Wilson's specific intent to commit the underlying felony. For as this Court has explained, the intent element is central to felony murder. *See State v. Jones*, 353 N.C. 159, 166–69 (2000). A defendant "must be purposely resolved to commit" the predicate felony "to be held accountable for unlawful killings that occur during the crime's commission." *Id.* at 167; *see also id.* ("[T]he actual intent to kill may be present or absent; however, the actual intent to commit the underlying felony is required."). Culpable negligence is not enough—the State must prove that "the defendant actually intended to commit" the predicate felony. *Id.* at 167–68. And so for Mr. Wilson, the State could not simply show that he acted recklessly or with "heedless indifference to the safety and rights of others." *Id.* at 165 (quoting *State v. Weston*, 273 N.C. 275, 280 (1968)) (defining criminal negligence). To commit attempted robbery, he had to be "purposely resolved" to taking Mr. Finch's personal property using a dangerous weapon. *Id.* at 167. And so if evidence cuts against Mr. Wilson's specific intent to commit armed robbery, it cuts against his guilt of the predicate felony and—by extension—felony murder.

II. When must a court instruct the jury on a lesser-included offense?

Time and again, this Court has recognized a defendant's right "to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *Palmer*, 293 N.C. at 643–44; *State v. Thomas*, 325 N.C. 583, 594 (1989) (explaining that a lesser-included offense instruction is required if the evidence "would permit a jury rationally to find defendant guilty of the lesser offense and acquit him of the greater" (cleaned up)).

That rule flows from constitutional guarantees of due process. A judge's charge to the jury, we have explained, is "one of the most critical parts of a criminal trial." *State v. Walston*, 367 N.C. 721, 730 (2014). It provides jurors with a menu of choices, thus shaping whether, why, and for what they return a verdict. And so for "over a century," this Court has required judges to instruct the jury on "an included crime of lesser degree than that charged" if "there is evidence tending to support" it. *State v. Brichikov*, 383 N.C. 543, 553 (2022) (quoting *State v. Hicks*, 241 N.C. 156, 160 (1954)); *see also State v. Jones*, 79 N.C. 630, 631 (1878) ("It was [defendant's] privilege to have the State's evidence applied to any theory justified by it. . . . This right he demanded in his prayer for instructions which ought to have been given.").

In practice, that safeguard "reduce[s] the risk of an unwarranted conviction." *State v. Conaway*, 339 N.C. 487, 514 (1995). And as the Supreme Court has explained, that danger is greatest when "one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense." *Beck v. Alabama*, 447 U.S. 625, 634 (1980) (quoting *Keeble v. United States*, 412 U.S. 205, 212–13 (1973)). A jury left with "only two options"—"convicting the defendant" or "acquitting him outright"—is "likely to resolve its doubts" by convicting the defendant. *Id.* Instructing jurors on a lesser-included offense provides a "third option." *Id.* And by affording "the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal," *id.* at 633, the instruction thus "accord[s] the defendant the full benefit of the reasonable-doubt standard," *id.* at 634.

In light of those due process concerns, our cases do not set a high bar for lesser-included offense instructions. Before charging jurors, a trial court must ask whether "the State's evidence is positive as to each and every element of the crime charged." *Thomas*, 325 N.C. at 594 (cleaned up); *accord State v. Locklear*, 331 N.C. 239, 246 (1992). A judge may decline to instruct the jury on a lesser crime only if "there is *no* contradictory evidence relating to *any* element" of that offense. *Id.* (emphases added) (citing *State v. Peacock*, 313 N.C. 554 (1985)).

But the calculus changes if "there is any evidence or if any inference can be fairly deduced therefrom, tending to prove one of the lower grades of murder." *State v. Spivey*, 151 N.C. 676, 686 (1909); *see also State v. Strickland*, 307 N.C. 274, 293 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203–04 (1986). If so, the evidence is "in conflict." *Gwynn*, 362 N.C. at 336. And because that conflict raises a "risk of an unwarranted conviction," it requires a lesser-included offense instruction. *Conaway*, 339 N.C. at 514; *see also Beck*, 447 U.S. at 634–36.

This case focuses on when the evidence is "in conflict," and how a defendant may identify that factual discord. Analytically, that matters to Mr. Wilson. When the State charges a defendant with felony murder and there is a "conflict in the evidence regarding whether defendant committed the underlying felony," then the court must instruct jurors on "all lesser degrees of homicide charged in the indictment" and "supported by the evidence." *State v. Camacho*, 337 N.C. 224, 231 (1994).

Despite the majority's narrow formulation of a conflict, our precedent has adopted a more generous approach. A conflict exists "if any other evidence tended to negate" the elements of the charged crime

"when viewed in the light most favorable to defendant." *Brichikov*, 383 N.C. at 554. So too is the evidence in conflict when it "permits more than one inference" as to an essential element. *State v. Leroux*, 326 N.C. 368, 378, *cert. denied*, 498 U.S. 871 (1990); *see also State v. Perry*, 209 N.C. 604, 606 (1936) ("Whenever there is any evidence or when any inference can be fairly deduced therefrom tending to show a lower grade of murder, it is the duty of the trial judge, under appropriate instructions, to submit that view to the jury."); *State v. Gause*, 227 N.C. 26, 30 (1946) (requiring trial court to instruct on second-degree murder when "more than one inference may be drawn from the evidence in respect to lying in wait").

As detailed above, specific intent is an essential ingredient for first-degree murder. For felony murder, the State needed to prove that Mr. Wilson specifically intended—or "purposely resolved"—to commit the underlying felony. *See Jones*, 353 N.C. at 167. So a conflict exists—and a court must instruct on a lesser degree of homicide—if "any evidence" or "any inference. . . fairly deduced" from it cuts against Mr. Wilson's specific intent to commit attempted robbery with a dangerous weapon. *See Perry*, 209 N.C. at 606.

III. Was the evidence in conflict as to Mr. Wilson's specific intent to commit the underlying felony?

According to the majority, Mr. Wilson cannot show a conflict because the State "presented positive evidence as to each element of attempted robbery with a dangerous weapon." To support that claim, the majority surveys the State's evidence.

At trial, the majority recounts, prosecutors used Mr. Wilson's statements as evidence that he and Tink "discussed the idea of robbing [Mr.] Finch before meeting him." The State also showed that Mr. Wilson—wary about meeting with an unknown person—asked Tink to do the talking, promising him $60 from the sale. On the day of the meet-up, Mr. Wilson and Tink "went armed with firearms to meet Finch." At the meeting, Mr. Wilson's statements suggested that Tink "pointed his gun" at Mr. Finch "in order to rob him." In the wake of the killing, the majority notes, Mr. Wilson's girlfriend testified that he admitted to "sho[oting] and robb[ing] somebody." Mr. Wilson's comments to a friend suggested, too, that he "was personally involved in the attempted robbery with a dangerous weapon." So according to the majority, the State "presented positive evidence" for each element of the underlying felony, including specific intent.

But that account omits key information. When officers interviewed him, Mr. Wilson stated at least seven times that he intended to *sell* his phone to Mr. Finch, not rob him. Though Tink floated the idea of a robbery, Mr. Wilson repeatedly shot it down. Regardless of Tink's half-baked designs, Mr. Wilson had no plan to rob Mr. Finch or help Tink do so. From Mr. Wilson's perspective, too, it was not unusual for him or Tink to carry guns. His statement suggests that Tink was always armed but seldom used his weapon. *See State v. Wilson*, 283 N.C. App. 419, 443 (2022) (Stroud, C.J., concurring in part and dissenting in part). At trial, a friend also testified that Mr. Wilson told him that he planned to buy a phone on the LetGo app. And at the crime scene itself, officers found the iPhone and loose cash near Mr. Finch's body. In his pockets, they discovered another $200.

Viewed in the light most favorable to Mr. Wilson, that evidence tends to negate Mr. Wilson's specific intent. It shows that Tink—not Mr. Wilson—was the only person who mentioned a robbery. It shows, too, that Mr. Wilson tried to dissuade Tink from that course, insisting, "[Y]ou ain't got to rob him just sell him the phone." And it shows that neither Mr. Wilson nor Tink took any money or property from Mr. Finch—the alleged purpose of the meet-up—after the deal went south. Taken together, that evidence undercuts Mr. Wilson's specific intent to commit the underlying felony. *Id.* at 167. At worst, Mr. Wilson knew that Tink was armed and had "talked about" robbing Mr. Finch. But he "didn't know for sure" if Tink would do so, and he had no intent to assist Tink or commit the robbery himself. Culpable negligence is not enough for felony murder. *Id.* Even if Mr. Wilson acted recklessly or with "heedless indifference" to Mr. Finch's safety, the evidence—viewed in his favor—does not show that he "purposely resolved" to commit the underlying felony. *See id.* at 165, 167.

IV. What are the problems with the majority's approach?

The majority avoids the conflicting evidence by scrubbing it from consideration. A defendant's statements cannot themselves raise a conflict, the majority holds. But that rule clashes with Supreme Court precedent. In *Beck*, like this case, the defendant implicated himself in a robbery-turned-homicide. *Beck*, 447 U.S. at 629. But the defendant "consistently denied" that "he killed the man or that he intended his death." *Id.* As the defendant told it, "he and an accomplice entered their victim's home in the afternoon." *Id.* at 629–30. And after the defendant "seized the man intending to bind him with a rope, his accomplice unexpectedly struck and killed him." *Id.* at 630.

The defendant's testimony, according to the Court, was enough to require a lesser-included offense instruction. *See id.* at 635–38. When the evidence shows that "the defendant is guilty of a serious, violent offense" but "leaves some doubt with respect to an element that would justify conviction" of a more serious crime, the failure "to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637. The Court reaffirmed the guiding principle of that due-process safeguard: A "defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Id.* at 635 (quoting *Keeble*, 412 U.S. at 208). So the lodestar is not the precise source of the evidence but whether it raises a "doubt with respect to an element that would justify conviction" of a less-serious crime. *Id.* at 637.[1]

This Court, too, has relied on a defendant's statements to find a conflict in the evidence. *See Camacho*, 337 N.C. at 232–33; *see also Thomas*, 325 N.C. at 597 (relying on defendant's statements to police officer as basis for finding a conflict in evidence about whether "defendant

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1. The majority downplays the dissonance of its position with *Beck*, claiming that that decision did not declare "a universal rule applicable to all States," but provided "simply a summary of Alabama's law and how it applied to the facts of that case." In support of that point, it notes *Beck*'s observation that "[A]bsent the statutory prohibition on such instructions, this testimony would have entitled petitioner to a lesser included offense instruction on felony murder *as a matter of state law*." *Beck*, 447 U.S. at 360 (emphasis added).

The majority identifies the very same constitutional flaw with the challenged statute: That it precluded a lesser-included offense instruction when the evidence would warrant one. By doing so, the Court explained, the statute "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.* at 642. More specifically, the "unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished." *Id.*

While states may define crimes and the lesser-included offenses that comprise them, the due-process clause requires a lesser-included offense instruction when the evidence would support one. *See id.* at 635–37. Indeed, the Court underscored that point in the footnote the majority only partly cites. Reproduced in full, the opinion says: "Although the States vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction, *they agree that it must be given when supported by the evidence*." *Id.* at 636 n.12 (emphasis added). In Mr. Wilson's case, then, if evidence would support a second-degree murder conviction, *Beck* requires one. And by artificially narrowing the relevant evidence, the ruling here runs into the same constitutional problems that animated *Beck*: When there is "some doubt with respect to an element that would justify conviction" of a serious crime, denying jurors the "third option" impermissibly "enhance[s] the risk of an unwarranted conviction." *Id.* at 637.

shared a common purpose or plan" to commit the underlying felony).[2] In *Camacho*, for instance, we reversed a conviction because the trial court refused to instruct jurors on second-degree murder. *See Camacho*, 337 N.C. at 232–33. We first asked whether the evidence was in conflict for any element of the first-degree murder charge. *See id.* In that case, the State prosecuted the defendant for homicide by lying in wait—a species of first-degree murder. *Id.* at 231. And at trial, the State's "evidence tend[ed] to show that the defendant hid in the victim's closet and waited for her to return to her room before jumping out of the closet and assaulting her with a hammer, leading to her death." *Id.* at 232.

But the defendant's testimony, on the other hand, "tend[ed] to show he did not lie in wait for his victim." *Id.* He told jurors that "he was in the victim's room only to retrieve some personal belongings when he was overcome with 'head rushes' resulting from his excessive use of alcohol and cocaine." *Id.* When he stooped "to pick up some tools he had dropped," the victim entered the room and attacked "him with a knife." *Id.* During their struggle, the defendant struck the fatal blow with a hammer. *Id.*

Because the evidence pointed both ways, this Court concluded that it was "in conflict as to whether the crime was committed by lying in wait." *Id.* at 231. Although the "State's evidence tend[ed] to show that it was," the "defendant's evidence tend[ed] to show that it was not." *Id.* at 231. Because of that conflict, the "trial judge should have given the jury an instruction based upon any version of the crime supported by the evidence favorable to defendant." *Id.* at 232. In other words, we required that jurors have the option to consider and convict the defendant for "any version of the crime which did not involve lying in wait, and which is supported by other evidence and charged in the indictment." *Id.* (cleaned up). And since the defendant's statements showed "that he did not intend to kill the victim" but "did intend to beat the victim in the

2. According to the majority, these cases were "abrogated" by our decisions in *Millsaps* and *Thomas*. But neither of those later rulings purported to change or "abrogate" our precedent. In fact, *Millsaps* repeatedly cited the very case that it (per the majority) did away with. *See Millsaps*, 356 N.C. at 560 (citing *State v. Thomas*, 325 N.C. 583, 593 (1989), when explaining "certain well-settled principles applicable to first-degree murder"); *id.* at 561 (citing *Thomas*, 325 N.C. 583); *id.* at 561–62 (citing *Thomas*, 325 N.C. at 594); *id.* at 565 (citing *Thomas*, 325 N.C. 583); i*d.* at 569 (citing *Thomas*, 325 N.C. at 593). And at one point, *Millsaps* excerpted full paragraphs from that earlier decision, relying on its formulation of the rules governing lesser-included offense instructions. *See id.* at 561–62. On top of that, this Court's 2016 opinion in *Juarez* cited the "abrogated" decisions as good law. *See State v. Juarez*, 369 N.C. 351, 355–56 (2016). And just last year, this Court quoted one "abrogated" case with approval. *See Brichikov*, 383 N.C. at 557 (citing *Thomas*, 325 N.C. at 599).

head with a hammer," a second-degree murder instruction was required. *Id.* at 232–33.

The majority skips past that precedent, rooting its rule in a distinct species of cases: Those in which a defendant—through statements or testimony—categorically denies any role in the crime, without explanation. The majority, for instance, relies on *State v. Thomas*, 350 N.C. 315 (1999). In that case, the defendant requested a second-degree murder instruction, arguing that the evidence was in conflict about his premeditation. *See id.* at 346. The only basis for that conflict: The defendant's "own testimony denying his involvement in the crime." *Id.* at 347. We held that the defendant's wholesale disavowal of guilt did not, standing alone, "tend to negate premeditation and deliberation." *Id.* In *Millsaps*—also cited by the majority—we declined to find a conflict based on nothing "other than defendant's denial that he committed the offense." *State v. Millsaps*, 356 N.C. 556, 560 (2002) (cleaned up).

But those cases differ critically from this one. When a defendant disclaims any role in a crime, he disavows the conduct that makes up both the greater *and* lesser-included offenses. The defendant, in effect, contends that he engaged in no crime at all. And for that reason, his bare "denial that he committed the offense" does not support a lesser-included offense instruction. *See id.*; *see also Conaway*, 339 N.C. at 515 (declining to require a second-degree murder instruction when defendant pointed to no evidence negating premeditation and deliberation aside from his testimony "that he did not commit the murders").

The analysis changes when a defendant's statements do not categorically disclaim criminal culpability but instead contradict a discrete element of the charged crime—an element that separates a more serious offense from lesser-included ones. That defendant—unlike those in the cases cited by the majority—does not entirely disavow his role in the events that make up the greater and lesser-included offenses. His words bear on *which* crime he committed, not on whether he committed a crime at all. When offered for that distinct purpose, a defendant's statements are not a naked "denial that he committed the offense." *Cf. Millsaps*, 356 N.C. at 560.[3]

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3. Per the majority, *State v. Thomas*, 350 N.C. 315 (1999), forecloses this argument because the defendant's statements in that case "were far more than 'blanket denials of guilt.' " But that conclusion does not follow from the majority's premises. In *Thomas*, the defendant admitted his presence at the victim's home on the night of the murder. *See id.* at 327. But according to the defendant, he left to go "settle a drug debt." *Id.* When he drove away from the house, he testified that the victim "was still alive." *Id.*

That logic applies to Mr. Wilson's case. Unlike the defendants in the majority's cases, Mr. Wilson does not "deny[ ] his involvement in the crime" or disclaim any role in any offense. *Cf. Thomas*, 350 N.C. at 347. Just the opposite. His own words link him to Mr. Finch, the crime scene, and the crime. Mr. Wilson instead offers his statements to show a conflict in the evidence on a discrete point: His specific intent to commit an attempted armed robbery with a dangerous weapon. Put differently, Mr. Wilson's words call into question whether his intent matched the elements of second- versus first-degree felony murder.

In my view, Mr. Wilson's statements are key data points. The State admitted them into evidence, read them to the jury, leaned on them to make its case, and addressed them during closing arguments. And since Mr. Wilson does not categorically disclaim any involvement in the crime but instead disputes his specific intent to commit first-degree felony murder, our precedent does not demand the rule the majority extracts from it.

On a practical level, the majority's approach also overlooks the nature of inchoate crimes. To commit an attempted robbery, Mr. Wilson did not need to go through with it. The crime was complete when the participants "purposely resolved" to rob Mr. Finch using a dangerous weapon, and overtly acted to that end. Specific intent is key. But specific intent is also notoriously difficult to ferret out. For many inchoate crimes, the participants themselves are the only ones with insight into whether, how, and why they pursued a course of conduct. And so the participants' statements and testimony will be the primary—often the only—evidence for and against their guilt.

Just look at the State's evidence here. To convict Mr. Wilson of attempted robbery, prosecutors admitted into evidence his statements to police and leaned on them to meet their burden. *Wilson*, 283 N.C. App. at 442 (Stroud, C.J., concurring in part and dissenting in part). They

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In other words, the defendant flatly denied his participation in the events comprising the murder charge. Though he conceded that he was at the victim's house that night, he insisted that he left before anything happened. *See id*. And because the defendant categorically disavowed his role in and proximity to the murder, his statements did not negate a discrete element of first-degree murder. While the majority flattens *Thomas* into a categorical rule, its own summary of that case distinguishes it from Mr. Wilson's. Unlike the defendant in *Thomas*, Mr. Wilson does not entirely remove himself from the events underlying the murder charge—he instead disputes whether he had the intent needed for first- versus second-degree murder. Thus, unlike the defendant in *Thomas*, Mr. Wilson's words bear on his *degree* of culpability rather than disclaiming any culpability at all.

played his words to the jury, and even referenced them during closing arguments. *Id.* But though the State used Mr. Wilson's statements as evidence of his intent, the majority now bars Mr. Wilson from using those same statements to show a conflict on the same point.

In fact, the majority itself deploys that one-way ratchet. In finding no conflict in the evidence, the majority points to Mr. Wilson's comments. It notes that, as Mr. Wilson told officers, he and Tink "discussed the idea of robbing Finch before meeting him." It observes too that Mr. Wilson and Tink agreed to split the proceeds of the sale. And it cites Mr. Wilson's "statements" as evidence that "Tink pointed his gun at [Mr.] Finch at the meeting in order to rob him." So for the majority, Mr. Wilson's words work one way only—though the majority may use them as evidence of his guilt, Mr. Wilson cannot use them to question it. That "heads-I-win, tails-you-lose" approach flouts basic principles of fairness.

Finally, the majority ignores how Mr. Wilson's youth bears on his intent. At the time of the crime, Mr. Wilson was just fifteen years old. And as the Supreme Court has recognized, intent and age are closely intertwined. *See Miller v. Alabama*, 567 U.S. 460, 471–72 (2012). A child's criminal culpability is tempered by the "distinctive attributes of youth"—their "transient rashness, proclivity for risk, and inability to assess consequences." *Id.* at 472 (cleaned up). Chief Judge Stroud made a similar point below. Although a "reasonable adult considering the situation would likely know something more was going to occur than just selling the phone," Mr. Wilson "was not a reasonable adult." *Wilson*, 283 N.C. App. at 443 (Stroud, C.J., concurring and dissenting). He was an impulsive teenager "who plainly, throughout his statement, seemed to believe Tink could talk a big game, but he would not actually shoot anyone, even though he was armed." *Id.*

The jury was the proper body to weigh the conflicting evidence and assess whether and how Mr. Wilson's age mattered. And if instructed on second-degree murder, it may well have found that offense a closer fit to the facts. Indeed, we know that jurors did not fully swallow the State's version of events. In acquitting Mr. Wilson of conspiracy to commit robbery with a firearm, the jury signaled that it "believed at least some of defendant's account of events or was not fully convinced by the State's evidence regarding a plan to commit robbery." *Id.* at 443–44.

Though it minimizes the jury's acquittal, the majority proves the very point it purports to rebut. Relying on Mr. Wilson's admissions to officers, the majority concludes that Monte did "not appear to have been a part of the arrangements between defendant and Tink." Because

the "conspiracy charge alleged a conspiracy between defendant and Monte," the majority continues, the jury's acquittal for that crime "does not inform whether defendant and Tink planned to rob Finch."

But for that logic to hold true, the jury *must* have believed at least some of Mr. Wilson's words. Indeed, the majority cites Mr. Wilson's statements as the sole evidence "tend[ing] to show that Monte was not part of any arrangement with defendant and/or Tink." If jurors believed Mr. Wilson when he disclaimed a conspiracy, then it is more likely that they believed him when he disputed his specific intent to commit an attempted armed robbery. Given jurors' skepticism on the conspiracy count, they may well have reached a different verdict on the murder charge had they received different instructions.[4]

For that reason, this case raises the due process concerns that have long animated our precedent. Beyond question, the evidence "points to some criminal culpability" on Mr. Wilson's part. *Thomas*, 325 N.C. at 599. Even so, his specific intent—the key element of the predicate felony—"remains in doubt." *Beck*, 447 U.S. at 634. And viewed in Mr. Wilson's favor, the evidence is "in conflict" on whether he "purposely resolve[d]" or "actually intend[ed]" to rob Mr. Finch or help Tink do so. *See Jones*, 353 N.C. at 167–68.

But despite that conflict, the trial court declined to instruct jurors on second-degree murder, leaving them with just two options—to convict Mr. Wilson or acquit him entirely. *See Beck*, 447 U.S. at 634. That binary, we have explained, creates an impermissible "risk of an unwarranted conviction." *Conaway*, 339 N.C. at 514. Left with no other choices, jurors may have felt "compelled to convict" for "*some* offense in light of the gravity of the accused's admitted transgressions." *Brichikov*, 383 N.C. at 557. In this case, a second-degree murder instruction would have

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4. In brushing aside the conspiracy acquittal, the majority also underscores the unfairness of a rule that bars defendants from offering their words to show a conflict in the evidence. According to the majority, the "evidence tended to show that Monte was not part of any arrangement with defendant and/or Tink." That "evidence": Mr. Wilson's statements to officers that Monte—his alleged co-conspirator—was "never part of the arrangement" and "coincidentally was in the area [of the crime] at this time." In other words, the majority offers Mr. Wilson's words as evidence that "tended to show" the lack of a conspiracy. Likewise, the majority points to Mr. Wilson's statements as evidence that he committed first-degree felony murder.

But when Mr. Wilson offers those same statements to question his intent, the majority's rule would have us close our eyes and cover our ears. In my view, if Mr. Wilson's words are competent evidence to support the State's case and exculpate Monte from a conspiracy, then they are competent evidence to dispute Mr. Wilson's specific intent to commit first-degree murder.

offered "a less drastic alternative," affording Mr. Wilson "the full benefit of the reasonable-doubt standard" and allowing jurors to select a verdict from the full menu of criminal offenses. *See Beck*, 447 U.S. at 633–34. By denying Mr. Wilson that instruction, the trial court below—and the majority today—withholds a key "procedural safeguard" and blesses a dangerously unreliable verdict. *See id.* at 637.

Because I would vacate Mr. Wilson's conviction and remand his case for full and fair proceedings, I respectfully dissent.

Justice RIGGS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
MELVIN RAY WOOLARD, JR.

No. 208PA22

Filed 15 December 2023

1. Appeal and Error—appellate jurisdiction—petition for certiorari—order granting motion to suppress—no statutory mechanism for appeal to lower court

In a prosecution for driving while impaired, where the district court preliminarily granted defendant's motion to suppress evidence from his arrest; the State appealed that ruling to the superior court, which upheld the ruling; and then the district court entered a final suppression order per the superior court's instructions, the Supreme Court properly allowed the State's petition for a writ of certiorari to review the State's appeal from the final suppression order. The State's petition met the requirements for certiorari jurisdiction under Appellate Rule 21, where the district court's final order was interlocutory and where no right of appeal from that order existed because the State lacked a statutory basis to challenge it in the superior court.

2. Motor Vehicles—driving while impaired—probable cause to arrest—evidence viewed as a whole—erratic driving—signs of impairment

In a prosecution for driving while impaired, the trial court erred in granting defendant's motion to suppress evidence from his arrest where, viewing the evidence as a whole, the officer who arrested

defendant had probable cause to do so. Although some evidence at trial cut against a finding that defendant was driving while impaired, a reasonable officer still would have had a substantial basis to suspect defendant of drunk driving where: at the time of the arrest, defendant was driving erratically, veering over the centerline six to seven times, swerving onto the oncoming lane twice, and skating onto the right shoulder of the road; both defendant's breath and the interior of his truck smelled of alcohol, and defendant's eyes were red and glassy; defendant confessed to drinking "a couple of beers" before driving; and defendant showed all six clues of impairment during a horizontal gaze nystagmus test.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review order granting defendant's motion to suppress entered on 29 March 2022 by Judge Darrell B. Cayton Jr. in District Court, Beaufort County. Heard in the Supreme Court on 13 September 2023.

Joshua H. Stein, Attorney General, by Kathryne E. Hathcock, Special Deputy Attorney General, for the State-appellant.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellee.

EARLS, Justice.

On 11 April 2020, Captain Rodney Sawyer arrested Melvin Woolard Jr. for driving while impaired. Before trial, Mr. Woolard moved to suppress evidence seized during his arrest. The district court preliminarily granted his motion, ruling that Captain Sawyer lacked probable cause to suspect Mr. Woolard of drunk driving.

The State appealed that decision to superior court. That court also found that Mr. Woolard's arrest violated the Fourth Amendment. At the superior court's instruction, the district court entered a final order suppressing the evidence. Dissatisfied with that ruling, the State sought review in the Court of Appeals and then this Court. We agreed to review the district court's final order.

The question before us is simple: Did Captain Sawyer have probable cause to arrest Mr. Woolard for impaired driving? Our answer is yes. Drawing on the district court's factual findings, we hold that Captain Sawyer's "belief of guilt" was objectively reasonable and rooted in concrete evidence. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

Because Mr. Woolard's arrest thus satisfied the Fourth Amendment, we reverse the district court's suppression order and remand this case for further proceedings.

I. Facts

A. The Arrest

On the afternoon of 11 April 2020, Captain Sawyer—a State Highway Patrol Officer—was driving along a rural road in Beaufort County. For a while, he found himself a solo traveler.

That changed when a truck pulled onto the road in front of him. Captain Sawyer and the truck were the only cars in sight. About a mile separated them. Like Captain Sawyer, the truck travelled south. But unlike Captain Sawyer, the truck wove in and out of its lane.

The officer watched as the truck darted over the centerline—six to seven times by his count. Twice, the truck lurched into the oncoming lane. And at one point, it even skidded onto the road's right shoulder.

Concerned, Captain Sawyer flashed his lights to stop the truck. The other driver quickly pulled over. Although canals and ditches flanked both sides of the road, the truck avoided them as it stopped.

As Captain Sawyer approached the truck, he saw Mr. Woolard behind the wheel. A woman sat beside him. On first glance, Mr. Woolard seemed normal. Captain Sawyer saw no alcohol or contraband in the truck, and nothing in the vehicle alarmed him.

The officer told Mr. Woolard the reason for the stop: Mr. Woolard's erratic driving. Mr. Woolard replied that he was headed to work. He explained that he noticed bees inside the truck, and his efforts to shoo them out the window caused him to swerve. At Captain Sawyer's request, Mr. Woolard produced his driver's license and registration.

As they spoke, Captain Sawyer smelled alcohol on Mr. Woolard's breath and from inside his truck. The officer's suspicions grew when he noticed Mr. Woolard's flushed cheeks, and red and glassy eyes. Still, Mr. Woolard seemed coherent—he chatted normally with Captain Sawyer and appeared in control of his mind and body.

Captain Sawyer returned to his patrol car to check Mr. Woolard's license and registration. He found "nothing unusual." But back at Mr. Woolard's truck, Captain Sawyer questioned him about the smell of alcohol. Mr. Woolard confessed that he drank "a couple of beers earlier."

At that point, Captain Sawyer asked Mr. Woolard to take a preliminary breath test (PBT). Mr. Woolard agreed. As he exited his truck, Mr. Woolard's balance was unremarkable.

Captain Sawyer gave Mr. Woolard two PBTs and a Horizontal Gaze Nystagmus (HGN) test. During an HGN test, an officer checks for involuntary nystagmus—the jerking or fluttering of the eyes—as a person watches an object move.[1] *See State v. Helms*, 348 N.C. 578, 579 (1998). As that object "travels toward the outside of the subject's vision," the officer monitors whether the eyes twitch or bounce. *Id.* at 580. If they do—especially before the "object has traveled 45 degrees from the center of the person's vision"—it signals intoxication. *Id.* At six points during the HGN test, an officer notes "clues" of impairment. The more clues he gathers, the more likely the driver is impaired. When Captain Sawyer tested Mr. Woolard, he logged all six possible clues.

After the HGN test, Captain Sawyer arrested and charged Mr. Woolard for driving while impaired in violation of N.C.G.S. § 20-138.1(a)(1). In relevant part, that statute prohibits people from "driv[ing] any vehicle upon any highway, any street, or any public vehicular area within this State" while "under the influence of an impairing substance." N.C.G.S. § 20-138.1(a)(1) (2021).[2]

B. The Suppression Ruling

Mr. Woolard's case came before Judge Darrell B. Cayton Jr. of District Court, Beaufort County. Before trial, Mr. Woolard moved to suppress portions of the State's evidence.

Mr. Woolard first challenged the PBT results. In his view, Captain Sawyer broke from the procedures set by N.C.G.S. § 20-16.3(c). That provision—aptly titled "Tests Must Be Made with Approved Devices and in Approved Manner"—instructs that "No screening test for alcohol

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1. We have more precisely defined "nystagmus" as "a physiological condition that involves an involuntary rapid movement of the eyeball, which may be horizontal, vertical, or rotary. An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN." *See State v. Helms*, 348 N.C. 578, 579 (1998) (cleaned up).

2. Under our precedent, a person is "under the influence of intoxicating liquor or narcotic drugs"—and thus in violation of N.C.G.S. § 20-138.1—when "he has drunk a sufficient quantity of intoxicating beverages or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of those faculties." *See State v. Parisi*, 372 N.C. 639, 649–50 (2019) (quoting *State v. Carroll*, 226 N.C. 237, 241 (1946)).

concentration is a valid one" unless "conducted in accordance with the applicable regulations of the Department as to the manner of its use." N.C.G.S. § 20-16.3(c) (2021). When Captain Sawyer tested Mr. Woolard, those "applicable regulations" required him to first ensure that Mr. Woolard "removed all food, drink, tobacco products, chewing gum and other substances and objects from his mouth." 10A N.C. Admin. Code 41B.0502 (2022). Because the officer neglected to do so, Mr. Woolard faulted the PBTs as unreliable and procedurally defective. The district court agreed and excluded them.

Mr. Woolard also disputed the HGN test. Although no statute sets specific protocols, Mr. Woolard pointed to the procedures recommended by the National Highway Traffic Safety Association (NHTSA). Because Captain Sawyer diverged from those protocols, Mr. Woolard argued, the HGN test—like the PBTs—should be discarded. The district court disagreed. Although Captain Sawyer strayed from the NHSTA's guidelines, the court reasoned that his oversight went to the weight of the HGN results, "not their admissibility."[3]

Most relevant here, Mr. Woolard urged the district court to suppress evidence seized during his arrest. In his view, that arrest violated the Fourth Amendment because Captain Sawyer lacked probable cause to suspect him of impaired driving. The district court agreed and entered a Pre-Trial Indication to suppress the evidence. It filed a written order soon after.

C. The State's Appeals

The State sought review from the Superior Court, Beaufort County as permitted by statute. *See* N.C.G.S. § 20-38.7(a) (2021). That court also found that Captain Sawyer lacked probable cause to arrest Mr. Woolard for impaired driving. The superior court thus directed the district court to suppress the evidence. A few weeks later, the district court entered its final suppression order.

The State disagreed with that ruling and petitioned the Court of Appeals for a writ of certiorari. When that court denied its request, the State sought this Court's review. We granted certiorari to examine the district court's final suppression order.

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3. Specifically, the district court noted that Captain Sawyer "testified the time period to conduct a pass on the lack of smooth pursuit for both the left and right eye was a total of two seconds for both eyes, not the four seconds required for each eye (total of 8 second for one pass of both eyes). [Captain] Sawyer testified the speed for passing the stimulus on the maximum deviation pass was the same and that the stimulus should be held for three seconds at maximum deviation not the four seconds required."

II. This Court's Jurisdiction and the Scope of Our Review

A. Jurisdiction

[1] Before reaching the merits, we resolve two procedural issues. First, Mr. Woolard disputes whether this Court may hear his case at all. In his view, the State improperly leapfrogged the superior court. According to Mr. Woolard, the State needed to go to superior court before seeking review from the Court of Appeals. And since the State broke the proper chain of appeal, Mr. Woolard urges, it improperly sought certiorari and we improperly granted its petition.

However, the State's petition does fall within our certiorari jurisdiction. Under Rule 21, parties may seek a writ of certiorari in "appropriate circumstances" to appeal the "orders of trial tribunals when . . . no right of appeal from an interlocutory order exists." N.C. R. App. P. 21. The State's petition here fits that condition. For one, the district court's final suppression order is interlocutory. Though it excludes portions of the State's evidence, it requires "further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362 (1950); *cf. State v. Fowler*, 197 N.C. App. 1, 5–6 (2009), *disc. rev. denied and appeal dismissed*, 364 N.C. 129 (2010) (concluding that a superior court order allowing motion to suppress did not end a criminal case because, even if the ruling "may have the same 'effect' of a final order," it "requires further action for finality").

The question, then, is whether the State could appeal that interlocutory order as of right. If not, Rule 21 allowed it to petition this Court for certiorari. The parties disagree on that score. According to the State, it lacks a statutory vehicle to challenge the district court's ruling. And because the order is not a "final disposition" of Mr. Woolard's case, the State is suspended in procedural limbo—an "interlocutory no-man's land." With no avenue to appeal the suppression order, the State contends, a writ of certiorari was its only opportunity to seek review.[4] Mr. Woolard, on the other hand, points to statutes purportedly allowing the State to obtain redress in the superior court. According to him, the State could—and should—have used those statutory mechanisms before seeking certiorari from the Court of Appeals.

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4. Counsel for the State underscored this point at oral argument. Specifically, the State explained that it "is stuck in this interlocutory no-man's land, for lack of a better word. The case has not been called yet for trial, so there's nothing for the State to appeal. But the State also has an ethical obligation not to move forward with evidence that has been suppressed. So the State can't appeal, and the State can't move forward unless the suppressed evidence is reversed. So there is no way for the State to appeal."

After examining the statutory scheme, it is apparent that no provision authorized the State to challenge the district court's final order in superior court. And because the State could not appeal that final order and would otherwise be marooned in an "interlocutory no-man's land," Rule 21 allowed it to petition this Court for certiorari. *See* N.C. R. App. P. 21.

When Mr. Woolard moved to suppress evidence, the district court preliminarily granted his motion. At that stage, its decision was tentative. Under N.C.G.S. § 20-38.6(f), the district court could not enter a "final judgment on the motion" until the State appealed its ruling and the superior court reviewed it.[5] N.C.G.S. § 20-38.6(f) (2021). Another statute—N.C.G.S. § 20-38.7(a)—allowed the State to challenge the district court's decision in the superior court. *See* N.C.G.S. § 20-38.7(a) (2021). So when the district court provisionally granted Mr. Woolard's suppression motion, the State could use subsection 20-38.7(a) to contest that ruling.

But that statute only covers a district court's "*preliminary* determination granting a motion to suppress." *Id.* (emphasis added). That makes the difference in Mr. Woolard's case. After the superior court affirmed the district court's ruling, it directed the entry of a final order suppressing the evidence. And when the district court complied, its "preliminary determination" became a "final judgment on the motion." *Id.*; N.C.G.S. § 20-38.6(f). Because that order was final, the State could no longer use section 20-38.7 to challenge it.

In other words, the State had to look elsewhere for a right of appeal. And per subsection 20-38.7(a), "[a]ny further appeal shall be governed by Article 90 of Chapter 15A." But those statutes, too, offer little help to the State. By its terms, section 15A-1432—the provision parsing the State's right to contest a district court decision in superior court—sweeps narrowly. *See* N.C.G.S. § 15A-1432(a) (2021). It lets the State challenge just two species of district court rulings: (1) a "decision or judgment dismissing criminal charges," and (2) the grant of "a motion for a new trial on the ground of newly discovered or newly available evidence." *See* N.C.G.S. § 15A-1432(a)(1)–(2). But that provision is silent on whether the State may appeal a district court's *final suppression order* to superior court. And without a "statute clearly conferring that right," the State here could not challenge the district court's ruling. *State v. Harrell*, 279

5. We note as well that the district court may "enter a final judgment on the motion" if the State "has indicated it does not intend to appeal." N.C.G.S. § 20-38.6(f).

N.C. 464, 466 (1971) (quoting *State v. Vaughan*, 268 N.C. 105, 108 (1966)). In short, the State was up a creek without a statutory paddle.

Our Court of Appeals has twice faced a similar issue. *See Fowler*, 197 N.C. App. at 5–8; *State v. Palmer*, 197 N.C. App. 201 (2009), *disc. rev. denied and appeal dismissed*, 363 N.C. 810 (2010). And twice, that court has rejected the State's efforts to conjure up a right of appeal where none exists. In *Fowler*, for instance, the court interpreted subsection 20-38.7(a) and section 15A-1432, the provisions at issue here. *See Fowler*, 197 N.C. App. at 6. In that case—like this one—the district court preliminarily granted the defendant's motion to suppress. *Id.* at 4. And in that case—like this one—the superior court affirmed that ruling. *Id.* The difference between *Fowler* and Mr. Woolard's case: In *Fowler*, the State appealed the superior court's decision *before* the district court entered a final order. *Id.* at 4–5.

According to the Court of Appeals, the State erred by doing so, as it lacked a statutory right to challenge the superior court's ruling. *Id.* at 7. The State, for its part, tried to stitch together a right to appeal from different statutes. *See id.* at 6–7. Subsection 20-38.7(a), it noted, allowed it to appeal a district court's "preliminary determination" to superior court. *Id.* at 6. And that provision—read alongside subsection 15A-1432(e)—permitted it to then contest the superior court's ruling in the Court of Appeals. *Id.*

The Court of Appeals, however, disagreed. *Id.* at 6–8. By its plain text, the court explained, subsection 20-38.7(a) gave the State "a right of appeal to superior court from a district court's *preliminary* determination indicating that it *would* grant a defendant's pretrial motion to *dismiss or suppress*." *Id.* at 7. Section 15A-1432, however, covered different ground. *Id.* If the district court dismissed the charges against a defendant or granted a new trial, subsection 15A-1432(a) allowed the State to seek review in superior court. *Id.* And if the superior court affirmed the district court, subsection 15A-1432(e) allowed the State to challenge that ruling in the Court of Appeals. *Id.*

But the State's right of appeal ended there. *Id.* By their plain language, the statutes withheld from the State a vehicle to appeal a district court's final suppression order. *Id.* at 29–30. To challenge that decision, the Court of Appeals explained, the State had to rely on other statutes or remedial writs. *See id.* at 8, 29. Writs like the writ of certiorari.

Though *Fowler* and *Palmer* concluded that the State had no statutory right to raise its claims, the court in both cases "exercised [its] discretion to grant the State's petition for writ of certiorari." *Fowler*, 197

N.C. App. at 8; *Palmer*, 197 N.C. App. at 204. Rule 21, the court reasoned, was crafted for just these cases—those where no right of appeal exists. *See Fowler*, 197 N.C. App. at 8; *Palmer*, 197 N.C. App. at 204. When a party "is without any other remedy," a writ of certiorari fills the gaps, permitting appellate courts to intervene when they could otherwise not. *See Bayer v. Raleigh & Augusta Air Line R.R. Co.*, 125 N.C. 17, 20 (1899); *see also id.* at 25 ("It seems to us . . . that, to refuse the writ in this case, 'the defendant would be undone.' ").

The same is true of the State's petition here. Because no statute allowed the State to appeal the district court's final suppression order, it lacked a statutory basis to challenge that ruling in superior court. And since the State had no "right of appeal from an interlocutory order," N.C. R. App. P. 21, it could petition this Court for certiorari. *Warren v. Maxwell*, 223 N.C. 604, 608 (1943) (underscoring that "the proper method of review is by *certiorari*" if "there has been an error in law, prejudicial to the parties" and a "statute provides no appeal").

Despite Mr. Woolard's arguments, we did not err by issuing the writ. In large part, that is because our jurisdiction is constitutionally etched. N.C. Const. art. IV, §§ 1, 12. We may "review upon appeal any decision of the courts below, upon any matter of law or legal inference." N.C. Const. art. IV, § 12(1). And we may "issue any remedial writs necessary to give [us] general supervision and control over the proceedings of the other courts." *Id.*

Certiorari, of course, is an "extraordinary remedial writ." *State v. Roux*, 263 N.C. 149, 153 (1964). We deploy it sparingly, reserving it "to correct errors of law," *State v. Simmington*, 235 N.C. 612, 613 (1952), or to cure a "manifest injustice," *State v. Cochran*, 230 N.C. 523, 526 (1949). To that end, a petitioner must "show merit or that error was probably committed below." *Cryan v. Nat'l Council of YMCA*, 384 N.C. 569, 572 (2023) (cleaned up). In the past, this Court has granted certiorari to resolve legal questions raised by interlocutory orders in criminal cases, even when the petitioner lacked a right of appeal. *See, e.g.*, *State v. Jefferson*, 66 N.C. 309 (1872) (noting that petitioner had no right to appeal but still issuing writ of certiorari to review whether the trial court erroneously discharged a criminal jury); *Ex parte Biggs*, 64 N.C. 202 (1870).

Ultimately, though, the writ is "discretionary." *See State v. Ross*, 369 N.C. 393, 400 (2016) (citing *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579 (1927)). And here, since the State is "without any other remedy" to challenge the district court's final suppression order, it could seek—and we could grant—a writ of certiorari. *See Bayer*, 125 N.C. at 20. In

this case, we exercised our "sound discretion" to release the State from procedural limbo. *See State v. Niccum*, 293 N.C. 276, 278 (1971). This does not mean we should deploy our certiorari jurisdiction whenever the State loses a motion to suppress in these circumstances. But since we properly granted the writ in this case, we have jurisdiction to reach the merits.

B. Scope of Review

With our jurisdiction settled, we next clarify *what* we review. After Mr. Woolard moved to suppress evidence, the district court "preliminarily indicate[d that] the motion should be granted." *See* N.C.G.S. § 20-38.6(f). On review, the superior court affirmed the district court's ruling and directed it to "enter its final order." The district court complied—in a 29 March 2022 order, it adopted the Pre-Trial Indication as its final decision.

The district court's final order is the only one before us. We do not consider the superior court's ruling or the Court of Appeals' denial of certiorari. Because we examine the district court's order alone, we rest our analysis on that court's factual findings.[6]

III. Standard of Review

This Court reviews a trial court's suppression order in two steps. *See State v. Bullock*, 370 N.C. 256, 258 (2017). We first ask "whether the trial court's underlying findings of fact are supported by competent evidence." *State v. Parisi*, 372 N.C. 639, 649 (2019) (cleaned up). We then examine "whether those factual findings in turn support the trial court's ultimate conclusions of law." *Id.* (cleaned up).

Under that framework, we start with the facts. And here, that step is key because probable cause is context-specific—it hinges "on the totality of the circumstances present in each case." *State v. Sanders*, 327 N.C. 319, 339 (1990) (cleaned up); *see Ker v. California*, 374 U. S. 23, 33 (1963). The trial court's findings steer our review. *See Parisi*, 372 N.C.

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6. At oral argument the State contended that the district court's final order "adopted" or "incorporated" the superior court's factual findings. We disagree. In its final order, the district court specified that "the Pre-Trial Indication entered by the Court on 15 November 2021 is now the final order of the Court." The district court never mentioned the superior court's factual findings. True, if "there is a dispute about the findings of fact," the superior court may "determine the matter de novo." N.C.G.S. § 20-38.7(a). But here, it does not appear that the State disagreed with the district court's factual conclusions or challenged them in superior court. Because the district court relied solely on its findings of fact, we, too, rely on those findings in reviewing its final order.

at 655; *see also State v. Bartlett*, 368 N.C. 309, 313 (2015). Because that tribunal is closer to the case and steeped in the evidence, it is better equipped to distill "what happened in space and time." *Parisi*, 372 N.C. at 655 (quoting *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 351 (1987)).

In cases like Mr. Woolard's, then, the district court gauges "the actual observations made by arresting officers" and "the extent to which a person suspected of driving while impaired exhibits indicia of impairment." *Id.* at 656. If backed "by competent evidence," we treat those findings as "conclusive on appeal." *State v. Eason*, 336 N.C. 730, 745 (1994).

At the second step, we decide whether—based on the facts—Captain Sawyer had probable cause as a matter of law. That task "inherently requires" us to exercise judgment and apply "legal principles." *Parisi*, 372 N.C. at 655 (cleaned up). For that reason, probable cause is a legal question. *Id.* at 656; *see also Ornelas v. United States*, 517 U.S. 690, 697–98 (1996). And for the same reason, we review it de novo. *See Parisi*, 372 N.C. at 655. We thus examine the issue with fresh eyes and may "freely substitute" our judgment for the district court's. *Id.* (quoting *State v. Biber*, 365 N.C. 162, 168 (2011)).

IV. Probable Cause to Arrest for Impaired Driving

A. Probable Cause Standard

[2] Before arresting a person, an officer must have probable cause to suspect him of a crime "at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *State v. Streeter*, 283 N.C. 203, 207 (1973). That requirement is key to the Fourth Amendment's protections, and its roots grow "deep in our history." *Bailey v. United States*, 568 U.S. 186, 192 (2013) (quoting *Henry v. United States*, 361 U.S. 98, 100 (1959)). The Founders' "[h]ostility to seizures based on mere suspicion" spurred the Fourth Amendment's adoption and served as the springboard for its probable-cause requirement. *Dunaway v. New York*, 442 U.S. 200, 213 (1979); *see also Stanford v. Texas*, 379 U.S. 476, 481 (1965). In purpose and practice, the probable-cause standard shields "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." *Pringle*, 540 U.S. at 370 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

Probable cause to arrest exists when an officer has a reasonable belief, anchored in specific facts and objectively rational inferences, that a particular person has committed a crime. *See id.*; *see also Beck v. Ohio*, 379 U.S. 89, 91 (1964). Under that framework, we take the "facts

as a whole" rather than "one by one." *District of Columbia v. Wesby*, 583 U.S. 48, 61 (2018); *see also Sanders*, 327 N.C. at 339. And though officers must find a "particularized and objective basis for suspecting legal wrongdoing," *United States v. Arvizu*, 534 U.S. 266, 273 (2002), they are not required "to rule out a suspect's innocent explanation for suspicious facts," *Wesby*, 583 U.S. at 61.

But not all evidence satisfies the Fourth Amendment. An officer may not arrest based on a "mere hunch" or gut feeling. *See Arvizu*, 534 U.S. at 274 (cleaned up); *see also United States v. Sokolow*, 490 U.S. 1, 7 (1989); *State v. Jackson*, 368 N.C. 75, 78 (2015). Nebulous suspicions are also insufficient—an officer's "belief of guilt must be particularized with respect to the person to be searched or seized." *Pringle*, 540 U.S. at 371 (citing *Ybarra v. Illinois*, 444 U. S. 85, 91 (1979)). So the key question is whether a reasonable officer would find a supported, "good faith," and objectively rational basis to suspect a person of a crime. *See State v. Zuniga*, 312 N.C. 251, 262 (1984); *see also Biber*, 365 N.C. at 169.

Those principles apply on the road, too. An officer has probable cause to arrest for impaired driving when, under the "totality of the circumstances," he reasonably believes that a motorist "consumed alcoholic beverages" and drove "in a faulty manner or provided other indicia of impairment." *Parisi*, 372 N.C. at 651. Our cases have plotted what evidence may support that belief. Erratic driving, we have explained, provides strong grounds for suspicion. *Id.*; *see State v. Otto*, 366 N.C. 134, 138 (2012) (finding reasonable suspicion for traffic stop based on the defendant's "constant and continual" weaving for three quarters of a mile on a weekend evening). So too does the "fact that a motorist has been drinking." *Parisi*, 372 N.C. at 650 (citing *State v. Hewitt*, 263 N.C. 759, 764 (1965)); *cf. State v. Ellis*, 261 N.C. 606, 607 (1964).

"[O]ther conduct" may also suggest impairment. *Parisi*, 372 N.C. at 650. Take the smell of alcohol on a motorist. That fact, "*standing alone*, is no evidence that a driver is under the influence of an intoxicant." *State v. Rich*, 351 N.C. 386, 398 (2000) (cleaned up). But it may signal "that [the driver] has been drinking," especially when coupled with other clues. *Atkins v. Moye*, 277 N.C. 179, 185 (1970); *cf. State v. Romano*, 369 N.C. 678, 693 (2017) (noting that defendant "smelled strongly of alcohol"). The same holds true when a driver has red and glassy eyes. *Parisi*, 372 N.C. at 650–51 (cataloguing cases). And field-sobriety tests—performed in line with statutory and constitutional standards—may offer reliable metrics of impairment. *Id.* at 653 (noting that the "defendant exhibited multiple indicia of impairment while performing various sobriety tests"); *see Romano*, 369 N.C. 678; *State v. Godwin*, 369 N.C. 604, 612–13

(2017) (allowing an officer, properly qualified as an expert, to testify about HGN tests).

Any single fact alone may not establish probable cause. But taken together, they may clear that hurdle. The probable-cause inquiry is, after all, an additive one. *See Wesby*, 583 U.S. at 61. And so courts—like officers—must examine "each case in the light of the particular circumstances and the particular offense involved." *State v. Harris*, 279 N.C. 307, 311 (1971); *see also Atkins*, 277 N.C. at 185 ("[T]he fact that a motorist has been drinking, when considered in connection with faulty driving or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [section] 20-138." (cleaned up)).

We most recently tackled this topic in *Parisi*. In that case, a police officer stopped Mr. Parisi's car at a checkpoint. *Parisi*, 372 N.C. at 640. After requesting his license, the officer smelled alcohol on Mr. Parisi's breath and noticed his "glassy and watery" eyes. *Id.* An "open box of beer" sat "on the passenger's side floorboard," though the officer did not see any open containers. *Id.* When asked, Mr. Parisi admitted that he had been drinking that evening—three beers, all told. *Id.*

On top of those observations, the officer conducted field-sobriety tests. *Id.* Each confirmed Mr. Parisi's intoxication. On the HGN test, Mr. Parisi showed six clues of impairment. *Id.* On the walk-and-turn test, he miscounted his steps walking each way. *Id.* And on the one-leg-stand test, he swayed and held out his arms to balance. *Id.*

To the officer, the evidence suggested that Mr. Parisi had consumed enough "alcohol to appreciably impair his mental and physical faculties." *Id.* He thus arrested and charged Mr. Parisi for driving while impaired. *Id.* at 640–41. But the trial court disagreed. *Id.* at 641. On Mr. Parisi's motion, that court suppressed evidence seized during his arrest, holding that the officer lacked probable cause. *Id.* The Court of Appeals reversed that decision.

We unanimously affirmed the Court of Appeals. In our view, a "prudent officer" viewing all the evidence would reasonably suspect Mr. Parisi of drunk driving. *Id.* at 650. We noted:

- That Mr. Parisi "had been driving";
- That he "admitted having consumed three beers";
- That his "eyes were red and glassy";

- That "a moderate odor of alcohol emanated from [his] person"; and
- That he "exhibited multiple indicia of impairment while performing various sobriety tests."

Id. at 653.

Given those facts, we had "no hesitation" in finding probable cause. *Id.* That was so, we explained, because a "prudent officer" in the same position would harbor the same suspicions. *Id.* at 650. And since the officer reasonably believed that Mr. Parisi "consumed alcohol" and that "his faculties were appreciably impaired," Mr. Parisi's arrest squared with the Fourth Amendment. *Id.* at 655.

B. Application

Because probable cause pivots on the facts, we rely on the district court's findings. *See id.* at 649. We start where Captain Sawyer did—with Mr. Woolard's erratic driving. As he trailed Mr. Woolard, the officer watched him swerve over the centerline six to seven times. Twice, Mr. Woolard ventured into the oncoming lane. And Mr. Woolard veered the other way, too—at one point, he drifted off the asphalt and onto the road's right shoulder.

Concerned, Captain Sawyer pulled Mr. Woolard over to investigate his weaving. And during that stop, the clues of impairment mounted. As in *Parisi*, Captain Sawyer smelled alcohol on Mr. Woolard's breath and from inside his truck. *See id.* at 653. As in *Parisi*, he noticed Mr. Woolard's red and glassy eyes. *See id.* And as in *Parisi*, Mr. Woolard admitted that he drank several beers before driving. *See id.* Captain Sawyer supplemented his observations with an HGN test.[7] When checking Mr. Woolard's eyes for nystagmus, Captain Sawyer logged all six clues of impairment—another parallel to *Parisi*. *See id.*

So "at the time of the arrest," *Devenpeck*, 543 U.S. at 152, Captain Sawyer faced these facts:

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7. Although the State also challenges the trial court's suppression of the PBTs, it did not appeal the trial court's orders on those tests. *See* State's Petition for Writ of Certiorari at 1, 12, *State v. Woolard*, No. 208PA22 (N.C. July 8, 2022) (seeking this Court's "review of the Beaufort County district court's Order of Suppression"). Nor did we grant certiorari to examine those rulings. Instead, we agreed only to consider the district court's final suppression order and whether, based on its factual findings, that court correctly determined whether Captain Sawyer had probable cause to arrest.

- That while driving, Mr. Woolard veered over the centerline six to seven times;
- That he twice swerved into the oncoming lane;
- That he skated onto the right shoulder of the road;
- That the inside of his truck smelled of alcohol;
- That his breath smelled of alcohol, too;
- That his eyes were red and glassy;
- That he confessed to drinking "a couple of beers" before driving; and
- That he showed all six clues of impairment on the HGN test.

In Mr. Woolard's view, that evidence does not amount to probable cause. As he tells it, he swerved on the road because he was shooing bees out of his truck. Besides, he continues, some evidence cut *against* his impairment. When pulling over, Mr. Woolard deftly avoided the ditches flanking the road. He spoke and acted normally during the traffic stop. He retrieved his license without difficulty. And he easily exited the truck when asked. So according to Mr. Woolard, the "whole picture" of the evidence negated Captain Sawyer's suspicions. *See United States v. Cortez*, 449 U.S. 411, 417 (1981).

However, an "objectively reasonable police officer" in Captain Sawyer's shoes would draw the same conclusions that he did. *See Pringle*, 540 U.S. at 371. Though duly considered, Mr. Woolard's arguments do not change our holding. While the totality of the circumstances may include a defendant's explanations for his conduct, probable cause does not require officers to rule out a defendant's version of events. *See Wesby*, 583 U.S. at 61. What matters is whether a reasonable officer, viewing the "evidence as a whole," would have a "substantial basis" to suspect Mr. Woolard of a crime. *See State v. Lowe*, 369 N.C. 360, 364 (2016) (quoting *State v. Beam*, 325 N.C. 217, 221 (1989)); *accord Wesby*, 583 U.S. at 61.

We think that a reasonable officer would find a "substantial basis" to arrest in this case. *See Lowe*, 369 N.C. at 364 (cleaned up). As Mr. Woolard urges, his explanation of the incident ran counter to Captain Sawyer's suspicions of "wrongdoing." *Cf. Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020). A sober driver, after all, is more likely than a drunk

one to navigate hilly terrain, retrieve his ID, chat normally, and follow instructions. But the "evidence as a whole" gave Captain Sawyer probable cause to suspect Mr. Woolard of impaired driving. *See Lowe*, 369 N.C. at 364 (cleaned up). Despite some arguably innocuous conduct, Mr. Woolard still drove erratically; banked onto the road's shoulder; smelled of alcohol; had red, glassy eyes; admitted to drinking before driving; and showed every clue of impairment on the HGN test.

V. Conclusion

Probable cause is a "fluid concept," not a fixed formula. *See Ornelas*, 517 U.S. at 695–96 (cleaned up). It draws content from "particular factual contexts" as "viewed through the lens of common sense." *Florida v. Harris*, 568 U.S. 237, 244, 248 (2013) (cleaned up). For that reason, the constitutional doctrine rejects rigid rules in favor of a "flexible, all-things-considered approach." *Id.* at 244. We keep with that fact-intensive, "common-sensical standard" in this case. *Id.*

On these facts, we hold that Captain Sawyer had probable cause to arrest Mr. Woolard for impaired driving. An "objectively reasonable" officer in Captain Sawyer's shoes would discern a "substantial chance of criminal activity" from Mr. Woolard's erratic weaving; the smell of alcohol on his breath and in his truck; his red, glassy eyes; his admission to drinking; and his performance on the HGN test. *See Wesby*, 583 U.S. at 57, 61.

Because Captain Sawyer's "belief of guilt" was objectively reasonable and rooted in sound evidence, Mr. Woolard's arrest did not violate the Fourth Amendment. *See Pringle*, 540 U.S. at 371. The district court erred in holding the opposite. We thus reverse the district court's suppression order and remand Mr. Woolard's case for further proceedings.

REVERSED.

PAUL STEVEN WYNN
v.
REX FREDERICK, IN HIS OFFICIAL CAPACITY AS A MAGISTRATE, AND
GREAT AMERICAN INSURANCE COMPANY

No. 314PA21

Filed 15 December 2023

1. Immunity—sovereign—magistrate—statutory waiver—applicability

In a statutory bond action against a magistrate who failed to timely serve plaintiff's nephew with an involuntary commitment order (subsequently, the nephew shot plaintiff with a crossbow during an acute psychotic episode), the magistrate's sovereign immunity barred the suit. Section 58-76-5 of the N.C. General Statutes, which provides a limited waiver of sovereign immunity for certain officials covered by statutory bonds, did not encompass magistrates, which are state officers, when it provided the limited waiver for five specifically named categories of county officers "or other officer." The section's internal structure, broader statutory context, and statutory history made clear that the General Assembly intended to limit the section's scope to bonded county officers.

2. Immunity—judicial—magistrate—sued in official capacity—applicability

In a statutory bond action against a magistrate who failed to timely serve plaintiff's nephew with an involuntary commitment order (subsequently, the nephew shot plaintiff with a crossbow during an acute psychotic episode), the Court of Appeals erred by holding that judicial immunity is a categorically unavailable defense to an official capacity claim against a judicial officer. Judicial immunity applies to both official capacity and individual capacity claims.

Justice EARLS concurring in part and dissenting in part.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 278 N.C. App. 596, 863 S.E.2d 790 (2021), affirming an order entered on 15 January 2020 by Judge John O. Craig III in Superior Court, Orange County. On 17 August 2022, the

Supreme Court allowed plaintiff's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court on 21 September 2023.

Carlos E. Mahoney and Barry D. Nakell for plaintiff-appellee.

Joshua H. Stein, Attorney General, by Sarah G. Boyce, Deputy Solicitor General, Nicholas S. Brod, Deputy Solicitor General, and Lindsay Vance Smith, Deputy Solicitor General, for defendant-appellant Rex Frederick.

NEWBY, Chief Justice.

In this case we consider whether magistrates can be sued in a statutory bond action under N.C.G.S. § 58-76-5 based on actions they take in their official capacities or whether sovereign immunity and/or judicial immunity bars suit. To answer this question, we must first determine whether magistrates are "other officer[s]" under N.C.G.S. § 58-76-5. Because the provision's text, history, and broader statutory context reveal that section 58-76-5 encompasses only county, rather than state, officers, magistrates fall outside the scope of "other officer[s]" under the statute and accordingly retain their sovereign immunity. Additionally, we hold, in accordance with our established precedent, that judicial immunity applies to official and individual capacity claims. We therefore reverse the decision of the Court of Appeals.

Plaintiff alleges the following facts. In 2016, plaintiff owned two nearby properties in Mebane, North Carolina. Plaintiff lived at one property and rented the second property to his sister, Judy Wynn, and her twenty-four-year-old son, Robert Morris. Morris had suffered from severe mental health issues since he was a teenager and was diagnosed with schizoaffective disorder, schizophrenia, and bipolar disorder. In addition, Morris engaged in significant alcohol and drug use and was diagnosed with substance abuse disorders. When Morris did not take his medications, his conditions caused him to become violent towards others. As a result, Morris had been involuntarily committed to UNC Hospitals on several occasions, including three separate times during 2016. To monitor Morris's condition and medication compliance, Morris received regular visits at his home from the UNC Center for Excellence in Community Mental Health's Assertive Community Treatment (ACT) team. The ACT team provides medical support and treatment to individuals with severe mental illnesses who live at home in Orange County.

Dr. Austin Hall, a psychiatrist at the UNC Center for Excellence in Community Mental Health, served as the ACT team's Medical Director and provided psychiatric care and treatment to Morris.

During the week of 12 December 2016, Morris was living with Ms. Wynn at the Mebane property that she rented from plaintiff. Morris was not taking his medications, had not slept for three days, and stayed outside at night guarding the house with a crossbow. In addition, earlier that week, Morris drained Ms. Wynn's car battery to prevent her from leaving the house. Accordingly, Ms. Wynn informed the ACT team and Dr. Hall about Morris's condition. On the morning of 16 December 2016, Dr. Hall met with Ms. Wynn and Morris at the Mebane property, and upon evaluating Morris, Dr. Hall determined that Morris needed to be involuntarily committed. Dr. Hall returned to his office, prepared an Affidavit and Petition for Involuntary Commitment, and faxed it to the Orange County Magistrate's Office. Defendant, a magistrate in Orange County, received the faxed affidavit and petition.

Upon reviewing the affidavit and petition, defendant issued a Findings and Custody Order for Involuntary Commitment and faxed the custody order to UNC Hospitals so that Morris could be served and committed at the hospital. Defendant thought Morris was already at the hospital; however, Morris was still at his home in Mebane. Therefore, Morris was not served with the custody order on 16 December 2016.

On the morning of 17 December 2016, Dr. Hall called Ms. Wynn to ask if the Orange County Sheriff's Office had served Morris with the custody order and taken him to UNC Hospitals. Ms. Wynn told Dr. Hall that Morris was still at the Mebane property. Dr. Hall then called defendant to ask about the status of the custody order, and defendant informed Dr. Hall that he faxed the custody order to UNC Hospitals. Dr. Hall explained that Morris was still at his home and accordingly told defendant he would again fax the documents to defendant so that Morris could be served at the Mebane property.

At 9:27 a.m., Dr. Hall again faxed the Affidavit and Petition for Involuntary Commitment to the Magistrate's Office, and Chief Magistrate Tony Oakley received the documents. By 11:02 a.m., Chief Magistrate Oakley had also received a copy of the custody order. He then contacted the Sheriff's Office and requested a deputy to serve Morris at his house. Around 11:20 a.m., Deputy Malcolm Hester retrieved the custody order from the Magistrate's Office and began driving to the Mebane property.

Meanwhile, around 11:00 a.m., plaintiff went to his sister's property to jump-start her car battery. After starting the car, plaintiff went inside

Ms. Wynn's home not knowing that Morris was off his medication and experiencing a psychotic episode. After plaintiff entered the house, Morris used a crossbow to shoot plaintiff in the neck with an arrow, instantly paralyzing plaintiff. Ms. Wynn called 911 at 11:18 a.m. Deputy Hester arrived at the Mebane property with the custody order by 11:36 a.m., and emergency services arrived shortly thereafter. At that time, Morris was taken into custody.

On 17 September 2019, plaintiff filed suit against defendant, in his official capacity as a magistrate, under defendant's official bond pursuant to N.C.G.S. § 58-76-5, and Great American Insurance Company, defendant's insurer. Plaintiff alleged defendant was negligent in faxing the custody order to UNC Hospitals rather than to the Sheriff's Office so that a deputy could serve Morris with the custody order at his home. Plaintiff sought damages under the bond in the amount of $100,000.

Defendant filed a motion to dismiss on 21 October 2019 asserting sovereign immunity, absolute judicial immunity, public official immunity, and that plaintiff otherwise failed to state a claim upon which relief could be granted. Great American Insurance Company also filed a motion to dismiss, joining in and adopting defendant's motion. On 6 January 2020, the trial court held a hearing on the motions, in which it heard arguments, reviewed the complaint, and considered briefs submitted by the parties. On 15 January 2020, the trial court entered an order denying defendant's motion to dismiss.[1] The trial court determined that the factual allegations in the complaint establish that defendant is not entitled to sovereign immunity or judicial immunity for the statutory bond action and that plaintiff stated a claim upon which relief could be granted against defendant in his official capacity.[2] Defendant appealed.

On appeal, the Court of Appeals affirmed the trial court's denial of defendant's motion to dismiss. *Wynn v. Frederick*, 278 N.C. App. 596, 597, 863 S.E.2d 790, 792 (2021). First, the Court of Appeals held that N.C.G.S. § 58-76-5, which waives sovereign immunity for certain officials covered by a statutory bond, applies to magistrates. *Id.* at 601, 603, 863 S.E.2d at 794–95; *see* N.C.G.S. § 58-76-5 (2021) (waiving sovereign immunity for a "register, surveyor, sheriff, coroner, county treasurer, or other officer" to the extent of their respective bonds). The Court of

1. The trial court also denied Great American Insurance Company's motion to dismiss. Great American Insurance Company, however, withdrew its appeal at the Court of Appeals and is therefore no longer a party to this appeal.

2. At the hearing on the motion, defendant waived his argument of dismissal based on public official immunity. Thus, that issue is not before this Court.

Appeals explained that while magistrates are not specifically enumerated in the statute's list of officers, magistrates nonetheless fall into the statute's general category of "other officer[s]." *Wynn*, 278 N.C. App. at 602–03, 863 S.E.2d at 795. Thus, according to the Court of Appeals, section 58-76-5 plainly waived defendant's sovereign immunity. *Id.*

The Court of Appeals next addressed the issue of judicial immunity. The Court of Appeals held that "judicial immunity is [only] an available defense for judicial officers sued as individuals." *Id.* at 603, 863 S.E.2d at 796. According to the Court of Appeals, because plaintiff sued defendant in his official capacity, rather than in his individual capacity, defendant could not assert judicial immunity as a defense to suit. *Id.* The Court of Appeals thus categorically limited judicial immunity to suits in which judicial officers are sued in their individual capacity. *Id.*

Defendant filed a petition for discretionary review with this Court on 24 August 2021, and plaintiff filed a conditional petition for discretionary review on 3 September 2021. On 17 August 2022, this Court allowed defendant's petition for discretionary review and allowed in part plaintiff's conditional petition for discretionary review.[3]

In this case we consider whether sovereign immunity and judicial immunity are available defenses in a statutory bond action for a magistrate sued in his official capacity under N.C.G.S. § 58-76-5. We review de novo a trial court's denial of a motion to dismiss that raises immunity as a ground for dismissal. *White v. Trew*, 366 N.C. 360, 362–63, 736 S.E.2d 166, 168 (2013).

[1] This Court has long recognized the doctrine of sovereign immunity, acknowledging that "[i]t is an established principle of jurisprudence . . . that a state may not be sued . . . unless by statute it has consented to be sued or has otherwise waived its immunity from suit." *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952). Unless waived, this protection extends to public officials of the State sued in their official capacities. *White*, 366 N.C. at 363, 736 S.E.2d at 168. "Waiver of sovereign immunity may not be lightly inferred[,] and [s]tate statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 538–39, 299 S.E.2d 618, 627 (1983).

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3. The issue allowed in plaintiff's conditional petition for discretionary review is substantially the same as the judicial immunity issue we allowed in defendant's petition for discretionary review. We therefore address two primary issues on appeal.

Section 58-76-5 of the North Carolina General Statutes provides a limited waiver of sovereign immunity for certain officials covered by statutory bonds. Specifically, section 58-76-5 provides that "[e]very person injured by the neglect, misconduct, or misbehavior in office of any register, surveyor, sheriff, coroner, county treasurer, or other officer, may institute a suit . . . against said officer . . . upon their respective bonds." N.C.G.S. § 58-76-5. Prior to 21 July 2023, magistrates were statutorily required to hold a bond "conditioned upon the faithful performance of the duties of the office of magistrate."[4] N.C.G.S. § 7A-174 (2021) (repealed 2023). Therefore, we must determine whether N.C.G.S. § 58-76-5 waives sovereign immunity for magistrates sued under their official bond. To do so, we examine the text and structure of section 58-76-5, its broader statutory context, and the provision's statutory history.

Our primary goal in construing a statute is "to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citing *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981)). When construing a statute, we first examine "the plain words of the statute," *id.* (citing *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)), as "[t]he best indicia of [legislative intent is] the language of the statute" itself, *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). If the plain language of the statute is unambiguous, we "apply the statute[ ] as written." *N.C. Dep't of Correction v. N.C. Med. Bd.*, 363 N.C. 189, 202, 675 S.E.2d 641, 649 (2009). If the plain language of the statute is ambiguous, however, we then look to other methods of statutory construction such as the broader statutory context, "the structure of the statute[,] and certain canons of statutory construction" to ascertain the legislature's intent. *Elec. Supply Co. of Durham*, 328 N.C. at 656, 403 S.E.2d at 294; *see Meyer v. Walls*, 347 N.C. 97, 106, 489 S.E.2d 880, 885 (1997) ("Where words of general enumeration follow

4. The General Assembly repealed the statutory bond requirement for magistrates in N.C.G.S. § 7A-174 effective on 21 July 2023. *See* An Act to Make Various Changes and Technical Corrections to the Laws Governing the Administration of Justice, As Recommended by the Administrative Office of the Courts and to Allow for the Expunction of the Offense of Breaking and Entering of a Building with Intent to Commit a Felony or Larceny and Amend the Conditions that Result in a Petition for Expunction Being Denied, S.L. 2023-103, § 5(b), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-103.pdf. Because plaintiff initiated this statutory bond suit against defendant prior to the repeal of N.C.G.S. § 7A-174, plaintiff's rights have vested. Accordingly, we consider the issues presented in the appeal.

those of specific classification, the general words will be interpreted to fall within the same category as those previously designated." (quoting *Turner v. Bd. of Educ.*, 250 N.C. 456, 463, 109 S.E.2d 211, 216 (1959))); *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970) ("[G]eneral words [that] follow a designation of particular subjects or things . . . includ[e] only things of the same kind, character and nature as those specifically enumerated." (quoting *State v. Fenner*, 263 N.C. 694, 697–98, 140 S.E.2d 349, 352 (1965))). Additionally, the legislature's intent may be revealed from the legislative history of the statute in question, *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001), as changes the legislature makes to a statute's text over time provide evidence of the statute's intended meaning, *Elec. Supply Co. of Durham*, 328 N.C. at 656, 403 S.E.2d at 295.

Here we must determine whether N.C.G.S. § 58-76-5 applies to state and county officials or only county officials. We start with the text of the statute. The plain language of section 58-76-5 provides a right of action against "any register, surveyor, sheriff, coroner, county treasurer, or other officer" under their respective bonds. N.C.G.S. § 58-76-5. The text of section 58-76-5 reveals that magistrates are not specifically included in the statute's enumerated list of officers. Therefore, we next examine section 58-76-5's internal structure and its broader statutory context to determine whether the legislature intended magistrates to fall within the statute's scope of "other officer[s]."

We often utilize canons of statutory construction to aid in discerning the legislature's intent. In *Meyer*, this Court invoked the canon *ejusdem generi*s to determine whether a local entity fell within the scope of the general terms "departments, institutions, and agencies" in the State Tort Claims Act. 347 N.C. at 106, 489 S.E.2d at 885 (quoting *Turner*, 250 N.C. at 462–63, 109 S.E.2d at 216). According to that canon, "[w]here words of general enumeration follow those of specific classification, the general words will be interpreted to fall within the same category as those previously designated." *Id.* (quoting *Turner*, 250 N.C. at 463, 109 S.E.2d at 216). Thus, in *Meyer*, we concluded that the local entity fell outside the scope of those general terms because all of the "departments, institutions, and agencies" specifically enumerated within the statute were state entities. *Id.* at 104, 489 S.E.2d at 884.

Here a closer reading of the enumerated list of officers in section 58-76-5 reveals that five specific categories of officers—registers, surveyors, sheriffs, coroners, and county treasurers—precede the more general phrase "or other officer[s]." *See* N.C.G.S. § 58-76-5. Significantly, each of the five specifically-enumerated officers are county officers rather than

state officers such as magistrates.[5] Under the canon of *ejusdem generis*, "other officer[s]" fall "within the same category as those previously [and expressly] designated" in section 58-76-5. *Meyer*, 347 N.C. at 106, 489 S.E.2d at 885 (quoting *Turner*, 250 N.C. at 463, 109 S.E.2d at 216). Because the specifically-enumerated officers preceding the general phrase in section 58-76-5 are all county officers, the structure of section 58-76-5 counsels in favor of reading "other officer[s]" to include only other county officers. A contrary reading of the statute to include *any* "other officer" required to be bonded would render the statute's specific reference to registers, surveyors, sheriffs, coroners, and county treasurers unnecessary. *See id.* ("[I]f the legislative body had intended the general words to be used in their unrestricted sense the specific words would have been omitted." (quoting *Turner*, 250 N.C. at 463, 109 S.E.2d at 216)); *see also Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) ("Courts should 'give effect to the words actually used in a statute' . . . ." (quoting *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014))).

Reading section 58-76-5 to include only county officers is also consistent with how the General Assembly structured the provisions governing official bonds over one hundred years ago. In the early 1900s, Chapter 9 of the Revised Code contained all of the statutes governing official bonds. *See* N.C. Revised Code of 1905, ch. 9 (1905). Chapter 9 consisted of eleven articles, one of which was entitled "State Officers" and another of which was entitled "County Officers." *See id.* §§ 287–306. The two articles regulated the official bonds for the state and county officers specifically enumerated within each article. The "State Officers" article included state officials, such as the secretary of state, treasurer, insurance commissioner, clerk of supreme court, and public printer. *See id.* §§ 287–88, 290, 292–94. Alternatively, the "County Officers" article expressly included officials such as county treasurers, sheriffs, coroners, registers of deeds, and county surveyors. *Id.* §§ 297–303. Most notably, each of the officers identified in the "County Officers" article of Chapter 9 of the Revised Code are the same officers that are specifically enumerated in section 58-76-5 today. None of the officers listed in the "State Officers" article are found in section 58-76-5. The General Assembly has therefore historically categorized the enumerated officers in section 58-76-5 as county officers. This historical classification reflects the General Assembly's intent that the statute provide a right of action

5. The parties do not contest that magistrates are state officials.

against only bonded county officers, which necessarily excludes magistrates as state officers.

The broader statutory context of the articles governing official bonds today similarly confirms that section 58-76-5 is limited to county officials. Articles 72 through 76 of Chapter 58 of the North Carolina General Statutes address official bonds today. Many of the provisions throughout the five articles include the same list of officers provided in section 58-76-5. *See* N.C.G.S. § 58-72-10 (2021) (governing the condition and terms of official bonds for "[e]very treasurer, sheriff, coroner, register of deeds, surveyor, and every *other officer of the several counties* who is required by law to give a bond for the faithful performance of the duties of his office" (emphasis added)). None of the provisions specifically address magistrates or magistrates' bonds. Additionally, many of the provisions within the five articles consistently reference county commissioners, who are heavily involved in the bond process for county officials. *See* N.C.G.S. § 58-72-25 (2021) (tasking the board of commissioners with filling vacancies if an officer fails to renew his bond); N.C.G.S. § 58-72-60 (2021) (declaring every commissioner who approves an official bond that he knows to be insufficient liable as if he were a surety thereto). Conversely, county commissioners play no role in the process surrounding magistrates' bonds.[6] The differing procurement procedures for magistrates' bonds as compared to the procedures for bonds for county officers reflect the legislature's intent that magistrates are excluded from the scope of "other officer[s]" in section 58-76-5. Thus, not only has the General Assembly historically categorized the officers enumerated in section 58-76-5 as county officers, but the broader statutory context today also indicates that the General Assembly has intended to continue to limit section 58-76-5 to county officers.

The statutory history of section 58-76-5 further reinforces that the statute applies only to claims against county officers and does not extend to claims against state officials. In 1965, the General Assembly enacted the Judicial Department Act, which reorganized our state court system into its current structure. *See* An Act to Implement Article IV of the Constitution of North Carolina by Providing for a New Chapter of The General Statutes of North Carolina, ch. 310, 1965 N.C. Sess. Laws 369, 369–420. The changes transformed the State's more local, county-centric

6. Magistrates' bonds are overseen by the Administrative Officer of the Courts, a state officer, who determines the amount by which magistrates shall be bonded and procures such bonds from the indemnity or guaranty company. *See* N.C.G.S. § 7A-174.

court system into one unified statewide system divided into an Appellate Division, a Superior Court Division, and a District Court division. *Id.* at 370 (codified at N.C.G.S. § 7A-4). As a necessary corollary of this transition "to a uniform system completely operational in all counties of the State," *id.* at 370, the General Assembly eliminated several local judicial offices, such as justices of the peace and constables,[7] and created several state judicial offices, such as magistrates, *id.* at 380–82 (codified at N.C.G.S. §§ 7A-170 to -176).

Because of this reorganization, the General Assembly twice revised section 58-76-5. Both revisions reflect the statute's local focus on county officers. First, in 1973, the General Assembly deleted a reference to constables in an earlier version of section 58-76-5 (then codified at N.C.G.S. § 109-34) because the legislature had eliminated that office with the passing of the Judicial Department Act. *See* Act of Mar. 28, 1973, ch. 108, § 59, 1973 N.C. Sess. Laws 84, 88.[8] Notably, the General Assembly did not simultaneously add magistrates to section 58-76-5's enumerated list of officers. In the same session law, however, the General Assembly specifically added "magistrates" to several other provisions throughout the General Statutes. These deliberate decisions support the conclusion that "magistrates" fall outside the scope of "other officer[s]" in section 58-76-5.

Subsequently, the General Assembly deleted the office of "clerk of the superior court" from section 58-76-5's list of enumerated officers. *See* An Act to Make Technical Corrections to the General Statutes as Recommended by the General Statutes Commission and to Make Various Other Technical Changes to the General Statutes and the Session Laws, S.L. 2010-96, § 29, 2010 N.C. Sess. Laws 377, 385. This change was also a warranted consequence of the enactment of the Judicial Department Act and reflects section 58-76-5's local focus on county officers. Before

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7. Constables were elected county officers who generally served under the justices of the peace in a specific township. N.C. Revised Code of 1905, ch. 9, § 302. They shared similar duties to the county sheriffs and could make arrests and enforce criminal laws throughout the county that their township covered. *See State v. Corpening*, 207 N.C. 805, 178 S.E. 564 (1935). Constables also often served as "collecting agent[s]." *Morgan v. Horne*, 44 N.C. (Busb.) 25, 26 (1852).

8. Constables were expressly classified as county officials in Chapter 9 of the N.C. Revised Code of 1905. This classification reinforces section 58-76-5's local focus and the General Assembly's historic consideration of the statute as encompassing only county officers. The deletion of constable—a county officer—from the list does not detract from the county-specific nature of the list. Rather, the deletion was necessary because the office no longer existed.

1965, superior court clerks were considered county officials, consistent with the local nature of our state's court system prior to the reorganization. Upon the enactment of the Judicial Department Act, however, superior court clerks became classified as state officials. *See* N.C.G.S. § 7A-101(a) (2021) ("The clerk of superior court is a full-time employee of the State . . . ."). Therefore, because superior court clerks were no longer classified as county officers, the General Assembly's deletion of superior court clerks from the statute was necessary in order to retain section 58-76-5's county focus.[9]

A broad reading of section 58-76-5 to include *all* bonded officials would render the legislature's deletion of superior court clerks from the statute's enumerated list of officers futile. Under this reading, superior court clerks would seemingly qualify as "other officer[s]" even after their express deletion from the statute simply because they were statutorily required to hold a bond. Such a reading, however, would fail to give effect to the legislature's specific amendment to the statute. *See Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992) ("[W]e follow the maxim[ ] of statutory construction that . . . [statutory] amendments are presumed not to be without purpose."). The changes the legislature has made to section 58-76-5 reflect the legislature's continued intention to confine the statute to county officers.

Section 58-76-5's internal structure, broader statutory context, and statutory history make clear that the General Assembly intended to limit section 58-76-5 to statutory bond actions against bonded county officers. We therefore hold that magistrates are not included within the scope of "other officer[s]" under N.C.G.S. § 58-76-5. Accordingly, N.C.G.S. § 58-76-5 does not waive defendant's sovereign immunity.

[2] We next consider whether defendant may assert judicial immunity as a defense to plaintiff's official capacity bond claim. Because judicial immunity protects judicial officials from litigation arising out of acts performed in their judicial capacity, we conclude that judicial immunity applies to official capacity and individual capacity claims. The essential question is whether the judicial officer acted in a judicial capacity, or in the discharge of his official duties. The availability of judicial immunity

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9. Similar to constables, clerks of superior court were expressly classified as county officials in Chapter 9 of the N.C. Revised Code of 1905. The deletion of superior court clerks from the enumerated list of officers does not detract from the county-centric nature of the list. Instead, the deletion likewise reinforces the statute's local focus. The deletion was necessary in order to reflect superior court clerks' conversion from county officers to state officers with the enactment of the Judicial Department Act.

as a defense does not hinge upon whether the plaintiff decided to bring an official capacity or individual capacity claim against a judicial officer.

It has long been recognized that judicial immunity is "a general principle of the highest importance to the proper administration of justice." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). "[A] judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* Recognizing this principle, this Court has broadly held that a "judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties." *Town of Fuquay Springs v. Rowland*, 239 N.C. 299, 301, 79 S.E.2d 774, 776 (1954); *see also Hedgepeth v. Swanson*, 223 N.C. 442, 444, 27 S.E.2d 122, 123 (1943) ("[O]fficers acting in a judicial capacity or quasi-judicial capacity are exempt from civil liability and cannot be called upon to respond in damages to private individuals for the honest exercise of [their] judgment though [the] judgment may have been erroneous . . . ." (emphasis omitted)). Only when a judicial or quasi-judicial officer "acts corruptly or of malice" rather than "in . . . honest exercise of his judgment . . . is he liable in such a suit instituted against him." *Id.*

Despite this precedent, the Court of Appeals held that judicial immunity is a categorically unavailable defense to an official capacity claim against a judicial officer.[10] *Wynn*, 278 N.C. App. at 603, 863 S.E.2d at 795–96. The Court of Appeals reasoned, and plaintiff here similarly contends, that judicial immunity applies to individuals, while sovereign immunity applies to the State and its public officials in their official capacity. *Id.* at 603, 863 S.E.2d at 795. Therefore, according to the Court of Appeals, "[t]hese differences show that the doctrines of sovereign immunity and judicial immunity are not intended to be parallels applicable under the same circumstances." *Id.* at 603, 863 S.E.2d at 796.

Our case law, however, clearly establishes that judicial immunity protects judicial officers from liability when they perform judicial acts and presents a complete and absolute bar to recovery regardless of whether the plaintiff brings an official or individual capacity claim. In *Fuquay Springs*, for instance, this Court specifically held that a judge could assert judicial immunity as a defense to an official capacity claim.

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10. In an official capacity claim, the plaintiff "seeks recovery from the entity of which the public servant defendant is an agent." *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887. An official capacity claim therefore seeks damages from the State itself. *Id.* Alternatively, in an individual capacity claim, the plaintiff "seeks recovery from the defendant directly" and personally. *Id.*

In that case, the town of Fuquay Springs filed suit against a judge in his official capacity, alleging the judge had instructed the clerk of court to refrain from taxing certain fees in select cases. 239 N.C. at 299–300, 79 S.E.2d at 775–76. The judge, however, contended that the complaint failed to state a valid claim because the town could not sue him in his official capacity. *Id.* at 300, 79 S.E.2d at 775. This Court agreed and held that "[a] judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties." *Id.* at 301, 79 S.E.2d at 776. Accordingly, judicial immunity barred the plaintiff's official capacity claim against the judicial official.[11]

Similarly, in *Hedgepeth*, the plaintiff brought an official capacity claim against a county sheriff who "procur[ed] [a] search warrant for the plaintiff's premises and [a] warrant for [the plaintiff's] arrest." 223 N.C. at 445, 27 S.E.2d at 123. At the time, county sheriffs could enforce the law and also act in a judicial or quasi-judicial capacity in certain circumstances. Although the specific official capacity claim at issue ultimately involved a sheriff, we first noted the general rule that public officers acting in a judicial capacity may assert judicial immunity as a defense "for the honest exercise of [their] judgment though [the] judgment may have been erroneous." *Id.* at 444, 27 S.E.2d at 123. Therefore, in both cases, rather than basing our analysis on whether the plaintiff brought an official or individual capacity claim, we instead began with the general rule that officers are judicially immune from suit for acts performed in their judicial capacity and then considered whether the officer "committed [the error] in the discharge of his official duties," *Fuquay Springs*, 239 N.C. at 300, 79 S.E.2d at 776, or "act[ed] in a judicial capacity," *Hedgepeth*, 223 N.C. at 444, 27 S.E.2d at 123.

Here plaintiff sued defendant in his official capacity as a magistrate. Magistrates are judicial officers of the State. *See Foust v. Hughes*, 21 N.C. App. 268, 270, 204 S.E.2d 230, 231 (1974). Accordingly, under our precedent in *Fuquay Springs* and *Hedgepeth*, judicial immunity is an

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11. The Court of Appeals has consistently relied on *Fuquay Springs* in holding that public officials may assert judicial or quasi-judicial immunity when they engage in judicial acts pursuant to the discharge of their official duties. *See Price v. Calder*, 240 N.C. App. 190, 192–95, 770 S.E.2d 752, 754 (2015) (court-appointed commissioner had judicial immunity when overseeing a real property partition proceeding); *Bare v. Atwood*, 204 N.C. App. 310, 314–15, 693 S.E.2d 746, 750–51 (2010) (clerk of court had judicial immunity for acts in connection with partition of real property); *Sharp v. Gulley*, 120 N.C. App. 878, 880, 463 S.E.2d 577, 578 (1995) (family court-appointed referee had judicial immunity regarding equitable distribution determination for a marital estate); *Foust v. Hughes*, 21 N.C. App. 268, 270, 204 S.E.2d 230, 231–32 (1974) (magistrate had judicial immunity when issuing a warrant).

available defense to defendant. Because plaintiff's claim is independently barred by sovereign immunity, however, we need not consider whether defendant performed a judicial act in faxing the custody order to UNC Hospitals.[12]

In sum, section 58-76-5's text, structure, and history make clear that the statute encompasses only county, rather than state, officers. Magistrates therefore fall outside the scope of "other officer[s]" under the statute and accordingly retain their sovereign immunity in a statutory bond action under section 58-76-5. Judicial immunity is also an available defense because judicial immunity applies to both official and individual capacity claims. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

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

Justice EARLS concurring in part and dissenting in part.

Across North Carolina, public officers at every level of government do their jobs with care and caution. Within their role, those officers are entrusted with "some portion of the sovereign power." *State v. Hord*, 264 N.C. 149, 155 (1965). But that "power, once granted, does not disappear like a magic gift when it is wrongfully used." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971). While most public servants faithfully discharge their duties, some do not. And even the best-intentioned officials make mistakes.

Recognizing that truth, our legislature granted citizens a path to relief: Bond actions. Before many public officers assume their role, they must secure bonds conditioned on the "faithful performance of the[ir] duties." *See, e.g.*, N.C.G.S. § 7A-174 (2021) (requiring magistrates

12. It should be noted that we discuss judicial immunity to correct a mistake made by the Court of Appeals which had limited the defense of judicial immunity. The dissent would go much further and summarily find defendant's conduct as not the type of conduct normally performed by a judicial officer, without the benefit of full briefing or argument on the issue. In fact, this Court specifically declined to consider how judicial immunity applies to the facts of this case by denying this very issue in plaintiff's conditional petition for discretionary review. Additionally, both parties concede in their briefs that this issue is not properly before the Court and would need to be remanded for its initial consideration.

to secure bonds as a condition of office). And in practice, those bonds protect "the public from any injuries caused by the public official" while "in office." *See* Jeffrey S. Price et al., *The Public Officials Bond—A Statutory Obligation Requiring "Faithful Performance," "Fidelity," and Flexibility*, 11 Fid. L. Ass'n J. 151, 160 (2006). When an officer's misfeasance causes harm, Section 58-76-5—the bond-action statute—allows injured citizens to sue that officer and his surety on the official bond. N.C.G.S. § 58-76-5 (2021).

By its terms, Section 58-76-5 sweeps broadly. It allows "[e]very person injured" to seek relief from an officer for "all acts" done "by virtue or under color" of his office. *Id.* The statute also lists some officials within its ambit, authorizing suits against "any register, surveyor, sheriff, coroner, county treasurer, or other officer." *Id.* The precise question is whether magistrates are "other officer[s]" liable on their official bonds. If they are, then sovereign immunity does not bar Mr. Wynn's claim against Magistrate Frederick. At stake, then, is whether Mr. Wynn may have his day in court. Whatever the merits of his suit, he cannot raise it at all if the bond-action statute does not apply and sovereign immunity remains intact.

But despite the provision's broad scope and broad purpose, the majority reads "other officer[s]" to include just county officials. And since magistrates are state officers, the majority exempts them from liability on their bonds. But that county-officer limit is missing from Section 58-76-5's text. It also clashes with the rest of the statute's language and the provisions surrounding it. And most importantly, it runs counter to the purposes of official bonds and bond actions: To make citizens "secure in their rights" and provide "adequate remedy for wrongs" flowing from official misconduct. *See State ex rel. Kivett v. Young*, 106 N.C. 567, 569 (1890). Because the majority improperly extinguishes Mr. Wynn's access to the courts and chance for relief, I respectfully dissent.

I. Judicial Immunity Does Not Shield Magistrate Frederick for Nonjudicial Acts

Analytically, I would address judicial immunity first. I agree with the majority that judicial immunity is at play when a magistrate is sued in both his individual or official capacity. But capacity itself is not the key focus—what matters instead is the nature of the magistrate's challenged conduct.

Judicial immunity attaches to acts, not offices. *Forrester v. White*, 484 U.S. 219, 227 (1988). Under that doctrine, a judicial officer is absolutely immune for his judicial conduct. *See Stump v. Sparkman*, 435

U.S. 349, 359 (1978). Magistrates are "judicial officers." *Bradshaw v. Admin. Off. of the Cts.*, 320 N.C. 132, 134 (1987); *see also id.* ("Our legislature has prescribed by statute many of the functions performed by magistrates, most of which require such independent judgment by a judicial officer."). And so here, the question is whether Mr. Wynn has sued Magistrate Frederick for a judicial act. If so, judicial immunity bars Mr. Wynn's claim. If not, we then ask whether sovereign immunity applies and whether the state has waived it.

At its core, judicial immunity safeguards the "independent and impartial exercise of judgment vital to the judiciary." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435 (1993). Still, an absolute bar to liability is "strong medicine." *Forrester*, 484 U.S. at 230 (cleaned up). So rather than woodenly insulating judicial officers, judicial immunity "is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Id.* at 227; *see also id.* at 224 (explaining that immunity turns on "the nature of the functions with which a particular official or class of officials has been lawfully entrusted"). Courts have thus drawn a firm "line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." *Id.* at 227. And so a judge's acts *as a judge* are distinct from "the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.*; *see also Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980). Anchoring judicial immunity in judicial acts aligns the doctrine with its purpose and historical roots. *See Antoine*, 508 U.S. at 432–36.

The "touchstone" of a judicial act is whether the officer performs the "function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Id.* at 435–36 (cleaned up); *accord Forrester*, 484 U.S. at 227 (describing "paradigmatic judicial acts" as those "involved in resolving disputes between parties who have invoked the jurisdiction of a court"). Courts also consider whether an act "is a function normally performed by" a judicial officer. *Stump*, 435 U.S. at 362; *see also Ex parte Va.*, 100 U.S. 339, 348 (1879) (declining to apply judicial immunity for conduct that "might as well have been committed to a private person as to one holding the office of a judge"). Relevant, too, is the officer's discretion in carrying out the conduct. *See Hedgepeth v. Swanson*, 223 N.C. 442, 444–45 (1943) (explaining that immunity protects "public officers acting in a judicial capacity or quasi-judicial capacity" when they are "engaged in official acts involving the exercise of judgment and discretion"); *Antoine*, 508 U.S. at 436 (withholding judicial immunity from court reporters transcribing proceedings because

they are "afforded no discretion" in that task and must simply "record, as accurately as possible, what transpires in court"). But the key point is clear: A judicial officer is only immune for the "kind of discretionary decisionmaking that the doctrine of judicial immunity is designed to protect." *Antoine*, 508 U.S. at 435; *see also Peavey v. Robbins*, 48 N.C. 339, 341–42 (1856) (granting immunity to election inspectors who were "acting judicially under a public law" and exercising "judicial power to adjudge upon the right of every man to vote at that precinct"). The reverse is true, too—judicial immunity does not extend to "such acts as are not judicial." *See Furr v. Moss*, 52 N.C. 525, 526–27 (1860).

Under that framework, Magistrate Frederick is immune for his judicial acts in considering and issuing the custody order for Mr. Morris. That decision required him to exercise discretion in "adjudicating private rights"—whether to involuntarily commit Mr. Morris. *See Antoine*, 508 U.S. at 436 (cleaned up); *see also* N.C.G.S. § 122C-281(b) (2021) (allowing a designated officer to issue a custody order if he "finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably a substance abuser and dangerous to self or others"). And custody determinations are "normally performed by" a judicial officer. *Stump*, 435 U.S. at 362; *see also id.* at 364 (explaining that "controversial" decisions about the "liberty and character of the parties" are "being constantly determined in . . . courts" (cleaned up)).

But judicial immunity does not shield Magistrate Frederick for negligently faxing the custody order to the wrong place. Sending a fax—unlike resolving a custody request—is not the "kind of discretionary decisionmaking that the doctrine of judicial immunity is designed to protect." *See Antoine*, 508 U.S. at 435. In fact, it requires virtually no discretion at all. *See City of Bayou La Batre v. Robinson*, 785 So. 2d 1128, 1133 (Ala. 2000) (withholding judicial immunity from a magistrate because she was "executing an administrative duty that did not involve the exercise of judgment" when she faxed a "warrant-recall order to the police department upside down"). Sending a fax does not invoke a magistrate's "judicial or adjudicative" power, *see Forrester*, 484 U.S. at 229, nor require him to "exercise the kind of judgment" inherent in judicial decision-making, *see Antoine*, 508 U.S. at 437. Any person—whether a Supreme Court justice or a part-time secretary—goes through the same mechanical actions to fax a document. Because that conduct is not normally performed by a judicial officer, it "might as well have been committed to a private person," *Ex parte Va.*, 100 U.S. at 348; *see also Forrester*, 484 U.S. at 228. Mr. Wynn thus seeks relief from Magistrate Frederick for an "administrative" function beyond the embrace of judicial immunity. *See Forrester*, 484 U.S. at 228.

Since Magistrate Frederick is not judicially immune for nonjudicial acts, the next question is whether sovereign immunity bars Mr. Wynn's claim. When a plaintiff sues a state officer in his official capacity, the state itself is the true party in action. *See Meyer v. Walls*, 347 N.C. 97, 110 (1997) (explaining that an official capacity claim "seeks recovery from the entity of which the public servant defendant is an agent"). But the state—as a sovereign—is absolutely immune from suit unless it consents. *See Corum v. Univ. of North Carolina*, 330 N.C. 761, 785–86 (1992). Thus, Mr. Wynn may sue Magistrate Frederick in his official capacity for nonjudicial acts only if the state waived sovereign immunity from that claim.

II. The Bond-Action Statute Waives Magistrates' Sovereign Immunity from Suit on their Official Bonds

Everyone agrees that the bond-action statute allows suit against covered officers when they cause injury through "neglect, misconduct, or misbehavior in office." *See* N.C.G.S. § 58-76-5. Mr. Wynn alleges that Magistrate Frederick "neglect[ed]" to send Mr. Morris' custody order to a proper law enforcement officer, thereby causing Mr. Wynn's injuries "by virtue or under the color" of his office as magistrate. *See id.* The question is whether the bond-action statute applies to Magistrate Frederick at all. If it does, then the state—by rendering magistrates liable on their official bonds—consented to claims like Mr. Wynn's. If it does not, then sovereign immunity remains intact. Because I would hold that a magistrate is an "officer" covered by the bond-action statute, I would allow Mr. Wynn to sue Magistrate Frederick on his official bond.

A. Statutory Text

1. Ordinary and Legal Meaning

Like the majority, I start with the statute's text. *See Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992). The bond-action provision, as the majority notes, does not expressly list magistrates. After mentioning some public officials, it reaches further, including "other officer[s]" within its compass. That language is broad, but intentional. In practice, that catch-all clause is a statutory safety net. By including it, the legislature expanded the provision beyond the specific officers it lists. Otherwise, there would be no reason to mention "other officer[s]" at all. And to underscore the provision's breadth, the legislature did not attach any qualifier or limit to the term "officer."

When the legislature has not supplied a definition, we generally give a term its ordinary meaning. *Wilkie v. City of Boiling Spring Lakes*, 370

N.C. 540, 550 (2018). In common use, an "officer" is "a person holding public office under a national, state, or local government, and authorized by that government to exercise some specific function." *See Officer*, *Black's Law Dictionary* (11th ed. 2019). Magistrates fit that description. The legislature created their position, *see* N.C.G.S. § 7A-170(a) (2021), set qualifications on it, *see* N.C.G.S. §§ 7A-171, -171.2, 171.3, 173, 177 (2021), and fixed the functions magistrates perform, *see*, *e.g.*, N.C.G.S. §§ 7A-211, 211.1, 213 (2021). So in ordinary language, magistrates are "officers."

That common meaning fits with common legal use. Other provisions of law classify magistrates as "officers." Our Constitution designates magistrates as "officers of the District Court" where they sit. N.C. Const. art. IV, § 10. Our statutes say the same. N.C.G.S. § 7A-170(a) ("A magistrate is an officer of the district court"); *see also* N.C.G.S. § 14-230(a) (listing magistrate as one "such officer" who is subject to criminal penalties for willfully failing to discharge official duties). And this Court has drawn on those provisions in labeling magistrates "judicial officers." *Bradshaw*, 320 N.C. at 134.

In reading statutes, this Court presumes that the legislature acts with awareness of the law. We presume that it chooses its words with care. We presume, too, that it intends language to have its ordinary meaning unless it says otherwise. *Wilkie*, 370 N.C. at 550. Since a magistrate is an "officer"—both in common speech and broader legal parlance—I would give that word its "natural, approved, and recognized meaning." *Black v. Littlejohn*, 312 N.C. 626, 638 (1985).

2. The Other Language in the Bond-Action Statute

All the same, we do not interpret language in a vacuum. We read a statute with an eye towards its context and internal structure. *See Smith v. United States*, 508 U.S. 223, 229 (1993). But here, text, structure, and context point the same way: Throughout the bond-action statute, the legislature chose broad language to reinforce the provision's broad sweep. In defining the scope of a bond action, for instance, the provision focuses on the nature of the injuring act rather than the title of the injuring officer. It grants a right of action to "[e]very person injured" by an officer's "neglect, misconduct, or misbehavior in office." N.C.G.S. § 58-76-5. The "person injured" may sue the officer and the surety on the bond "for the due performance of their duties in office in the name of the State." *Id.* The provision closes with a broad statement of its purpose: An officer and his surety "shall be liable to the person injured for all acts done by said officer by virtue or under color of that officer's office." *Id.*

So the statute does not distinguish between state and county officers. Throughout, it refers to "every such officer," "the officer's official bond," and "that officer's office" without limiting these terms. And so taken as a whole, the text focuses on whether an officer caused injury "by virtue or under color" of his position and official authority. This Court has recognized the language's sweep. The bond-action statute, we have explained, is "very comprehensive in its terms, scope and purpose." *Kivett*, 106 N.C. at 569. By enacting it, the legislature "enlarge[d] the compass of the conditions of official bonds and their purpose." *Id.* And rightfully so—that scheme tracked "serious" concerns of "justice and policy." *Id.* So the thrust of the statute's text and the principles animating it reach beyond the majority's cramped interpretation. *See id.* ("[S]uch officers, indeed all public officers, should be held to a faithful discharge of their duties as such. . . . So that now official bonds and the conditions of them embrace and extend to all acts done by virtue or under color of office of the officer giving the bond.").

3. The Language of the Statute Requiring Magistrates to Secure Bonds

Consider, too, the text of Section 7A-174—the provision mandating that magistrates secure a bond in the first place. N.C.G.S. § 7A-174. Starting in 1965, the General Assembly required magistrates to obtain bonds before taking office. *See* An Act to Implement Article IV of the Constitution of North Carolina by Providing for a New Chapter of The General Statutes of North Carolina, ch. 310, 1965 N.C. Sess. Laws 369, 382.[1] And the legislature conditioned those bonds "upon the faithful performance of the duties of the office." *Id.* If that language sounds familiar, it is—the bond-action statute uses parallel phrasing. That provision—echoing Section 7A-174—allows "[e]very person injured" to sue an officer on his bond "for the due performance of [the officer's] duties in office." N.C.G.S. § 58-76-5. So a citizen may recover on a bond for the same reason a magistrate must obtain one: To ensure the "due" or "faithful" performance of his official duties.

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1. Just this year, the legislature repealed the statute requiring magistrates to secure bonds. *See* An Act to Make Various Changes and Technical Corrections to the Laws Governing the Administration of Justice, As Recommended by the Administrative Office of the Courts and to Allow for the Expunction of the Offense of Breaking and Entering of a Building with Intent to Commit a Felony or Larceny and Amend the Conditions that Result in a Petition for Expunction Being Denied, S.L. 2023-103, § 5(b), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-103.pdf. Because that repeal took effect on 21 July 2023, the majority's holding applies to a narrow universe of claims—those filed before the repeal of N.C.G.S. § 7A-174.

I think that shared language signals a shared meaning. *See United Savings Assn. v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (cleaned up)). It also triggers a cardinal rule of construction: When statutes cover the same "matter or subject," this Court must construe them together *in pari materia*. *DTH Media Corp. v. Folt*, 374 N.C. 292, 300 (2020) (cleaned up). That requires us to harmonize the legislature's language, giving "effect, if possible, to all provisions without destroying" their meaning. *Id.* (cleaned up).

And here, reading Section 7A-174 *in pari materia* with the bond-action statute undercuts the majority's narrow construction. Because of his public office, a magistrate—just like a county officer—wields heightened power. To ensure responsible use of that power and the faithful performance of his official duties, a magistrate—just like a county officer—must secure a bond. When a magistrate—just like a county officer—engages in "neglect, misconduct, or misbehavior in office," he deviates from "due performance of [his] duties." *See* N.C.G.S. § 58-76-5. And when those actions injure a person, a magistrate—just like a county officer—effected that harm "by virtue or under color of [his] office." *See id.*

In that case, allowing injured citizens to seek relief realizes the purpose of a magistrate's bond and the purpose of a bond action. And so reading "officer" to cover magistrates harmonizes overlapping statutes, giving effect to what the legislature enacted and the language it used. By coupling magistrates' bond requirement with a broadly phrased waiver of immunity on those bonds, the legislature designed a principled scheme. One that anchors magistrates, like other public officers, to the people they serve.

But in its reading of the bond-action statute, the majority shunts aside Section 7A-174, effectively nullifying that provision's text and its purpose in requiring magistrate bonds. If, as the majority says, no one may sue a magistrate on his bond, then that bond is but a piece of paper. It has no function but to enrich bond companies who receive payment without ever needing to compensate injured people. And without any recourse under it, a magistrate's bond cannot—as the legislature intended and enacted—ensure "faithful performance of the duties of the office." N.C.G.S. § 7A-174. It is, in a word, surplusage. I do not think the General Assembly intended for magistrates' bonds to be a ticket to nowhere.

In short, I would give "other officer[s]" its ordinary meaning—a meaning that fits with its broader legal use and the rest of the statute's language. I think it significant that the statute says "officer" without qualifying that label or limiting its reach to specific strata of government. Other textual clues underscore that broad sweep. We know that the legislature included a catch-all phrase to widen the statute's aperture. We know, too, that the statute does not focus on an officer's precise job title, but on whether he caused injury "by virtue or under color" of his office. And we know that a magistrate's bond ensures the "faithful performance" of his duties—language echoed by the bond-action provision and consonant with its purpose. *See* N.C.G.S. § 7A-174.

More fundamentally, the majority's interpretation of the bond-action statute bleeds Section 7A-174 of meaning. If the General Assembly ordered magistrates to secure bonds but barred citizens from suing on them, then those bonds and the statute requiring them were little more than inkblots. And so on the majority's view, Section 7A-174 meant nothing—not when the legislature enacted it in 1965 and not in the nearly 60 years since. I cannot afford the bond-action statute such a piecemeal, disjointed interpretation.

Thus, giving "officer" its straightforward interpretation with an eye toward context and structure, the bond-action statute covers magistrates. For that reason, I would rely on "the words actually used in [the] statute" and decline to "insert words not used in the relevant statutory language during the statutory construction process." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258 (2016) (cleaned up).

B. The *Ejusdem Generis* Canon

In constricting the bond-action statute, the majority relies on the *ejusdem generis* canon. When general words follow specific ones, it reasons, the latter must cabin the former. And since the bond-action statute lists county officials before "other officers," the majority restricts that phrase to county officials, too.

But *ejusdem generis*—like every interpretive canon—is but a tool for divining legislative intent. *See State v. Fenner*, 263 N.C. 694, 698 (1965); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (explaining that "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation" (cleaned up)). It is a fallback means of construction rather than an unflinching "limitation in scope" of a statute's "general words or terms." *Fenner*, 263 N.C. at 698. For that reason, *ejusdem generis* does "not warrant the court subverting or defeating the legislative will." *Id.* And so it does not control

"when the whole context dictates a different conclusion." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991); *Rice v. Rehner*, 463 U.S. 713, 732 (1983) (explaining that courts should not use a canon of construction "when application would be tantamount to a formalistic disregard of congressional intent"). As discussed above and below, I think the "whole context" of the bond-action statute cuts against the majority's cramped reading.

Start with the linchpin of the majority's analysis: Our decision in *Meyer*. In that case, as the majority explains, we considered whether a county agency fell "within the scope of the general terms 'departments, institutions, and agencies' in the State Tort Claims Act." But as the majority tells it, this Court applied *ejusdem generis* "because all of the 'departments, institutions, and agencies' specifically enumerated within the statute were state entities." From that, the majority extracts a general rule: When a statute lists entities within a specific strata of government, that limit applies to any general terms that follow.

But that rendition of *Meyer* omits key distinctions between that case and this one. Reproduced in full, the State Tort Claims Act (STCA) allowed suits "against the State Board of Education, the Board of Transportation, and all other departments, institutions, and agencies *of the State*." *Meyer*, 347 N.C. at 105 (emphasis omitted) (quoting N.C.G.S. § 143-291(a) (1996)). So unlike the bond-action statute, the STCA expressly limited its scope to a specific sphere of government.

That state-specific qualification mattered to *Meyer*'s analysis. Relying on the statute's textual limit and its mention of particular state entities, *Meyer* read the STCA to "appl[y] only to actions against state departments, institutions, and agencies." *Id.* at 107. By its terms, the statute waived immunity for "the State departments and agencies" but did "not include local units." *Id.* at 106 (quoting *Turner v. Gastonia City Bd. of Educ.*, 250 N.C. 456, 463 (1959)). And though a county department of social services is an agent of North Carolina's Department of Human Resources, we explained that an "agent of the State and a state agency are fundamentally different and are treated differently by the [STCA]." *Id.* at 107. The provision only authorized "a claim against the State agency." *Id.* at 105 (quoting *Wirth v. Bracey*, 258 N.C. 505, 507–08 (1963)). And since a county entity was "not a state agency," the STCA did not waive its immunity. *Id.* at 104.

Placed in context, *Meyer* did not announce the flat rule the majority wrings from it. Our reasoning in that case tracked the precise statute before us. And since the STCA differs sharply from the bond-action statute, I would not pluck *Meyer*'s analysis from its context. Unlike the

provision here, the STCA lacks a catch-all clause. And more importantly, the STCA expressly limited its application to state government entities. In other words, the legislature signaled its intent to treat state and county actors differently. Those textual guardrails shaped how we applied *ejusdem generis*. We did not bar STCA claims against local entities simply because the parties "specifically enumerated within the statute were state entities," as the majority contends. Instead, the provision expressly limited liability to subdivisions "of the State," drawing the very state-local distinction the majority imports into the bond-action statute. So for *Meyer*'s analysis to map onto this case, the bond-action provision—paralleling the STCA—would have to narrow liability to "other officers of the county." It does not.

In more applicable cases, however, this Court has flagged *ejusdem generis* as a particularly poor tool for reading public-officer statutes. In *Ross*, for instance, we considered whether the phrase "any other fiduciary" enlarged the "scope of the embezzlement statute." *State v. Ross*, 272 N.C. 67, 71 (1967) (emphasis omitted). The defendant, a commissioner, urged us to narrow the provision via *ejusdem generis*. *Id.* The statute did not mention commissioners "by name," he noted. *Id.* And commissioners were "not in the same class" as the enumerated officers—officers like a "guardian, administrator, executor, [or] trustee." *Id.* That meant, he contended, that *ejusdem generis* excluded him from the statute's sweep. *See id.*

We rejected that narrow reading. By mentioning "any other fiduciary," we explained, the General Assembly broadened the statute's aperture. *Id.* That language "cannot be ignored." *Id.* And so to carry out the legislature's intent, we focused on the power an officer wielded rather than their job title. *See id.* at 71–72. Like a receiver, we explained, a commissioner functions as "an arm or hand of the court." *Id.* at 71 (cleaned up). Acting "under authority of and subject to the orders of the clerk of the superior court," a commissioner collects and distributes money. *Id.* Since a commissioner wields the authority of the law, "[s]pecial confidence and trust is imposed in him." *Id.* at 72. And so commissioners—like the other officers in the statute—were "fiduciaries whose duties are prescribed by law and who act under the supervision and orders" of a higher power. *Id.* at 71. We thus declined to narrow the statute through *ejusdem generis*. In view of the commissioner's official duties and the "special confidence" attached to his position, a functional analysis was more faithful to legislative intent. *See id.* at 71–72.

I would take the same approach with the statute here. In my view, the key metric is the power wielded by an officer rather than the label

attached to the office. A magistrate—like the other officers listed in the bond-action statute—is clothed with the state's authority. And because of that power, a magistrate—like the other officers—is entrusted with "[s]pecial confidence and trust." *Cf. id.* at 72. Recognizing that fact, the legislature required magistrates—like the other officers—to secure a bond conditioned on the "faithful performance" of their official duties. And because of their official power and the "[s]pecial confidence" placed in them, *cf. id.*, magistrates—like the other officers—should be liable on their bond for their misfeasance in office. Woodenly deploying *ejusdem generis* would yield an unduly narrow reading, converting a tool for discerning intent into one that defeats it.

According to the majority, however, interpreting "other officer[s]" to cover magistrates would nullify the statute's "specific references" to certain officials. If the General Assembly intended to give those "general words" their "unrestricted sense," the majority reasons, it would have deleted the statute's specific enumerations.

But the reverse is true, too. If the legislature wished to adopt the majority's narrow construction, it would have axed the broad reference to "other officer[s]." It could have also inserted the county-level limitation the majority adds to the text. Indeed, the legislature has done just that in neighboring provisions. And as the majority documents, the legislature has reshuffled and revised the bond-action statute, removing some officers from its scope and restructuring the provisions around it. But the phrase "other officer[s]" has weathered each round of revision. I think its retention is an important clue of legislative intent.

C. Statutory Context

Statutory context supports what the text says: That magistrates are "officer[s]" liable on their official bonds. In neighboring statutes, the legislature made clear its intent to guarantee citizens a remedy for official misconduct. To advance that goal, other provisions close loopholes to officers' liability on their bonds.

Section 58-72-1, for instance, prevents an officer from escaping suit based on a technical error in his bond or an "irregularity or invalidity in the conferring of the office or making of the appointment." N.C.G.S. § 58-72-1 (2021). The statute specifically applies to bonds issued by a county's board of commissioners—a restriction only relevant for county officials. But that provision—like the bond-action statute—then reaches further, covering "any person or persons acting under or in virtue of any public authority." *Id.* Even if an officer did not properly assume his role and even if the bond itself contains mistakes, those technicalities do

not defeat the officer's liability. So long as the bond "purport[ed] to be a bond executed to the State for the performance of any duty belonging to any office or appointment," it provides a "valid" right of action "for the benefit of the person injured by a breach of" its conditions. *Id.*; *accord* N.C.G.S. § 58-72-5 (2021) (imposing a $500 penalty for "[e]very person or officer of whom an official bond is required" who "presumes to discharge any duty of his office before" securing a required bond).

Against that backdrop, the omission of a county-officer limit from the bond-action statute is especially striking. For when the General Assembly wants to cabin bond provisions to a particular class of officials, it can—and will—do so.

Some provisions focus on state officers. *See*, *e.g.*, N.C.G.S. § 58-73-1 (2021) (permitting state officials to name an "indemnity or guaranty company" as surety for official bond); N.C.G.S. §§ 58-73-5, -15, -20, -25 (2021) (parsing how a surety company may secure a state officer's bond and the liability that a company may incur on that bond). Other provisions zero in on county officers. *See*, *e.g.*, N.C.G.S. § 20-114(a) (2021) (providing that the "lawful officers of any county" may be "liable on his official bond" for neglecting or refusing to perform statutory duties).

And most relevant to the bond-action statute, provisions in the same chapter contain the very county-officer limit that the majority adds. *See*, *e.g.*, N.C.G.S. § 58-72-10 (2021) ("Every treasurer, sheriff, coroner, register of deeds, surveyor, *and every other officer of the several counties* who is required by law to give a bond for the faithful performance of the duties of his office, shall give a bond for the term of the office to which such officer is chosen.") (emphasis added); N.C.G.S. § 58-72-15 (2021) (authorizing the commissioners "of the county in which said officer or officers are elected" to pay the premiums on the bonds of county officers as well as the "assistants, deputies or other persons regularly employed in the offices of *any such county officer or officers*") (emphasis added).

The legislature also provided county-specific enforcement mechanisms for county-specific bonds. Section 58-72-20 requires that county officers' bonds be "carefully examined on the first Monday in December of every year" to ensure sufficient collateralization. N.C.G.S. § 58-72-20 (2021). If a county officer fails to renew his bond, the county's board of commissioners must "declare his office vacant" and "appoint a successor." N.C.G.S. § 58-72-25 (2021). The citizens of a county also have statutory recourse. If they reasonably suspect that "the bond of any officer of such county" is inadequately secured, those citizens may request—and a judge may require—that the county officer appear in court and prove the validity of his bond. N.C.G.S. § 58-72-35 (2021).

Those examples underscore the same point: The General Assembly is well-versed in the legal regimes surrounding state and county officials. And when it intends to limit a bond provision to one strata of government, it can—and will—add that restriction in the text. But the bond-action statute—unlike the provisions surrounding it—contains no such limit. I would not insert a constraint where the legislature has not.

D. History

Though the majority offers a thoughtful survey of the statute's evolution, I think the history is less clear-cut than the majority suggests.

A century ago, North Carolina's bond statutes looked quite different. As the majority recounts, the chapter dealing with public officer bonds once contained separate provisions listing "State Officers" and "County Officers." N.C. Revised Code of 1905, ch. 9, §§ 287–306 (1905). In current form, the bond-action statute mentions some of the county-level positions it did a century ago. Per the majority, that continuity shows that the legislature has "historically categorized" those positions "as county officers." And that "historical classification," the majority contends, reflects the legislature's intent to limit suits to "only bonded county officers." By drawing that line, the majority concludes, the legislature "necessarily exclude[d]" state officers—like magistrates—from liability on their bonds.

I take different lessons from that history. While the 1905 code parceled out which state and county officers needed to secure bonds, it provided a single cause of action on those bonds. *See* N.C. Revised Code of 1905, ch. 9, § 281. And the bond-action statute of 1905 is nearly identical to the one we have today, including the catch-all phrase "or other officer[s]." *See id.* More tellingly, the legislature inserted that broadly phrased cause of action *before* the provisions listing state and county officers. In other words, though some portions of the code distinguished state officers from county ones, the bond-action statute then—like the bond-action statute now—did not draw the same lines. *See id.*

That was not an oversight. Like the statutory scheme we have today, the 1905 code prescribed specific rules for specific classes of public officers. Section 308, for example, required the officers "of the several counties" to examine their bonds on the first Monday of each December. *Id.* § 308. Even more, the code set separate rules for who could serve as sureties for the bonds of state officers versus officers in a "county, city, town or township in this state." *Compare id.* § 272 (addressing state officials), *with id.* § 273 (addressing local officials).

The point is that the 1905 code—like the regime we have today—is replete with examples of the legislature expressly distinguishing between and dictating separate rules for state and local officers. But that differential language never made its way into the bond-action statute. Then, as now, the legislature kept the broad reference to "other officer[s]." To now restrict that phrase to county officers would stray from history, not follow it.

In broader perspective, too, the statute's history suggests a shift towards inclusion. Though earlier laws split state officers from local ones, the General Assembly scrubbed that divide from the current statutory regime. *Compare* N.C. Revised Code of 1905, ch. 9, *with* N.C.G.S. §§ 58-73 to -76 (2021). By puncturing the wall between state and local officers, the modern bond-action statute emphasizes the common thread between public servants. Whether an official serves the state or a county, he is entrusted with power greater than his own. And with that power comes the potential to misuse it and cause harm. By retaining the broadly phrased cause of action while erasing the once-strict barriers between state and county officers, the legislature has signaled that an officer's public position—not their place in the government hierarchy—dictates the need for both a bond and a bond action.

While reasonable minds can extract different insights from history, one lesson is irrefutable: Throughout the life of the bond-action statute, the General Assembly has revised it when it saw fit. It has excised some positions, renamed the provision, and restructured the broader statutory scheme. The legislature does not need this Court to tinker with the language it has enacted and retained for well over a hundred years. If it wanted to restrict bond suits to county officials, it would have done so.

E. Purpose

Ultimately, statutory analysis must embrace "the spirit of the act" and what it "seeks to accomplish." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001) (cleaned up). And here, the legislature enacted the bond-action statute to secure citizens' rights, furnish a remedy for injuries, and hold public officers accountable to the people they serve. *See Kivett*, 106 N.C. at 569.

To that end, this Court has read the bond statute against the backdrop of contract law, specifically principles of third-party beneficiaries. A statute created for the public "must be considered as in contemplation of the parties in making a contract." *State ex rel. Dunn v. Swanson*, 217 N.C. 279, 281 (1940). And when the legislature addresses "the liability of the parties to the public," the provision "becomes an enforceable part of

the contract made for their benefit." *Id.*; *see also State ex rel. Williams v. Adams*, 288 N.C. 501, 504 (1975); *State ex rel. Cain v. Corbett*, 235 N.C. 33, 39 (1952) (construing bond-action statute by drawing on the principle "that where a contract between parties is made for the benefit of a third party, the latter is entitled to maintain an action for its breach").

On that view, official bonds provide both a sword and a shield. They shield citizens by incentivizing public officers to "du[ly] perform[]" their duties and responsibly wield their power. *See* N.C.G.S. § 58-76-5. And when an officer misuses his office, bonds provide a sword, allowing a person to recover for injuries flowing from that malfeasance. On both scores, bonds recognize that public officers are—and should remain—officers of the public. Because they wield the people's sovereign authority, those officers must act with awareness and accountability.

By allowing bond suits, the legislature also recognized a practical truth: That a private citizen and a public official are "not on equal terms." *State ex rel. Price v. Honeycutt*, 216 N.C. 270, 276 (1939). When an officer acts, he does so under "color of an authority which" a citizen is "bound to respect." *Id.* And practically speaking, citizens have little choice but "to accept the official services of such officers." *Kivett*, 106 N.C. at 569. Citizens must thus "rely on the restraint which the law throws around" a public officer while "at the same time it clothes him with power." *Price*, 216 N.C. at 276.

For that reason, courts may not turn a blind eye when an officer "begins to violate his duty and inflict injury under color of his office." *Id.* For a government official "possesses a far greater capacity for harm" than a citizen "exercising no authority other than his own." *Bivens*, 403 U.S. at 392. And at its most basic, the "guaranty provided by law" is that "official duty shall not be disregarded" nor "the delegated power abused." *Price*, 216 N.C. at 276. The bond-action statute realizes that principle. By converting an officer's bond into a cause of action to remedy official malfeasance, the statute leaves citizens "secure in their rights," furnishes an "adequate remedy for wrongs done," and holds public servants "to a faithful discharge of their duties as such." *Kivett*, 106 N.C. at 569.

More broadly, the bond-action statute taps into principles of legitimacy and justice. As this Court once recognized, the "law is never more definitely on trial" than "when it comes in contact with the public in its execution." *Price*, 216 N.C. at 276. Faced with that friction, courts should "preserve the respect the people have for [the law] as an instrument of justice" and forestall "the spirit of just resentment against oppression, which often flares into rebellion." *Id.* The bond-action statute prefigures

that problem and provides one solution: It grants citizens a mechanism to ensure that "official duty shall not be disregarded" nor "delegated power abused." *Id.* And so when a public official acts "under color of his office down to the point where he is remiss in his duties," courts may not bury their head in the sand. *Id.* In those cases, justice requires what the bond-action statute authorizes: When a public officer abuses his power, he may not shed "his official character" and escape "into the first person singular, to the relief of his surety." *Id.*

For these reasons, I would hold that magistrates are "officer[s]" covered by the bond-action statute. That reading aligns with the provision's text, structure, purpose, and context. Though I agree with the majority that judicial immunity applies to official capacity claims, I would decline to immunize Magistrate Frederick for his nonjudicial acts. On sovereign immunity grounds, I think that the state consented to suit on a magistrate's official bond. I would thus give Mr. Wynn his day in court and hold that the bond-action statute allows him to seek relief from Magistrate Frederick on the magistrate's bond.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

DEENA DIECKHAUS, GINA MCALLISTER, BRADY WAYNE ALLEN, JACORIA STANLEY, NICHOLAS SPOONEY, AND VIVIAN HOOD, EACH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA

From N.C. Court of Appeals
21-797

From Orange
20CVS564

No. 105P23

ORDER

This matter is before this Court on plaintiffs' petition for writ of certiorari to review a decision of the Court of Appeals affirming the trial court's dismissal of plaintiffs' claims on the basis of sovereign and statutory immunity. The petition is (1) allowed for review of whether N.C.G.S. § 116-311 violates the Contracts Clause of the United States Constitution; (2) allowed for review of whether N.C.G.S. § 116-311 violates the Takings Clause of the United States Constitution; (3) allowed for review of whether the legislature's enactment of N.C.G.S. § 116-311 violated the due process clauses of both the United States and North Carolina Constitutions; (4) allowed for review of whether defendants' breach was "reasonably related to protecting the public health, safety, and welfare" as required under N.C.G.S. § 116-311(a)(2); and (5) denied as to all remaining issues.

By order of the Court in Conference, this the 13th day of December 2023.

/s/ Riggs, J.
For the Court

Barringer, J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN RE ADOPTION OF B.M.T.

[385 N.C. 607 (2023)]

IN THE MATTER OF THE ADOPTION OF B.M.T., A MINOR	From N.C. Court of Appeals 22-377 FROM GUILFORD 19SP1132

No. 32PA23

ORDER

Reversed for the reasons stated in *In re C.H.M.*, 371 N.C. 22 (2018), and remanded for consideration of any outstanding issues on appeal.

By order of the Court in Conference, this the 15th day of November 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of November 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

JANU INC D/B/A STONECRAFTERS,
AUM HOSPITALITY SERVICES

v.

MEGA HOSPITALITY, LLC,
MEGA-C HOSPITALITY, LLC,
MEGA-B HOSPITALITY, LLC,
MEGA-K HOSPITALITY, LLC,
G.R. BHAT, AND SUJATA BHAT

From N.C. Court of Appeals
22-194

From Wake
18CVS15437

No. 91P23

ORDER

This Court allows defendants' petition for discretionary review for the limited purpose of vacating sections V and VI of the Court of Appeals decision (COA22-194) and remanding to the Court of Appeals for further remand to the trial court for hearing upon proper notice on defendants' motion to dismiss for lack of personal jurisdiction, consistent with this Court's holding in *Lynch v. Lynch*, 302 N.C. 189, 1978-98 (1981), and on defendants' motion for attorneys' fees.

By order of the Court in Conference, this the 13th day of December 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

RAKE v. SDC K-L, LLC

[385 N.C. 609 (2023)]

ERIN RAKE, D.D.S., P.C.;
HEIDI PANTAZIS D.M.D. PLLC

F/K/A RDEST DDS PLLC III;
HEALTHCARE DELIVERED, LLC
D/B/A ARIA CARE PARTNERS;
ARIA CARE MANAGEMENT, LLC
F/K/A MOBILECARE 2U, LLC; AND
ARIA DENTAL MANAGEMENT, LLC
F/K/A DEST DENTAL
MANAGEMENT, LLC

v.

SDC K-L, LLC; EROL KANLI, D.D.S.;
KATINA CLOUD; LESLIE JERNIGAN;
AND ELIZABETH KALLMAN

From N.C. Court of Appeals
P23-648

From Wake
23CVS019838

No. 304P23

ORDER

Plaintiffs' Motion for Temporary Stay is allowed without prejudice to defendants' right to move the trial court, in its discretion, to suspend or modify the injunction upon such terms as to bond or otherwise as the court considers proper for the security of the rights of the adverse parties under N.C.G.S. § 1A-1, Rule 62(c).

By order of the Court in Conference, this the 15th day of November 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of November 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

SOUTHLAND NATIONAL INSURANCE CORPORATION IN REHABILITATION, BANKERS LIFE INSURANCE COMPANY IN REHABILITATION, COLORADO BANKERS LIFE INSURANCE COMPANY IN REHABILITATION, AND SOUTHLAND NATIONAL REINSURANCE CORPORATION IN REHABILITATION

v.

GREG E. LINDBERG, GLOBAL GROWTH HOLDINGS, INC. F/K/A ACADEMY ASSOCIATION, INC., EDWARDS MILL ASSET MANAGEMENT, LLC, NEW ENGLAND CAPITAL, LLC, AND PRIVATE BANKERS LIFE AND ANNUITY CO., LTD.

From N.C. Court of Appeals
22-1049

From Wake
19CVS13093

No. 173P23

ORDER

This matter is before this Court on defendants' petition for discretionary review of a decision of the Court of Appeals affirming the trial court's decision that defendants were liable for breach of contract and fraud but vacating and remanding the decision as it related to remedies available to plaintiffs for defendants' fraud. The petition is (1) allowed for the purpose of reviewing whether reliance is reasonable in a claim for fraud in the inducement when a party fails to exercise due diligence; and (2) denied as to all remaining arguments.

By order of the Court in Conference, this the 13th day of December 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

WARREN v. SNOWSHOE LTC GRP., LLC

[385 N.C. 611 (2023)]

THOMAS A. WARREN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THOMAS E. WARREN, JR., EVELYN WARREN, AND ROSALIND REGINA PLATT

v.

SNOWSHOE LTC GROUP, LLC, MMDS OF NORTH CAROLINA, INC., DR. KARRAR HUSSAIN, M.D., EAGLE INTERNAL MEDICINE AT TANNENBAUM, AND DR. RICHARD LYNCH, D.O.

From N.C. Court of Appeals
22-595

From Guilford
20CVS7857

No. 65P23

ORDER

Plaintiffs' petition for discretionary review is allowed for the following limited purpose. The 11 January 2023 order of the Court of Appeals dismissing plaintiffs' appeal is vacated, and this case is remanded to the Court of Appeals for consideration of whether a sanction other than dismissal is appropriate. *See Dogwood Development and Management Company v. White Oak Transportation Company*, 362 N.C. 191 (2008).

By order of the Court in Conference, this the 13th day of December 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

15 DECEMBER 2023

3P23-3	State of North Carolina v. Joseph Edwards Teague, III	Def's Pro Se Petition for Writ of Habeas Corpus (COA21-10)	Denied **10/30/2023**
3P23-4	State of North Carolina v. Joseph Edwards Teague, III	Def's Pro Se Motion to Vacate Conviction and Dismiss Charges and Declare a Mistrial with Prejudice (COA21-10)	Dismissed
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. Dismissed **10/19/2023** 4. Dismissed **10/19/2023** 5. Dismissed 6. Dismissed **Dietz, J., recused** **Riggs, J., recused**
24P23	SCGVIII-Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	1. Def's (Kalishwar Das) Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA21-740) 2. Def's (Kalishwar Das) Pro Se Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 3. Def's (Kalishwar Das) Pro Se Petition for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Denied 3. Denied **Dietz, J., recused**
25P23	Kalishwar Das v. SCGVIII Lakepointe, LLC in c/o Mr. John F. Morgan, Jr.	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA21-806) 2. Plt's Pro Se Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	1. Denied 2. Denied **Dietz, J., recused**
32PA23	In the Matter of the Adoption of B.M.T., a Minor	The Court's *Ex Mero Motu* Motion to Reverse and Remand	Special Order **11/15/2023**

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

15 DECEMBER 2023

54P23	C.G.C., a Minor, by and through her Guardian ad Litem, Sarah Homes; T.W.C., a Minor, by and through his Guardian ad Litem, Sarah Homes; and Patrick Joseph Campbell v. Regina Petteway (In her individual and official capacity); Katie Treadway (In her individual and official capacity); Heather Kane (In her individual and official capacity); Audrey Difilipo (In her individual and official capacity); Britney Keene (In her individual and official capacity); and Stephanie Pearson (In her individual and official capacity)	Plts' PDR Under N.C.G.S. § 7A-31 (COA22-56)	Denied
59P97-6	State v. Ardie DeFronso Nolon	1. Def's Pro Se Motion for PDR (COAP23-336) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Riggs, J., recused**
65P23	Thomas A. Warren, Individually and as Personal Representative of the Estate of Thomas E. Warren, Jr., Evelyn Warren, and Rosalind Regina Platt v. Snowshoe LTC Group, LLC, MMDS of North Carolina, Inc., Dr. Karrar Hussain, M.D., Eagle Internal Medicine at Tannenbaum, and Dr. Richard Lynch, D.O.	Plts' PDR Under N.C.G.S. § 7A-31 (COA22-595)	Special Order

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

15 DECEMBER 2023

73P23-2	State v. Tyrone Sequine Reynolds	Def's Pro Se Motion to Dismiss Without Prejudice	Dismissed
78P22-3	State v. Eric Antron Ingram	Def's Pro Se Motion for Notice of Appeal Based Upon a Dissent (COAP23-168)	Dismissed *ex mero motu*
79P17-2	State v. Jimmy Allen Roberts	Def's Pro Se Petition for Writ of Certiorari and/or Mandamus	Dismissed
88P23	State v. Ronald Matthews Speaks	Def's PDR Under N.C.G.S. § 7A-31 (COA22-499)	Denied
91P23	Janu Inc d/b/a Stonecrafters, AUM Hospitality Services v. Mega Hospitality, LLC, Mega-C Hospitality, LLC, Mega-B Hospitality, LLC, Mega-K Hospitality, LLC, G.R. Bhat, and Sujata Bhat	Defs' PDR Under N.C.G.S. § 7A-31 (COA22-194)	Special Order
105P23	Deena Dieckhaus, Gina McAllister, Brady Wayne Allen, Jacoria Stanley, Nicholas Spooney, and Vivian Hood, Each Individually and on behalf of all others similarly situated v. Board of Governors of the University of North Carolina	Plts' Petition for Writ of Certiorari to Review Decision of the COA (COA21-797)	Special Order **Barringer, J., recused**
127P22-2	State v. Jeffery Ray Acker	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Craven County	Dismissed

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

15 DECEMBER 2023

130P23	Martin B. Sturdivant, Employee v. North Carolina Department of Public Safety, Employer, Self-Insured (CCMSI, Third-Party Administrator)	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-421) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Conditional Motion to Vacate Opinion of the COA 4. North Carolina Association of Self-Insurers, North Carolina Forestry Association, North Carolina Retail Merchants Association, North Carolina Home Builders Association, American Property Casualty Insurance Association, and North Carolina Chamber Legal Institute's Conditional Motion for Leave to File Amicus Brief	1. Allowed 2. Allowed 3. Dismissed as moot 4. Allowed
139P23	Robert Brewer, Employee v. Rent-A-Center, Employer, Travelers Insurance Co. (Sedgwick Claims Services, Third-Party Administrator), Carrier	1. Defs' Motion for Temporary Stay (COA22-296) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Motion for Reconsideration of Temporary Stay 5. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **06/08/2023** 2. Allowed 3. Allowed 4. Special Order **06/19/2023** 5. Allowed
140P23	Chad Gardner, Lisa Gardner, Lonnie Norton, Hope Norton, the Town of Dobbins Heights, and the City of Hamlet v. Richmond County	Plt's (Town of Dobbins Heights) PDR Under N.C.G.S. § 7A-31 (COA21-600)	Allowed
145P23	PennyMac Loan Services, LLC, Plaintiff/ Counterclaim Defendant v. Brad Johnson and Elci Wijayaningsih, Defendants/ Counterclaim Plaintiffs and Third-Party Plaintiffs v. Standard Guaranty Insurance Company, Erika L. Sanchez, Efren Saldivar, and Assurant, Inc., Third-Party Defendants	Def/Counterclaim Plt and Third-Party Plt's (Brad Johnson) Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-629)	Denied

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

15 DECEMBER 2023

152P23	Estate of Timothy Leroy Bunce, and Heidi Bunce, Individually v. University of North Carolina Health Care Systems	Plts' PDR Under N.C.G.S. § 7A-31 (COA23-358)	Denied
157PA22	State v. Tevin Demetrius Vann	1. Def's Motion to Withdraw and Substitute Counsel 2. Def's Motion to Reschedule Pending Oral Argument	1. Allowed **10/20/2023** 2. Denied **10/20/2023**
160P23	State v. Justin Thomas Burns	State's Petition for Writ of Certiorari to Review Order of Superior Court, Pitt County (COAP23-157)	Denied
166P23-2	Colell Steele v. North Carolina Department of Public Safety	Plt's Pro Se Motion for Petition Requesting Order for Relief from Judgment (COA23-77)	Dismissed
167P23	State v. Jedidiah David Crabtree	Def's PDR Under N.C.G.S. § 7A-31 (COA22-936)	Denied **Riggs, J., recused**
171P23	State v. Michael Edward Hughes	Def's Pro Se Motion for PDR (COA22-721)	Dismissed
173P23	Southland National Insurance Corporation, et al. v. Lindberg, et al.	1. Defs' Motion for Temporary Stay (COA22-1049) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Universal Life Insurance Company's Conditional Motion for Leave to File Amicus Brief 5. Plts' Motion to Expedite Petition for Writ of Supersedeas and PDR 6. Universal Life Insurance Company's Motion to Withdraw Request to File Amicus Curiae Brief	1. Allowed **07/13/2023** 2. Allowed 3. Special Order 4. Dismissed as moot 5. Dismissed as moot 6. Allowed

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

15 DECEMBER 2023

175P23	Nationstar Mortgage, LLC d/b/a Mr. Cooper v. Mark P. Melaragno a/k/a Mark Peter Melaragno, Wendy Kinkel Melaragno, Certusbank, N.A., s/b/m Myers Park Mortgage, Inc., The Building Center, Inc., and Substitute Trustee Services, Inc., Substitute Trustee	1. Defs' (Mark P. Melaragno a/k/a Mark Peter Melaragno and Wendy Kinkel Melaragno) PDR Under N.C.G.S. § 7A-31 (COA22-743) 2. Defs' (Mark P. Melaragno a/k/a Mark Peter Melaragno and Wendy Kinkel Melaragno) Motion to Withdraw PDR	1. --- **10/24/2023** 2. Allowed **10/24/2023**
176P23	:Lumin-Lucky: Lander. v. State Employees Credit Union, Rex Alan Spivey, CFO, Philip A. Glass, Attorney at Law	1. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 2. Defs' (NC State Employees Credit Union and Rex Alan Spivey) Motion to Dismiss PDR 3. Defs' (NC State Employees Credit Union and Rex Alan Spivey) Motion to Tax Plt Costs 4. Plt's Pro Se Motion for Default Judgment 5. Plt's Pro Se Motion to Tax Def Costs 6. Plt's Pro Se Motion for Injunctive Relief 7. Plt's Pro Se Motion for Default Judgment 8. Plt's Pro Se Motion for Default Judgment 9. Plt's Pro Se Motion for Injunctive Relief 10. Plt's Pro Se Motion to Strike 11. Plt's Pro Se Motion to Vacate	1. --- 2. Allowed 3. Allowed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed 9. Dismissed 10. Dismissed 11. Dismissed
183P23	Weijun Luo v. Ursula R. Neal, Adam C. Neal, Sr.	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-657) 2. Plt's Pro Se Motion for Extension of Time to File Brief 3. Plt's Pro Se Motion to Correct Docket Entry	1. Dismissed *ex mero motu* 2. Dismissed as moot 3. Dismissed as moot
208P14-3	State v. Colell Barion Steele	Def's Pro Se Motion for PDR (COAP21-115)	Dismissed **Riggs, J., recused**

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

15 DECEMBER 2023

209P23-2	State v. Travis Baxter	Def's Pro Se Motion to Transfer	Dismissed
211P23-2	Kenneth E. French v. Highland Paving Co. LLC, John W. McCauley (CEO), Albert O. McCauley (Partner), and Brian Rayner (Manager)	Plt's Pro Se Motion for Appeal of Right for Writ of Certiorari	Denied
212P22-3	Andrew C. Davis (Geometrodynamics University Corporation, et al.) v. Central Regional Hospital, et al.	1. Plt's Pro Se Petition for Writ of Certiorari 2. Plt's Pro Se Petition for Writ of Habeas Corpus 3. Plt's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed 2. Denied **11/21/2023** 3. Denied **11/30/2023**
213P22-2	State v. Jamaal Gittens	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of District Court, Cabarrus County 2. Def's Pro Se Motion to Expedite	1. Dismissed 2. Dismissed
220P22	Kimberly Bossian v. Dennis Bossian	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-483) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of District Court, Wake County	1. Denied 2.
220P23	Adil Aziz and Gladys Aziz v. Heatherstone Homeowners Association, Inc.	1. Plts' Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-819) 2. Plts' Pro Se Motion to Strike Response	1. Denied 2. Dismissed as moot
222P23	The North Carolina State Bar v. Kenneth Frank Irek	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-667)	Denied
231P23	Sheila Fadia, T. Camille Fadia, Minor Child v. Magistrate Judge Joe L. Webster, Judge Norwood Carlton Tilley, Clerk John Brubaker, Case Manager Leah, et al.	Plt's (T. Camille Fadia) Pro Se Motion for Sanctions for Spoliation of Evidence	Dismissed

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

15 DECEMBER 2023

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. Allowed 3. Allowed
240P23	Langtree Development Company, LLC v. JRN Development, LLC, f/k/a JRN Investments, LLC	Def's PDR Under N.C.G.S. § 7A-31 (COA22-1016)	Denied
244P23	Guadalupe J. Galindo v. Judge A. Graham Shirley	Plt's Pro Se Motion for Notice of Appeal	Dismissed
245P23	Craige Jenkins Liipfert & Walker LLP and Bryan C. Thompson, Acting as Personal Representative of the Estate of Cleester C. Hickerson v. Carmelene Lynne Woods	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA23-294)	Denied
246P23	State v. Jamaal Connelly	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-789)	Denied
249P23	State v. Mario Kennard Bennett	Def's Petition for Writ of Certiorari to Review Order of the COA (COAP23-402)	Dismissed
250PA21-2	Department of Transportation v. Bloomsbury Estates, LLC; et al.	Def's Motion to Amend Record on Appeal	Denied **10/27/2023**
253P23	State v. Antonio Daymonte Livingston	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA22-678)	Denied
254P23	In the Matter of 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** Dissolved 2. Denied **Riggs, J., recused**

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

15 DECEMBER 2023

256P23	State v. Tucker McKenzie Rector	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-803)	Denied
257P23	State v. Jessiah James Hubbard	Def's Pro Se Motion for Appeal (COAP23-471)	Denied
259P23	State v. Kevin Eugene Hinnant, Jr.	Def's Petition for Writ of Certiorari to Review Order of the COA (COA23-152)	Denied
262P23	State v. Dale Bernard Hairston	Def's PDR Under N.C.G.S. § 7A-31 (COA22-939)	Denied **Riggs, J., recused**
265P23	State v. John Henry Carver	Def's PDR Under N.C.G.S. § 7A-31 (COA22-1040)	Denied
266P23	State v. Aulden Matthew Whitcher, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA22-871)	Denied
267P23	Lynette Melvin v. Maggie E. Melvin	1. Plt's Pro Se Motion for Notice of Appeal Based Upon a Constitutional Question (COA23-112) 2. Def's Motion for Sanctions 3. Def's Motion for Extension of Time to File Brief	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
273P23	Donald Richard Bagwell v. Roy A. Cooper III, et al.	Petitioner's Pro Se Motion for Emergency Civil Action	Dismissed
275P23	Crescent Gardens Apartments and Crescent Gardens Apartments LP v. Jessica A. Humes and Shakein D. Applewhite	1. Defs' Pro Se Motion for Temporary Stay 2. Defs' Pro Se Petition for Writ of Supersedeas 3. Defs' Pro Se Motion for PDR 4. Defs' Pro Se Motion for Notice of Appeal	1. Denied **10/19/2023** 2. Denied **10/19/2023** 3. Dismissed **10/19/2023** 4. Dismissed **10/19/2023**

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

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277P23	In the Matter of Christine Amber Etheredge	1. Petitioner's Pro Se Emergency Petition for Writ of Mandamus 2. Petitioner's Pro Se Motion for Sanctions, Annulment, Custody, and Other Proper Relief 3. Petitioner's Pro Se Motion for Production of Documents and Discovery 4. Petitioner's Pro Se Motion to Review and Report Crimes 5. Petitioner's Pro Se Motion to Recuse Lower Court Judges 6. Petitioner's Pro Se Motion to Seal All Files and Hold Address as Confidential 7. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed **10/19/2023** 2. Dismissed **10/19/2023** 3. Dismissed **10/19/2023** 4. Dismissed **10/19/2023** 5. Dismissed **10/19/2023** 6. Allowed **10/19/2023** 7. Allowed **10/19/2023**
279P23	State v. Christopher Michael Johnson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA23-52) 2. Def's Motion to Supplement PDR with Additional Authority	1. Denied 2. Allowed
280P23	Brandon Williams v. State of North Carolina, Cabarrus County, et al.	1. Plt's Pro Se Motion for PDR 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **10/19/2023** 2. Allowed **10/19/2023**
280P23-2	Brandon Williams v. State of North Carolina, County of Cabarrus, et al.	1. Plt's Pro Se Motion for Appropriate Relief 2. Plt's Pro Se Motion for Petition to Withdraw Motion for Appropriate Relief	1. --- 2. Allowed
281A23	State v. Angela Benita Phillips	1. State's Motion for Temporary Stay (COA22-866) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **10/20/2023** 2. Allowed **11/07/2023** 3. ---
281P06-15	Joseph E. Teague, Jr., P.E., C.M. v. N.C. Department of Transportation, J.E. Boyette, Secretary	Plt's Pro Se Motion to Vacate the Final Decision of the NC State Personnel Commission, Dismiss All Underlying Charges, and Declare a Mistrial	Dismissed
282P23	State v. Linwood Duffie	Def's Pro Se Motion for Emergency Relief Demand	Denied **10/19/2023**

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283A22-2	In the Matter of Patricia Burnette Chastain	1. Respondent's Notice of Appeal Based Upon a Dissent (COA22-649) 2. Respondent's PDR as to Additional Issues 3. Petitioner's Motion to Certify Additional Issues for Review Under Appellate Rule 15	1. — 2. Allowed 3. Allowed **Allen, J., recused**
283P23	Willie James Byrd, Jr. v. Buncombe County	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **10/26/2023**
284P23	Stephanie Messick, Employee v. Walmart Stores, Inc., Employer, New Hampshire Insurance Company, Carrier (Claims Management Incorporated, Third-Party Administrator)	1. Defs' Motion for Temporary Stay (COA22-1069) 2. Defs' Petition for Writ of Supersedeas (COA22-1069) 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **10/24/2023** 2. 3.
286P23	State v. David K. Dixon	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/25/2023**
287P23	State v. Gerald Telphia Jacobs, II	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-997)	Denied
288P23	Onnipauper LLC v. Eugene Dunston	1. Def's Motion for Temporary Stay (COA23-151) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/25/2023** 2. 3.
291P23	State v. Darnell W. King	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	Dismissed
292P23	State v. Scott Anthony Putnam	Def's Pro Se Motion for Extension of Time to File PDR	Dismissed **Riggs, J., recused**
293P23	State v. Andre Eugene Lester	1. State's Motion for Temporary Stay (COA23-115) 2. State's Petition for Writ of Supersedeas 3. State's Motion to Withdraw Motion for Temporary Stay and Petition for Writ of Supersedeas	1. Dismissed as moot **11/01/2023** 2. Dismissed as moot **11/01/2023** 3. Allowed **11/01/2023**

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293P23-2	State v. Andre Eugene Lester	1. State's Motion for Temporary Stay (COA23-115) 2. State's Petition for Writ of Supersedeas	1. Allowed **12/13/2023** 2.
294P23	Pallie Irrevocable Business Trust, Daniel Watlington General Manager, Michael Battershell Beneficiary v. Michael Brian Watlington, Keith Blalock Known as Blalock Rentals, Ronald S. Bradsher, Jr. Attorney at Law, John M. Thomas Attorney at Law	Plt's (Daniel Watlington) Pro Se Motion for Notice of Appeal (COA23-771)	Denied
295P23	Michel Rabun-Fisher v. Mike Roberson (Sheriff of Chatham County)	Def's Pro Se Petition for Writ of Habeas Corpus (COAP23-683)	Denied **11/01/2023**
296P23	State v. Darron Omar Gill	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed **11/03/2023** 2. Dismissed **11/03/2023** 3. Dismissed **11/03/2023**
297P23	Shannon Steger/ Trinity Steger v. NCDHHS/State of NC/Robeson County DSS/County of Robeson	1. Petitioners' Pro Se Motion for Notice of Appeal (COAP23-662) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 3. Petitioners' Pro Se Motion for Extension of Time to File Brief	1. Dismissed *ex mero motu* 2. Allowed 3. Dismissed as moot
298P23	Charles Hodge v. David Coolidge	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed

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299P22	DeBerry v. DeBerry	1. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COAP22-465)	1. Dismissed
		2. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question	2. Dismissed
		3. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question in re: Judge Christine Walczyk	3. Dismissed
		4. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question in re: Judge Nancy E. Gordon	4. Dismissed
		5. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COAP22-465)	5. Dismissed
		6. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COAP22-974 and COAP22-998)	6. Dismissed
		7. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-872)	7. Dismissed
		8. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-974 and COA22-998)	8. Dismissed
		9. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-969)	9. Dismissed
		10. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question	10. Dismissed
		11. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-872)	11. Dismissed
		12. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question	12. Dismissed
		13. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-969)	13. Dismissed
		14. Petitioner's Pro Se Emergency Motion to Stay Judgment of All Invoices in the COA Pending Supreme Court Review of Multiple Pending Appeals in the Interest of the Public	14. Dismissed **Riggs, J., recused**
300P23	State v. James Kelly Moore, III	Def's Pro Se Motion for Extension of Time to File Petition for Writ of Certiorari (COA22-714)	Dismissed

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301P23	State v. Anton M. Lebedev	1. Def's Pro Se Motion for Temporary Stay (COA23-249) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Motion for Consideration of Attached Materials 4. Def's Pro Se Motion to Reconsider Denial of Temporary Stay 5. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Denied **11/09/2023** 2. 3. 4. Denied **11/14/2023** 5.
304P23	Erin Rake, D.D.S., P.C.; Heidi Pantazis D.M.D. PLLC f/k/a RDest DDS PLLC III; Healthcare Delivered, LLC d/b/a Aria Care Partners; Aria Care Management, LLC f/k/a Mobilecare 2u, LLC; and Aria Dental Management, LLC f/k/a Dest Dental Management, LLC v. SDC K-L, LLC; Erol Kanli, D.D.S.; Katina Cloud; Leslie Jernigan; and Elizabeth Kallman	1. Plts' Motion for Temporary Stay (COAP23-648) 2. Plts' Petition for Writ of Supersedeas 3. Plts' Petition for Writ of Certiorari to Review Order of the COA	1. Special Order **11/15/2023** 2. 3.
305P22	The North Carolina State Bar v. Lonnie P. Merritt, Attorney	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-191) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
306P23	Daniel Blaine Parsons v. T.A.R.C. Staff, et al.	1. Plt's Pro Se Motion to Compel Lower Courts to Stop Being Transphobic 2. Plt's Pro Se Motion to Compel N.C. Prison to Answer Grievance	1. Dismissed 2. Dismissed
307A23	State v. Mario Wilson	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Petition for Writ of Certiorari to Review Decision of the COA	1. Allowed **11/14/2023** 2. 3. 4.

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311P23	Hesman Tall a/k/a James W. Hunter, Jr. v. Palmer Farm, LLC, et al. Ms. Elfreda Dawn Palmer, Resident Agent	Plt's Pro Se Motion to Remand Case for Further Proceedings	Dismissed
314P23	In re Kyule Covington	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/28/2023**
322A23	In the Matter of K.P.W.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA23-205) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad Litem's Notice of Appeal Based Upon a Dissent	1. Dismissed as moot **12/01/2023** 2. Allowed **12/01/2023** 3. --- **Riggs, J., recused**
323P23	Betty Lou Tebib v. Hamza Tebib	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Wake County	1. Dismissed as moot **12/05/2023** 2. Denied **12/05/2023** 3. Dismissed **12/05/2023**
324P23	Briggan Investment v. William Hurley, Jr.	1. Petitioner's (Carla Land) Pro Se Motion for Temporary Stay 2. Petitioner's (Carla Land) Pro Se Petition for Writ of Supersedeas	1. Denied **12/05/2023** 2. Denied **12/05/2023**
326P23	In the Matter of D.T.P. & B.M.P.	1. Respondent-Parents' PDR Under N.C.G.S. § 7A-31 (COA23-29) 2. Respondent-Parents' Motion for Temporary Stay 3. Respondent-Parents' Petition for Writ of Supersedeas	1. Denied **12/07/2023** 2. Dismissed as moot **12/07/2023** 3. Denied **12/07/2023**

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329A09-5	State v. Martinez Orlando Black	1. Def's Pro Se Motion to Amend Order (COA08-1180)	1. Dismissed
		2. Def's Pro Se Motion for Subject Matter Jurisdiction	2. Dismissed
		3. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	3. Dismissed
		4. Def's Pro Se Motion to Proceed *In Forma Pauperis*	4. Allowed
		5. Def's Pro Se Motion to Appoint Counsel	5. Dismissed
		6. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	6. Dismissed
		7. Def's Pro Se Motion to Amend Petition for Writ of Certiorari	7. Dismissed as moot
		8. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP23-109)	8. Dismissed **Riggs, J., recused**
331PA20-2	Edward G. Connette, as Guardian ad Litem for Amaya Gullatte, a Minor, and Andrea Hopper, individually and as parent of Amaya Gullatte, a Minor v. The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System, and/or The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center, and/or The Charlotte-Mecklenburg Hospital Authority d/b/a Levine Children's Hospital, and Gus C. Vansoestbergen, CRNA	Defs' PDR Prior to Determination by the COA (COA23-460)	Denied **Berger, J., recused** **Dietz, J., recused**
331P23	State v. Kajuan Dyshawn Hamilton	1. State's Motion for Temporary Stay (COA22-857)	1. Allowed **12/11/2023**
		2. State's Petition for Writ of Supersedeas	2.

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332A23	In the Matter of A.G.J.	1. State's Motion for Temporary Stay (COA23-323) 2. State's Petition for Writ of Supersedeas	1. Allowed **12/11/2023** 2.
333A22	Digital Realty Trust, Inc.; Digital Realty Trust, LP; and DLR, LLC v. Peter Sprygada	Def's Consent Motion to Withdraw and Dismiss Appeal	Allowed **10/20/2023**
333P23	In the Matter of L.L.	1. Petitioner's Motion for Temporary Stay (COA22-1045) 2. Petitioner's Motion for Writ of Supersedeas	1. Allowed **12/12/2023** 2.
361P22-2	State v. Trentair Bingham	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-612)	Dismissed
378P22	Amy Palacios v. Jay White, Brad Urban (Ex2) and Matthew Bledsoe (Ex1), Donna Johnson	1. Petitioner's Pro Se Motion for Completed Appeal (COAP22-295) 2. Petitioner's Pro Se Petition for Writ of Prohibition 3. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA 4. Petitioner's Motion to Unseal Docket for Moving Counsel 5. Respondents' Motion to Dismiss Petitioner's 21 December 2022 Pro Se Filings and to Remand for a Hearing to Determine Sanctions	1. Dismissed 2. Dismissed 3. Dismissed 4. Allowed **02/03/2023** 5. Dismissed as moot
381P22-3	Matthew Safrit v. Todd Ishee and Drew Stanley	Petitioner's Pro Se Motion for PDR (COAP23-314)	Dismissed **Riggs, J., recused**
412P13-7	Henry Clifford Byrd, Sr. v. Superintendent John Sapper	1. Petitioner's Pro Se Motion to Vacate Orders 2. Petitioner's Pro Se Motion for a Rehearing En Banc	1. Dismissed 2. Dismissed

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

RULES GOVERNING THE DISCIPLINE AND DISABILITY OF ATTORNEYS

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 January 20, 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 attachments:

ATTACHMENT 1 - A: 27 N.C.A.C. 01B, Section .0100, Rule .0105, *Chairperson of the Grievance Committee: Powers and Duties*

ATTACHMENT 1 - B: 27 N.C.A.C. 01B, Section .0100, Rule .0106, *Grievance Committee: Powers and Duties*

ATTACHMENT 1 - C: 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 amendments 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 January 20, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of December, 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 20th day of December, 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 21st day of December, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 1B – DISCIPLINE AND DISABILITY RULES

SECTION .0100 – DISCIPLINE AND DISABILITY OF ATTORNEYS

27 NCAC 01B .0105 ~~CHAIRPERSON~~CHAIR OF THE GRIEVANCE COMMITTEE: POWERS AND DUTIES

(a) The ~~chairperson~~chair of the Grievance Committee will have the power and duty

(1) to supervise the activities of the counsel;

(2) to recommend to the Grievance Committee that an investigation be initiated;

(3) to recommend to the Grievance Committee that a grievance be dismissed;

(4) to direct a letter of notice to a respondent or direct the counsel to issue letters of notice in such cases or under such circumstances as the ~~chairperson~~chair deems appropriate;

(5) to issue, at the direction and in the name of the Grievance Committee, a letter of caution, letter of warning, an admonition, a reprimand, or a censure to a member;

(6) to notify a respondent that a grievance has been dismissed, and to notify the complainant in accordance with Rule ~~.0121~~.0125 of this ~~Subchapter~~subchapter;

(7) to call meetings of the Grievance Committee;

(8) to issue subpoenas in the name of the North Carolina State Bar or direct the secretary to issue such subpoenas;

(9) to administer or direct the administration of oaths or affirmations to witnesses;

(10) to sign complaints and petitions in the name of the North Carolina State Bar;

(11) to determine whether proceedings should be instituted to activate a suspension which has been stayed;

(12) to enter orders of reciprocal discipline in the name of the Grievance Committee;

(13) to direct the counsel to institute proceedings in the appropriate forum to determine if an attorney is in violation of an order of the Grievance Committee, the commission, or the council;

(14) to rule on requests for reconsideration of decisions of the Grievance Committee regarding grievances;

(15) to tax costs of the disciplinary procedures against any defendant against whom the Grievance Committee imposes discipline, including a minimum administrative cost of fifty dollars ($50.00);

(16) to dismiss a grievance upon request of the complainant, where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel consents to the dismissal;

(17) to dismiss a grievance where it appears that the grievance has not been filed within the time period set out in Rule ~~.0111(e);~~.0111(f)(4);

(18) to dismiss a grievance where it appears that the complaint, even if true, fails to state a violation of the ~~Revised~~ Rules of Professional Conduct and where counsel consents to the dismissal;

(19) to dismiss a grievance where it appears that there is no probable cause to believe that the respondent has violated the ~~Revised~~ Rules of Professional Conduct and where counsel and a member of the Grievance Committee designated by the committee consent to the dismissal;

(20) to appoint a subcommittee to make recommendations to the council for such amendments to the Discipline and Disability Rules as the subcommittee deems necessary or ~~appropriate.~~appropriate;

(21) to appoint the members of a grievance review panel; and

(22) to perform such other duties as the council may direct.

(b) Absence of ~~Chairperson~~Chair and Delegation of Duties. The president, vice-~~chairperson~~chair, or a member of the Grievance Committee designated by the president or the ~~chairperson~~chair or vice-~~chairperson~~chair of the committee may perform the functions, exercise the power, and discharge the duties of the ~~chairperson~~chair or any vice-~~chairperson~~chair when the ~~chairperson~~chair or a vice-~~chairperson~~chair is absent or disqualified.

(c) Delegation of Authority. The ~~chairperson~~chair may delegate his or her authority to the president, the vice-~~chairperson~~chair of the committee, or a member of the Grievance Committee.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 20, 1995; March 6, 1997; October 2, 1997; December 30, 1998; March 3, 1999; February 3, 2000; March 10, 2011; August 23, 2012; December 20, 2023.

SUBCHAPTER 1B – DISCIPLINE AND DISABILITY RULES

SECTION .0100 – DISCIPLINE AND DISABILITY OF ATTORNEYS

27 NCAC 01B .0106 GRIEVANCE COMMITTEE: POWERS AND DUTIES

The Grievance Committee will have the power and duty

(1) to direct the counsel to investigate any alleged misconduct or disability of a member of the North Carolina State Bar coming to its attention;

. . .

(5) to issue a letter of warning to a respondent in cases wherein no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct. The letter of warning will advise the ~~attorney~~respondent that he or she may be subject to discipline if such conduct is continued or repeated. The warning will specify in one or more ways the conduct or practice for which the respondent is being warned. A copy of the letter of warning will be maintained in the office of the counsel for three years subject to the confidentiality provisions of Rule ~~.0129~~.0133 of this subchapter;

(6) to issue an admonition in cases wherein the ~~defendant~~ respondent has committed a minor violation of the Rules of Professional Conduct;

(7) to issue a reprimand in cases wherein the ~~defendant~~ respondent has violated one or more provisions of the Rules of Professional Conduct, and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure;

(8) to issue a censure in cases wherein the ~~defendant~~respondent has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the ~~defendant's~~respondent's license;

. . .

(10) to include in any order of admonition, reprimand, or censure a provision requiring the ~~defendant~~respondent to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court;

(11) in its discretion, to refer grievances primarily attributable to unsound law office management to a program of law office management training approved by the State Bar in accordance with Rule .0112(i) of this ~~subchapter.~~ subchapter;

(12) in its discretion, to refer grievances primarily attributable to the respondent's substance abuse or mental health problem to the Lawyer Assistance Program in accordance with Rule .0112(j) of this ~~subchapter.~~subchapter;

(13) in its ~~discretion~~discretion, to refer grievances primarily attributable to the respondent's failure to employ sound trust accounting techniques to the trust account supervisory program in accordance with Rule .0112(k) of this ~~subchapter.~~subchapter;

(14) to operate the Attorney Client Assistance Program (ACAP). Functions of ACAP can include without limitation:

(a) assisting clients and ~~attorneys~~lawyers in resolving issues arising in the ~~client/attorney~~client/lawyer relationship that might be resolved without the need to open grievance files; and

(b) operating the Fee Dispute Resolution ~~Program.~~ Program;

(15) to consider and decide whether to follow the recommendation of a grievance review panel; and

(16) to perform such other duties as the council may direct.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 3, 1999; December 20, 2000; August 23, 2012; September 25, 2019; December 20, 2023.

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 - The Grievance Committee or any of its panels acting as the Grievance Committee with respect to grievances referred to it by the ~~chairperson~~chair of the Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. . . . The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the ~~chairperson~~chair of the Grievance Committee. . . . .

(b) Oaths and Affirmations - The ~~chairperson~~chair of the Grievance Committee will have the power to administer oaths and affirmations.

(c) Record of Grievance Committee's Determination - The ~~chairperson~~ chair will keep a record of the Grievance Committee's determination concerning each grievance and file the record with the secretary.

(d) Subpoenas - The ~~chairperson~~chair will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The ~~chairperson~~chair may designate the secretary to issue such subpoenas.

. . .

(g) Quorum Requirement - . . . The ~~chairperson~~chair will not be counted for quorum purposes and will be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(h) Results of Grievance Committee Deliberations - If probable cause is found and the committee determines that a hearing is necessary, the ~~chairperson~~chair will direct the counsel to prepare and file a complaint against the respondent. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the ~~chairperson's~~chair's signature an admonition, reprimand, or censure. . . . .

. . .

(k) Admonitions, Reprimands, and Censures

(1) . . . .

. . .

(3) Factors that shall be considered in determining whether the violation of the Rules is minor and warrants issuance of an admonition include, but are not limited to, the following:

(A) . . . ;

. . .

(J) imposition of admonition appropriately acknowledges the minor nature of the violation(s) of the ~~Revised~~ Rules of Professional Conduct;

. . . .

(l) Procedures for Admonitions, Reprimands, and Censures

(1) . . .

. . .

(4) . . . An extension of time may be granted by the ~~chairperson~~chair of the Grievance Committee for good cause shown. . . . .

. . .

(m) There shall be a grievance review panel of the Grievance Committee. For each review conducted, the chair shall appoint a panel consisting of the chair, two vice-chairs, and two other members of the Grievance Committee, including one public member. The panel shall not include any member who serves on the subcommittee that was assigned to address the underlying grievance file. The chair shall serve as the chair of the panel. If the chair or either of the two vice-chairs from the other subcommittees served on the subcommittee that issued the discipline or are otherwise unable to serve on the review panel, the chair may appoint a substitute member or members of the committee to serve on the review panel in the place of the chair or in the place of such vice-chair or vice-chairs.

(1) The panel shall have the following powers and duties:

(A) Upon a timely-filed written request by a grievance respondent, to review an order of public discipline issued to the respondent by the Grievance Committee.

(i) A written request for review must be filed with the secretary of the State Bar within 15 days of service of the public discipline upon the respondent.

(ii) The written request shall contain the grounds upon which the respondent believes review is warranted and may include supporting documentary evidence that has not previously been submitted to the Grievance Committee.

(iii) The respondent shall be entitled to be represented by legal counsel at the respondent's expense. The respondent or the respondent's legal counsel and legal counsel for the State Bar shall be entitled to appear and to present oral arguments to the panel. The panel's review shall be conducted upon the written record and oral arguments. Neither the respondent nor the State Bar may present live testimony or compel the production of books, papers, and other writings and documents in connection with a request for review. The panel may, in its discretion, question the respondent, legal counsel for the respondent, and legal counsel for the State Bar.

(iv) The panel shall consider the request for review, any documentation submitted in support of the request for review, and all materials that were before the Grievance Committee when it made its decision. The respondent shall be entitled to receive all material considered by the panel other than attorney-client privileged communications of the Office of Counsel and work product of the Office of Counsel. The panel shall determine whether the public discipline issued by the Grievance Committee is appropriate in light of all material considered by the panel.

(a) After considering the request for review, oral arguments, and the documentary record, the panel may, by majority vote, either concur in the public discipline issued by the Grievance Committee or remand the grievance file to the Grievance

Committee with its recommendation for a different disposition.

(b) The panel shall prepare a memorandum communicating its determination to the respondent and to the Office of Counsel. The memorandum will not constitute an order and will not contain findings of fact, conclusions of law, or the rationale for the panel's determination.

(c) The Grievance Committee shall act upon a remand at its next regularly scheduled meeting.

(d) Upon remand, the Grievance Committee may affirm the public discipline that it issued or may reach a different disposition of the grievance file.

(e) The decision of the Grievance Committee upon remand is final, and its decision is not subject to further consideration by the Grievance Committee.

(f) Within 15 days after service upon the respondent of (i) the panel's memorandum concurring in the original public discipline issued by the Grievance Committee, or (ii) the Grievance Committee's final decision upon remand after review, the respondent may refuse the public discipline imposed by the Grievance Committee and request a hearing before the commission. Such refusal and request shall be in writing, addressed to the Grievance Committee, and served upon the secretary of the State Bar by certified mail, return receipt requested.

(v) Second or subsequent requests for review of Grievance Committee action in the same file will not be considered.

(vi) A request for review is in addition to and not in derogation of all procedural and substantive rights contained in the Discipline and Disability Rules of the State Bar.

(2) All proceedings and deliberations of the panel shall be conducted in a manner and at a time and location to be determined by the chair of the Grievance Committee. Reviews may be conducted by videoconference in the discretion of the chair.

(3) All proceedings of the panel are closed to the public. Neither the respondent nor legal counsel for the respondent and the State Bar shall be privy to deliberations of the panel. All documents, papers, letters, recordings, electronic records, or other documentary materials, regardless of physical form or characteristic, in the possession of the panel are confidential and are not public records within the meaning of Chapter 132 of the General Statutes.

(~~mm~~n) Disciplinary Hearing Commission Complaints - Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the ~~chairperson~~chair of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the ~~chairperson~~chair of the Grievance Committee.

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; December 20, 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 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 October 27, 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 attachment:

ATTACHMENT 2: 27 N.C.A.C. 01D, Section .1500, Rule .1501, *Scope, Purpose and Definitions*

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 October 27, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of December, 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 20th day of December, 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 20th day of December, 2023.

s/Riggs, J.
For the Court

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

27 NCAC 01D .1501 SCOPE, PURPOSE AND DEFINITIONS

(a) Scope

. . . .

(b) Purpose

The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve. The North Carolina State Bar, under Chapter 84 of the General Statutes of North Carolina, is charged with the responsibility of providing rules of professional conduct and with disciplining ~~attorneys~~ lawyers who do not comply with such rules. The ~~Revised~~ Rules of Professional Conduct adopted by the North Carolina State Bar and approved by the Supreme Court of North Carolina require that lawyers adhere to important ethical standards, including that of rendering competent legal services in the representation of their clients.

. . .

~~It has also become clear that in order to render legal services in a professionally responsible manner, a lawyer must be able to manage his or her law practice competently. Sound management practices enable lawyers to concentrate on their clients' affairs while avoiding the ethical problems which can be caused by disorganization.~~

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the ~~Revised~~ Rules of Professional Conduct themselves—to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

(c) Definitions

(1) "Active member" . . . .

. . .

(5) "Continuing legal education" or "CLE" is any legal, judicial or other educational program accredited by the ~~board.~~Board. Generally, CLE will include educational

programs designed principally to maintain or advance the professional competence of lawyers and/or to expand an appreciation and understanding of the professional responsibilities of lawyers.

. . .

(7) "Credit hour" . . . .

(8) "Ethics" shall mean programs or segments of programs devoted to (i) professional responsibility, or (ii) professionalism as defined in Rules .1501(c)(14) and (15) below.

(89) "Inactive member" . . . .

(910) "In-house continuing legal education" shall mean courses or programs offered or conducted by law firms, either individually or in connection with other law firms, corporate legal departments, or similar entities primarily for the education of their members. ~~The board may exempt from this definition those programs which it finds~~

~~(A) to be conducted by public or quasi-public organizations or associations for the education of their employees or members;~~

~~(B) to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law.~~

(~~10~~11) A "newly admitted active member" is one who becomes an active member of the North Carolina State Bar for the first ~~time, has been reinstated, or has changed from inactive to active status.~~time.

(~~11~~12) "On demand" . . . .

(~~12~~13) "Online" program . . . .

~~(13) "Participatory CLE" shall mean programs or segments of programs that encourage the participation of attendees in the educational experience through, for example, the analysis of hypothetical situations, role playing, mock trials, roundtable discussions, or debates.~~

(14) "Professional responsibility" shall mean those programs or segments of programs devoted to ~~a)~~ (i) the substance, underlying rationale, and practical application of the Rules of Professional Conduct; ~~b~~ (ii) the professional obligations of the lawyer to the client, the court, the public, and other lawyers; or ~~c)~~ (iii) moral philosophy and

ethical decision-making in the context of the practice of ~~law;~~law. ~~and d) the effects of stress, substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities and the prevention, detection, treatment, and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions. This definition shall be interpreted consistent with the provisions of Rule .1501(c)(4) or (6) above.~~

(15) "Professionalism" . . . .

~~(16) "Registered sponsor" shall mean an organization that is registered by the board after demonstrating compliance with the accreditation standards for continuing legal education programs as well as the requirements for reporting attendance and remitting sponsor fees for continuing legal education programs.~~

(~~17~~16) "Rules" shall mean the provisions of the continuing legal education rules established by the Supreme Court of North Carolina ~~(Section .1500 of this subchapter)~~.

(~~18~~17) "Sponsor" is any person or entity presenting or offering to present one or more continuing legal education ~~programs, whether or not an accredited sponsor.~~programs.

(18) "Professional well-being" (PWB) is a program focused on the relationship between stressors inherent in the profession, competence, professionalism, and fitness to practice. Topics may include the prevention, detection, treatment, and etiology of a range of substance use and mental health conditions, as well as resources available for assistance and strategies for improving resilience and well-being. Experiential exercises, practices, or demonstrations of tools for improving resilience and well-being are permitted provided they do not exceed a combined total of 20 minutes in any 60-minute presentation.

(19) "Technology training" shall mean a program, or a segment of a program, devoted to education on information technology (IT) or cybersecurity (*see* N.C. Gen. Stat. §_143B-1320(a)(11), or successor statutory provision, for a definition of "information technology"), including education on an information technology product, device, platform, application, or other tool, process, or ~~methodology.~~methodology that is specific or uniquely suited to the practice of law. A technology training program must

have the primary objective of enhancing a lawyer's proficiency as a lawyer. ~~To be eligible for CLE accreditation as a technology training program, the program must satisfy the accreditation standards in Rule .1519 and the course content requirements in Rule .1602(e) of this subchapter.~~

~~(20) "Year" shall mean calendar year.~~

(20) "Registered Sponsor" shall mean an organization that is registered by the Board after meeting the eligibility standards in Rule .1522(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 6, 1997; March 3, 1999; June 7, 2001; March 3, 2005; March 8, 2007; October 9, 2008; August 25, 2011; April 5, 2018; September 20, 2018; September 25, 2019; December 20, 2023.

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