NORTH CAROLINA REPORTS

VOLUME 363

SUPREME COURT OF NORTH CAROLINA

6 FEBRUARY 2009

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CITE THIS VOLUME
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IN MEMORIAM

DAVID M. BRITT

ASSOCIATE JUSTICE
31 AUGUST 1978 - 31 JULY 1982

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice
SARAH PARKER

Associate Justices

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ROBERT H. EDMUNDS, JR.
EDWARD THOMAS BRADY
PAUL MARTIN NEWBY
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON

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I. BEVERLY LAKE, JR.

Former Justices

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1. Deceased 5 May 2009.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	J. Richard Parker[1]	Manteo
	Jerry R. Tillett	Manteo
	J. Carlton Cole[2]	Hertford
2	William C. Griffin, Jr.[3]	Williamston
	Wayland Sermons[4]	Washington
3A	W. Russell Duke, Jr.	Greenville
	Clifton W. Everett, Jr.	Greenville
6A	Alma L. Hinton	Halifax
6B	Cy A. Grant, Sr.	Windsor
7A	Quentin T. Sumner	Rocky Mount
7B	Milton F. (Toby) Fitch, Jr.	Wilson
7BC	Walter H. Godwin, Jr.	Wilson
	Second Division	
3B	Benjamin G. Alford	New Bern
	Kenneth F. Crow	New Bern
	John E. Nobles, Jr.	Greenville
4A	Russell J. Lanier, Jr.	Kenansville
4B	Charles H. Henry	Jacksonville
5	W. Allen Cobb, Jr.	Wilmington
	Jay D. Hockenbury	Wilmington
	Phyllis M. Gorham	Wilmington
8A	Paul L. Jones	Kinston
8B	Arnold O. Jones II	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith III	Yanceyville
10	Donald W. Stephens	Raleigh
	Abraham P. Jones	Raleigh
	Howard E. Manning, Jr.	Raleigh
	Michael R. Morgan	Raleigh
	Paul C. Gessner	Raleigh
	Paul C. Ridgeway	Raleigh

DISTRICT	JUDGES	ADDRESS
14	Orlando F. Hudson, Jr.	Durham
	A. Leon Stanback, Jr.[5]	Durham
	Ronald L. Stephens	Durham
	Kenneth C. Titus	Durham
	James E. Hardin, Jr.[6]	Durham
15A	J. B. Allen, Jr.	Burlington
	Robert F. Johnson[7]	Graham
15B	Carl Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill
	Fourth Division	
11A	Franklin F. Lanier	Buies Creek
11B	Thomas H. Lock	Smithfield
12	E. Lynn Johnson	Fayetteville
	Gregory A. Weeks	Fayetteville
	Jack A. Thompson	Fayetteville
	James F. Ammons, Jr.	Fayetteville
13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
16A	Richard T. Brown	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	James Gregory Bell	Lumberton
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Richard W. Stone	Wentworth
17B	A. Moses Massey	Mt. Airy
	Andy Cromer	King
18	Catherine C. Eagles	Greensboro
	Henry E. Frye, Jr.[8]	Greensboro
	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig III	Greensboro
	R. Stuart Albright	Greensboro
	Patrice A. Hinnant[9]	Greensboro
19B	Vance Bradford Long	Asheboro
21	Judson D. DeRamus, Jr.	Winston-Salem
	William Z. Wood, Jr.	Wiinston-Salem
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	Winston-Salem
23	Edgar B. Gregory	North Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	John L. Holshouser, Jr.	Salisbury

DISTRICT	JUDGES	ADDRESS
19D	James M. Webb	Whispering Pines
20A	Tanya T. Wallace	Rockingham
	Kevin M. Bridges	Oakboro
20B	W. David Lee	Monroe
22A	Christopher Collier	Mooresville
	Joseph Crosswhite	Statesville
22B	Mark E. Klass	Lexington
	Theodore S. Royster, Jr.	Lexington
	Seventh Division	
25A	Beverly T. Beal	Lenoir
	Robert C. Ervin	Morganton
25B	Timothy S. Kincaid	Hickory
	Nathaniel J. Poovey	Hickory
26	Robert P. Johnston[10]	Charlotte
	W. Robert Bell	Charlotte
	Richard D. Boner	Charlotte
	J. Gentry Caudill	Charlotte
	David S. Cayer[11]	Charlotte
	Yvonne Evans	Charlotte
	Linwood O. Foust	Charlotte
	Eric L. Levinson[12]	Charlotte
	F. Lane Williamson[13]	Charlotte
27A	Jesse B. Caldwell III	Gastonia
	Timothy L. Patti	Gastonia
27B	Forrest Donald Bridges	Shelby
	James W. Morgan	Shelby
	Eighth Division	
24	James L. Baker, Jr.	Marshall
	Charles Phillip Ginn	Marshall
28	Dennis Jay Winner	Asheville
	Alan Z. Thornburg	Asheville
29A	Laura J. Bridges	Marion
29B	Mark E. Powell	Rutherfordton
30A	James U. Downs	Franklin
30B	Bradley B. Letts	Sylva

SPECIAL JUDGES

Marvin K. Blount[14]	Greenville
Albert Diaz	Charlotte
Richard L. Doughton	Sparta

DISTRICT	JUDGES	ADDRESS
	A Robinson Hassell	Greensboro
	D. Jack Hooks, Jr.	Whiteville
	Lucy Noble Inman[15]	Raleigh
	Jack W. Jenkins	Morehead City
	John R. Jolly, Jr.	Raleigh
	Shannon R. Joseph	Raleigh
	Calvin E. Murphy	Charlotte
	William R. Pittman	Raleigh
	Ripley Eagles Rand	Raleigh
	Ben F. Tennille	Greensboro
	Cressie H. Thigpen, Jr.	Raleigh
	Gary E. Trawick, Jr.	Burgaw

EMERGENCY JUDGES

	W. Douglas Albright	Greensboro
	Steve A. Balog	Burlington
	Michael E. Beale	Rockingham
	Henry V. Barnette, Jr.	Raleigh
	Anthony M. Brannon	Durham
	Stafford G. Bullock	Raleigh
	Narley L. Cashwell[16]	Raleigh
	C. Preston Cornelius	Mooresville
	B. Craig Ellis	Laurinburg
	Ernest B. Fullwood	Wilmington
	Zoro J. Guice, Jr.	Rutherfordton
	Thomas D. Haigwood	Greenville
	Michael E. Helms[17]	North Wilkesboro
	Clarence E. Horton, Jr.	Kannapolis
	Donald M. Jacobs[18]	Raleigh
	Clifton E. Johnson[19]	Charlotte
	Charles C. Lamm, Jr.	Boone
	James E. Lanning[20]	Charlotte
	Gary Lynn Locklear	Pembroke
	Jerry Cash Martin	King
	J. Richard Parker[21]	Manteo
	James E. Ragan III	Oriental
	Donald L. Smith	Raleigh
	James C. Spencer, Jr.[22]	Durham
	A. Leon Stanback[23]	Durham
	Susan Chandler Taylor[24]	Albemarle
	John M. Tyson	Fayetteville
	George L. Wainwright	Morehead City

DISTRICT	JUDGES	ADDRESS

RETIRED/RECALLED JUDGES

Frank R. Brown	Tarboro
James C. Davis	Concord
Marvin K. Gray	Charlotte
Larry G. Ford	Salisbury
Knox V. Jenkins	Smithfield
John B. Lewis, Jr.	Farmville
Robert D. Lewis	Asheville
Julius A. Rousseau, Jr.	North Wilkesboro
Thomas W. Seay	Spencer
Ralph A. Walker, Jr.	Raleigh

1. Retired 1 October 2009.
2. Appointed and sworn in 1 September 2009.
3. Retired 30 June 2009.
4. Appointed and sworn in 4 September 2009.
5. Resigned 31 August 2009.
6. Appointed and sworn in 22 September 2009.
7. Appointed and sworn in 19 February 2010 to replace James Clifford Spencer, Jr., who retired 31 July 2009.
8. Retired 31 July 2009.
9. Appointed and sworn in 15 Oceober 2009.
10. Retired 12 January 2010.
11. Resigned 31 March 2009.
12. Appointed and sworn in 2 July 2009.
13. Appointed and sworn in 2 April 2010.
14. Appointed and sworn in 1 July 2009.
15. Appointed and sworn in 30 April 2010.
16. Resigned 25 August 2009.
17. Resigned 21 December 2009.
18. Resigned 31 July 2009.
19. Deceased 25 June 2009.
20. Resigned 8 June 2009.
21. Appointed and sworn in 26 October 2009.
22. Appointed and sworn in 1 August 2009.
23. Appointed and sworn in 17 November 2009.
24. Resigned 7 February 2010.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	C. Christopher Bean (Chief)	Edenton
	Edgar L. Barnes	Manteo
	Amber Davis	Wanchese
	Eula E. Reid	Elizabeth City
	Robert P. Trivette[1]	Kitty Hawk
2	Samuel G. Grimes (Chief)	Washington
	Michael A. Paul	Washington
	Regina Rogers Parker	Williamston
	Christopher B. McLendon	Williamston
3A	David A. Leech (Chief)	Greenville
	Patricia Gwynett Hilburn	Greenville
	Joseph A. Blick, Jr.	Greenville
	G. Galen Braddy	Greenville
	Charles M. Vincent	Greenville
3B	Jerry F. Waddell (Chief)	New Bern
	Cheryl Lynn Spencer	New Bern
	Paul M. Quinn	Morehead City
	Karen A. Alexander	New Bern
	Peter Mack, Jr.	New Bern
	L. Walter Mills	New Bern
4	Leonard W. Thagard (Chief)	Clinton
	Paul A. Hardison	Jacksonville
	William M. Cameron III	Richlands
	Louis F. Foy, Jr.	Pollocksville
	Sarah Cowen Seaton	Jacksonville
	Carol Jones Wilson	Kenansville
	Henry L. Stevens IV	Kenansville
	James L. Moore, Jr.	Jacksonville
5	J. H. Corpening II (Chief)	Wilmington
	John J. Carroll III	Wilmington
	Rebecca W. Blackmore	Wilmington
	James H. Faison III	Wilmington
	Sandra Criner	Wilmington
	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch	Wilmington
	Jeffrey Evan Noecker	Wilmington
6A	Brenda G. Branch (Chief)	Halifax
	W. Turner Stephenson III	Halifax
	Teresa R. Freeman	Enfield
6B	Alfred W. Kwasikpui (Chief)	Jackson
	Thomas R. J. Newbern	Aulander
	William Robert Lewis II	Winton
7	William Charles Farris (Chief)	Wilson
	Joseph John Harper, Jr.	Tarboro
	John M. Britt	Tarboro
	Pell C. Cooper	Tarboro
	William G. Stewart	Wilson
	John J. Covolo	Rocky Mount
	Anthony W. Brown[2]	Rocky Mount
8	David B. Brantley (Chief)	Goldsboro

DISTRICT	JUDGES	ADDRESS
	Lonnie W. Carraway	Goldsboro
	R. Leslie Turner	Kinston
	Timothy I. Finan	Goldsboro
	Elizabeth A. Heath	Kinston
	Charles P. Gaylor III	Goldsboro
9	Daniel Frederick Finch (Chief)	Oxford
	J. Henry Banks	Henderson
	John W. Davis	Louisburg
	Randolph Baskerville	Warrenton
	S. Quon Bridges	Oxford
	Carolyn J. Yancy	Henderson
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry	Pelham
10	Robert Blackwell Rader (Chief)	Raleigh
	James R. Fullwood	Raleigh
	Anne B. Salisbury	Raleigh
	Kristin H. Ruth	Raleigh
	Craig Croom	Raleigh
	Jennifer M. Green	Raleigh
	Monica M. Bousman	Raleigh
	Jane Powell Gray	Raleigh
	Jennifer Jane Knox	Raleigh
	Debra Ann Smith Sasser	Raleigh
	Vinston M. Rozier, Jr.	Raleigh
	Lori G. Christian	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Ned Wilson Mangum	Raleigh
	Jacqueline L. Brewer	Apex
	Anna Elena Worley	Raleigh
	Margaret Eagles[3]	Raleigh
	Keith O. Gregory[4]	Raleigh
11	Albert A. Corbett, Jr. (Chief)	Smithfield
	Jacquelyn L. Lee	Sanford
	Jimmy L. Love, Jr.	Sanford
	Addie M. Harris-Rawls	Clayton
	Resson O. Faircloth II	Lillington
	Robert W. Bryant, Jr.	Lillington
	R. Dale Stubbs	Lillington
	O. Henry Willis, Jr.	Smithfield
	Charles Patrick Bullock	Lillington
	Paul A. Holcomb	Smithfield
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12	A. Elizabeth Keever (Chief)	Fayetteville
	Robert J. Stiehl III	Fayetteville
	Edward A. Pone	Fayetteville
	Kimbrell Kelly Tucker	Fayetteville
	John W. Dickson	Fayetteville
	Talmage Baggett	Fayetteville
	George J. Franks	Fayetteville
	David H. Hasty	Fayetteville
	Laura A. Devan	Fayetteville
	Toni S. King	Fayetteville

DISTRICT	JUDGES	ADDRESS
13	Jerry A. Jolly (Chief)	Tabor City
	Napoleon B. Barefoot, Jr.	Supply
	Marion R. Warren	Exum
	William F. Fairley	Southport
	Scott Ussery	Whiteville
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14	Elaine M. Bushfan (Chief)	Durham
	Ann E. McKown	Durham
	Marcia H. Morey	Durham
	James T. Hill	Durham
	Nancy E. Gordon	Durham
	William Andrew Marsh III	Durham
	Brian C. Wilks	Durham
15A	James K. Roberson (Chief)	Graham
	Bradley Reid Allen, Sr.	Graham
	G. Wayne Abernathy	Graham
	David Thomas Lambeth, Jr.	Graham
15B	Joseph M. Buckner (Chief)	Hillsborough
	Alonzo Brown Coleman, Jr.[6]	Hillsborough
	Charles T. L. Anderson[7]	Hillsborough
	Beverly A. Scarlett	Hillsborough
	Page Vernon	Hillsborough
	Lunsford Long[8]	Hillsborough
16A	William G. McIlwain (Chief)	Wagram
	Regina M. Joe	Raeford
	John H. Horne, Jr.	Laurinburg
16B	J. Stanley Carmical (Chief)	Lumberton
	Herbert L. Richardson	Lumberton
	John B. Carter, Jr.	Lumberton
	Judith Milsap Daniels	Lumberton
	William Jeffrey Moore	Pembroke
17A	Fredrick B. Wilkins, Jr. (Chief)	Wentworth
	Stanley L. Allen	Wentworth
	James A. Grogan	Wentworth
17B	Charles Mitchell Neaves, Jr. (Chief)	Elkin
	Spencer Gray Key, Jr.	Elkin
	Angela B. Puckett	Elkin
	William F. Southern III	Elkin
18	Joseph E. Turner (Chief)	Greensboro
	Wendy M. Enochs	Greensboro
	Susan Elizabeth Bray	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	Greensboro
	Theresa H. Vincent	Greensboro
	William K. Hunter	Greensboro
	Sherry Fowler Alloway	Greensboro
	Polly D. Sizemore	Greensboro
	Kimberly Michelle Fletcher	Greensboro
	Betty J. Brown	Greensboro
	Angela C. Foster	Greensboro
	Avery Michelle Crump	Greensboro
	Jan H. Samet[9]	Greensboro
19A	William G. Hamby, Jr. (Chief)	Concord

DISTRICT	JUDGES	ADDRESS
	Donna G. Hedgepeth Johnson	Concord
	Martin B. McGee	Concord
	Michael Knox	Concord
19B	Michael A. Sabiston (Chief)	Troy
	James P. Hill, Jr.	Asheboro
	Jayrene Russell Maness	Carthage
	Lee W. Gavin	Asheboro
	Scott C. Etheridge	Asheboro
	Donald W. Creed, Jr.	Asheboro
	Robert M. Wilkins	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	William C. Kluttz, Jr.	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
20A	Lisa D. Thacker (Chief)	Wadesboro
	Scott T. Brewer	Monroe
	Amanda L. Wilson	Rockingham
	William Tucker	Albemarle
20B	Christopher W. Bragg (Chief)	Monroe
	Joseph J. Williams	Monroe
	Hunt Gwyn	Monroe
	William F. Helms	Monroe
21	William B. Reingold (Chief)	Winston-Salem
	Chester C. Davis	Winston-Salem
	William Thomas Graham, Jr.	Winston-Salem
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lisa V. L. Menefee	Winston-Salem
	Lawrence J. Fine	Winston-Salem
	Denise S. Hartsfield	Winston-Salem
	George Bedsworth	Winston-Salem
	Camille D. Banks-Payne	Winston-Salem
22A	L. Dale Graham (Chief)	Taylorsville
	H. Thomas Church	Statesville
	Deborah Brown	Statesville
	Edward L. Hendrick IV	Statesville
	Christine Underwood	Statesville
22B	Wayne L. Michael (Chief)	Lexington
	Jimmy L. Myers	Mocksville
	April C. Wood	Statesville
	Mary F. Covington	Mocksville
	Carlton Terry	Lexington
	J. Rodwell Penry	Lexington
23	Mitchell L. McLean (Chief)	Wilkesboro
	David V. Byrd	Wilkesboro
	Jeanie Reavis Houston	Wilkesboro
	Michael D. Duncan	Wilkesboro
24	Alexander Lyerly (Chief)	Banner Elk
	William A. Leavell III	Bakersville
	R. Gregory Horne	Newland
	Theodore Wright McEntire	Newland
25	Robert M. Brady (Chief)	Lenoir

DISTRICT	JUDGES	ADDRESS
	Gregory R. Hayes	Hickory
	L. Suzanne Owsley	Hickory
	C. Thomas Edwards	Morganton
	Buford A. Cherry	Hickory
	Sherrie Wilson Elliott	Newton
	John R. Mull[10]	Morganton
	Amy R. Sigmon	Newton
	J. Gary Dellinger	Newton
	Robert A. Mullinax[11]	Newton
26	Lisa C. Bell (Chief)	Charlotte
	H. William Constangy	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Regan A. Miller	Charlotte
	Hugh B. Lewis	Charlotte
	Becky Thorne Tin	Charlotte
	Thomas Moore, Jr.	Charlotte
	Christy Townley Mann	Charlotte
	Timothy M. Smith	Charlotte
	Ronald C. Chapman	Charlotte
	Paige B. McThenia	Charlotte
	Jena P. Culler	Charlotte
	William Irwin Belk[12]	Charlotte
	Kimberly Y. Best-Staton	Charlotte
	Charlotte Brown-Williams	Charlotte
	John Totten	Charlotte
	Elizabeth Thornton Trosh	Charlotte
	Donnie Hoover	Charlotte
	Theofanis Xenophon Nixon	Charlotte
	Tyyawdi M. Hands	Charlotte
	Karen Eady-Williams[13]	Charlotte
27A	Ralph C. Gingles, Jr. (Chief)	Gastonia
	Angela G. Hoyle	Gastonia
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Thomas Gregory Taylor	Belmont
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	Anna F. Foster	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford	Shelby
28	Gary S. Cash (Chief)	Asheville
	Shirley H. Brown	Asheville
	Rebecca B. Knight	Asheville
	Marvin P. Pope, Jr.	Asheville
	Patricia Kaufmann Young	Asheville
	Sharon Tracey Barrett	Asheville
	J. Calvin Hill	Asheville
29A	C. Randy Pool (Chief)	Marion
	Laura Anne Powell	Rutherfordton
	J. Thomas Davis	Rutherfordton

DISTRICT	JUDGES	ADDRESS
29B	Athena F. Brooks (Chief)	Cedar Mountain
	David Kennedy Fox	Hendersonville
	Thomas M. Brittain, Jr.	Hendersonville
	Peter Knight	Hendersonville
30	Danny E. Davis (Chief)	Waynesville
	Steven J. Bryant	Bryson City
	Richlyn D. Holt	Waynesville
	Monica Hayes Leslie	Waynesville
	Richard K. Walker	Waynesville
	Danya L. Vanhook[14]	Waynesville

EMERGENCY DISTRICT COURT JUDGES

Thomas V. Aldridge, Jr.	Whiteville
Kyle D. Austin	Pineola
Sarah P. Bailey	Rocky Mount
Grafton G. Beaman	Elizabeth City
Ronald E. Bogle	Raleigh
James Thomas Bowen III	Lincolnton
Ronald W. Burris[15]	Albemarle
Hugh B. Campbell	Charlotte
Samuel Cathey	Charlotte
Shelly H. Desvouges	Raleigh
M. Patricia DeVine	Hillsborough
J. Patrick Exum[16]	Kinston
J. Keaton Fonvielle	Shelby
Thomas G. Foster, Jr.	Greensboro
Earl J. Fowler, Jr.	Asheville
Rodney R. Goodman	Kinston
Joyce A. Hamilton	Raleigh
Lawrence Hammond, Jr.	Asheboro
James W. Hardison	Williamston
James A. Harrill, Jr.	Winston-Salem
Resa Harris	Charlotte
Robert E. Hodges	Morganton
Shelly S. Holt	Wilmington
James M. Honeycutt	Lexington
Philip F. Howerton, Jr.[17]	Charlotte
William G. Jones	Charlotte
Lillian B. Jordan	Asheboro
David Q. LaBarre	Durham
William C. Lawton	Raleigh
James E. Martin	Greenville
Harold Paul McCoy, Jr.	Halifax
Lawrence McSwain	Greensboro
Fritz Y. Mercer, Jr.	Charlotte
William M. Neely	Asheboro
Nancy Black Norelli[18]	Charlotte
Otis M. Oliver	Dobson
Warren L. Pate	Raeford
Nancy C. Phillips	Elizabethtown

DISTRICT	JUDGES	ADDRESS
	Nathaniel P. Proctor[19]	Charlotte
	Dennis J. Redwing	Gastonia
	J. Larry Senter	Raleigh
	Joseph E. Setzer, Jr.	Goldsboro
	Russell Sherrill III	Raleigh
	Catherine C. Stevens	Gastonia
	J. Kent Washburn	Graham
	Charles W. Wilkinson, Jr.	Oxford

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Donald L. Boone	High Point
Joyce A. Brown	Otto
Daphene L. Cantrell	Charlotte
T. Yates Dobson, Jr.	Smithfield
Spencer B. Ennis	Graham
Harley B. Gaston, Jr.	Gastonia
Jane V. Harper	Charlotte
Roland H. Hayes	Gastonia
Walter P. Henderson	Trenton
Charles A. Horn, Sr.	Shelby
Jack E. Klass[20]	Lexington
C. Jerome Leonard, Jr.[21]	Charlotte
Edward H. McCormick	Lillington
J. Bruce Morton	Greensboro
Stanley Peele	Hillsborough
Margaret L. Sharpe	Winston-Salem
Samuel M. Tate	Morganton
John L. Whitley	Wilson

1. Appointed and sworn in 31 December 2009.
2. Appointed and sworn in 31 August 2009.
3. Appointed and sworn in 30 November 2009.
4. Appointed and sworn in 19 February 2010.
5. Appointed and sworn in 18 February 2010.
6. Retired 30 June 2009.
7. Resigned 30 June 2009.
8. Appointed and sworn in 9 September 2009.
9. Appointed and sworn in 20 January 2010.
10. Deceased 19 July 2009.
11. Appointed and sworn in 30 October 2009.
12. Resigned 6 November 2009.
13. Appointed and sworn in 17 February 2010.
14. Appointed and sworn in 19 June 2009.
15. Appointed and sworn in 2 January 2009. Resigned 3 April 2009.
16. Resigned 6 July 2009.
17. Appointed and sworn in 30 November 2009.
18. Resigned 21 August 2009.
19. Resigned 14 April 2009.
20. Resigned 15 October 2009.
21. Resigned 3 December 2009.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
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Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
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HAROLD D. BOWMAN
DAVID P. BRENSKILLE
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JILL LEDFORD CHEEK
LEONIDAS CHESTNUT
KATHRYN J. COOPER
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26	Kevin P. Tully	Charlotte
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CASES REPORTED

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ORDERS

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

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PETITIONS TO REHEAR

GENERAL STATUTES CITED

GENERAL STATUTES CITED

CONSTITUTION OF NORTH CAROLINA CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF J.T. (I), J.T. (II), A.J.

No. 155PA08

(Filed 6 February 2009)

Process and Service; Termination of Parental Rights— failure to issue summons on juveniles—subject matter jurisdiction—personal jurisdiction

The Court of Appeals erred in a termination of parental rights (TPR) case by determining ex mero motu that failure to name a juvenile as respondent or to serve a summons upon the juvenile in accordance with N.C.G.S. § 7B-1106(a) precludes the trial court from exercising subject matter jurisdiction over the action because: (1) these summons-related deficiencies implicate personal jurisdiction rather than subject matter jurisdiction; (2) although a challenge to a court's jurisdiction over the subject matter of an action cannot be waived at any point in the proceedings, objections to a court's exercise of personal jurisdiction must be raised by the parties themselves and can be waived in a number of ways; (3) the requirements of N.C.G.S. § 7B-1101 were satisfied and thus the trial court's subject matter jurisdiction attached upon issuance of a summons to respondent parents; (4) any form of general appearance waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons, and in the instant case the full participation of the

juveniles' guardian ad litem and the attorney advocate throughout the TPR proceedings, without objection to the trial court's exercise of personal jurisdiction over the juveniles, constituted a general appearance and served to waive any such objections that might have been made; and (4) it was inconsequential to the trial court's subject matter jurisdiction that no summons named any of the three juveniles as respondent and that no summons was ever served on the juveniles or their GAL since these errors are examples of insufficiency of process and insufficiency of service of process, respectively, both of which are defenses that implicate personal jurisdiction and thus can be waived by the parties.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 189 N.C. App. 206, 657 S.E.2d 692 (2008), vacating an order terminating parental rights filed on 24 August 2007 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Supreme Court on 16 December 2008.

Elizabeth Kennedy-Gurnee, Staff Attorney, for petitioner-appellant Cumberland County Department of Social Services, and Beth A. Hall, Attorney Advocate, for appellant Guardian ad Litem.

Richard Croutharmel for respondent-appellee mother.

Peter Wood for respondent-appellee father J.T.

NEWBY, Justice.

This case presents the issue of whether, in an action to terminate parental rights, failure to name a juvenile as respondent or to serve a summons upon the juvenile in accordance with N.C.G.S. § 7B-1106(a) precludes the trial court from exercising subject matter jurisdiction over the action. Because we hold that these summons-related deficiencies implicate personal jurisdiction rather than subject matter jurisdiction, we reverse the decision of the Court of Appeals.

On 6 October 2006, the Cumberland County Department of Social Services ("DSS") filed a petition to terminate respondents' parental rights with respect to the juveniles J.T. I, J.T. II, and A.J. That same day, a summons was issued naming, *inter alia*, M.J. (mother of all three juveniles) and J.T. (father of J.T. I and J.T. II) as respondents. The trial court filed an order of termination on 24 August 2007, from which respondent-mother M.J. and respondent-father J.T. appealed.

Although the parties did not raise the question, the Court of Appeals determined *ex mero motu* that "DSS failed to cause to be issued a summons to the juveniles, as required by [N.C.G.S.] § 7B-1106(a)(5) (2005)." *In re J.T. (I)*, 189 N.C. App. 206, 207, 657 S.E.2d 692, 693 (2008). Based on this finding, the Court of Appeals vacated the trial court's order without reaching the parties' assignments of error, stating that " 'the failure to issue a summons to the juvenile deprives the trial court of subject matter jurisdiction.' " *Id.* at 208, 657 S.E.2d at 693 (quoting *In re K.A.D.*, 187 N.C. App. 502, 504, 653 S.E.2d 427, 428-29 (2007)). This Court allowed discretionary review on the issue of whether the trial court lacked subject matter jurisdiction because of the failure to fully comply with N.C.G.S. § 7B-1106(a).

Section 7B-1106 of the General Statutes, which governs the issuance of summons in termination of parental rights ("TPR") proceedings, provides in relevant part: "[U]pon the filing of the petition, the court shall cause a summons to be issued. The summons shall be directed to the following persons . . . who shall be named as respondents: . . . (5) The juvenile." N.C.G.S. § 7B-1106(a) (2007). The statute further requires that the summons be served on the juvenile through the juvenile's guardian ad litem ("GAL") "if one has been appointed." *Id.* In the instant case, the summons did not name the juveniles as respondents, nor was it served on the juveniles through a GAL. Nonetheless, a GAL and an attorney advocate were appointed to represent the juveniles, and both fully participated in the TPR proceedings without objecting to the court's exercise of jurisdiction in the action or over the juveniles. We must now determine whether their participation served to waive any jurisdictional objections that could have been raised based on the failure to fully comply with N.C.G.S. § 7B-1106(a).

It is well settled that a challenge to a court's jurisdiction over the subject matter of an action cannot be waived at any point in the proceedings. *See id.* § 1A-1, Rule 12(h)(3) (2007). This is because "the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (citing *High v. Pearce*, 220 N.C. 266, 17 S.E.2d 108 (1941)). "When the record clearly shows that subject matter jurisdiction is lacking, the [c]ourt will take notice and dismiss the action *ex mero motu*" in order to avoid exceeding its authority. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) (citing *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962)); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80, 2 L. Ed. 60, 73-74

(1803) (in which the Supreme Court of the United States refused to issue mandamus to Secretary of State James Madison because such action would have been a constitutionally unauthorized exercise of jurisdiction).

Objections to a court's exercise of personal (in personam) jurisdiction, on the other hand, must be raised by the parties themselves and can be waived in a number of ways. *E.g.*, N.C.G.S. § 1A-1, Rule 12(h)(1) (2007) (stating that defense of lack of personal jurisdiction is waived if omitted from a Rule 12(g) motion or if it is neither raised by any other Rule 12 motion nor included in a responsive pleading). Broadly stated, any form of general appearance "waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons." *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d 355, 359 (1956) (citations omitted).

In any given case under the Juvenile Code, "[t]he issuance and service of process is the means by which the court obtains jurisdiction, and thus where *no* summons is issued, the court acquires jurisdiction over neither the parties nor the subject matter of the action." *In re Poole*, 151 N.C. App. 472, 475, 568 S.E.2d 200, 202 (2002) (Timmons-Goodson, J., dissenting) (citations omitted), *rev'd per curiam for reasons stated in dissenting opinion*, 357 N.C. 151, 579 S.E.2d 248 (2003). In the case *sub judice*, it is undisputed that a summons was issued upon the filing of the TPR petition by DSS. It is equally clear that the General Assembly has granted subject matter jurisdiction to the trial court to hear and determine TPR petitions within a prescribed set of circumstances. N.C.G.S. § 7B-1101 (2007). Because the jurisdictional requirements of N.C.G.S. § 7B-1101 were satisfied in the instant case, the trial court's subject matter jurisdiction was properly invoked upon the issuance of a summons.

It is inconsequential to the trial court's subject matter jurisdiction that no summons named any of the three juveniles as respondent and that no summons was ever served on the juveniles or their GAL. These errors are examples of insufficiency of process and insufficiency of service of process, respectively, both of which are defenses that implicate personal jurisdiction and thus can be waived by the parties. *See id.* § 1A-1, Rule 12(h)(1); *Harmon*, 245 N.C. at 86, 95 S.E.2d at 359. The full participation of the juveniles' GAL and the attorney advocate throughout the TPR proceedings, without objection to the trial court's exercise of personal jurisdiction over the juveniles, constituted a general appearance and served to waive any such

objections that might have been made. *See Harmon*, 245 N.C. at 86, 95 S.E.2d at 359. The trial court thus acquired and properly exercised jurisdiction over the juveniles. *Id.*

In summary, given that the requirements of N.C.G.S. § 7B-1101 were satisfied, the trial court's subject matter jurisdiction attached upon issuance of a summons. It is therefore unnecessary to make inquiry into the summons beyond a determination of whether a summons was issued. The deficiencies in the summons implicated the court's jurisdiction over the juveniles, not over the action as a whole, and any defenses arising from those deficiencies were waived by general appearance. The decision of the Court of Appeals is therefore reversed and this case is remanded to that court for consideration of the parties' assignments of error.

REVERSED AND REMANDED.

SAFT AMERICA INC. v. PLAINVIEW BATTERIES, INC., ENERGEX BATTERIES, INC., BERNIE R. ERDE, AND RUSSELL J. BLEEKER

No. 204A08

(Filed 6 February 2009)

Jurisdiction— personal jurisdiction—corporate officer and shareholder—minimum contacts with this state

The decision of the Court of Appeals that a nonresident corporate officer and principal shareholder had insufficient minimum contacts with this state to permit the exercise of personal jurisdiction over him in an action for breach of contract and unjust enrichment based upon unpaid purchase orders for goods delivered to two corporations is reversed for the reasons stated in dissenting opinion that the corporate actions of a defendant who is also an officer and principal shareholder of a corporation may be imputed to him for the purpose of deciding the issue of personal jurisdiction, and defendant had sufficient minimum contacts with this state so that the exercise of personal jurisdiction over him did not violate due process where it was undisputed that defendant was an officer and principal shareholder of both corporations; he visited this state at least once to conduct business

with plaintiff; he negotiated the terms of the pertinent contracts and was otherwise personally involved in the transactions at issue; and the contract was to be performed in this state.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 189 N.C. App. ——, 659 S.E.2d 39 (2008), affirming in part and reversing in part an order denying motions to dismiss entered on 5 April 2007 by Judge David S. Cayer in Superior Court, Burke County, and remanding for further proceedings. On 26 August 2008, the Supreme Court allowed a petition by defendant Energex Batteries, Inc. for discretionary review of additional issues. Heard in the Supreme Court 15 December 2008.

Moore & Van Allen PLLC, by Anthony T. Lathrop and Michael T. Champion, for plaintiff-appellant/appellee.

Law Offices of Scott M. Zucker Esq., by Cameron Gilbert, pro hac vice, for defendant-appellant Energex Batteries, Inc.

Byrd, Byrd, Ervin, Whisnat & McMahon, P.A., by Lawrence D. McMahon, Jr.; and Law Offices of Scott M. Zucker Esq., by Cameron Gilbert, pro hac vice, for defendant-appellee Bernie R. Erde.

No brief for defendants Plainview Batteries, Inc. and Russell J. Bleeker.

PER CURIAM.

As to the issue of the trial court's personal jurisdiction over defendant Bernie R. Erde, we reverse the decision of the Court of Appeals majority for the reasons stated in the dissenting opinion and instruct that court to reinstate the trial court's denial of Mr. Erde's motion to dismiss. We further conclude that the petition of defendant Energex Batteries, Inc. for discretionary review as to additional issues was improvidently allowed.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

JOSEPH HORRY, JR. v. DAVID H. WOODBURY, INDIVIDUALLY AND AS THE EXECUTOR OF THE ESTATE OF RUTH N. HORRY

No. 198A08

(Filed 6 February 2009)

Estates— beneficiary's action against executor—acts as attorney-in-fact—standing—claim for conversion

The decision of the Court of Appeals in an action by plaintiff estate beneficiary for alleged conversion by defendant, the executor of decedent's estate, based upon acts as decedent's attorney-in-fact prior to decedent's death is reversed for the reasons stated in the dissenting opinion that (1) plaintiff had standing to bring the action without making a demand upon defendant executor or petitioning the clerk of court for the executor's removal; and (2) plaintiff established a claim for conversion where defendant closed two bank accounts he and decedent had individually opened with decedent's funds and owned as joint tenants with right of survivorship and individually opened two new joint owner accounts with funds from the closed accounts by signing on the signature cards his name as owner and decedent's name as her attorney-in-fact; defendant's survivorship rights in the source accounts ended when the source accounts were closed; the signature cards for the new accounts did not comply with N.C.G.S. § 53-146.1 and thus did not create a valid right of survivorship in defendant because defendant was prohibited by N.C.G.S. § 32A-14.1(b) from using the power of attorney in favor of himself and decedent never personally signed the signature cards; and the funds in the new accounts thus belonged to plaintiff as the sole beneficiary of decedent's estate.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 189 N.C. App. 669, 659 S.E.2d 88 (2008), reversing and remanding orders entered on 21 September 2005 and 8 October 2005 by Judge Steve A. Balog in Superior Court, Durham County, and instructing the trial court to dismiss plaintiff's claims. Heard in the Supreme Court 19 November 2008.

Brady, Nordgren, Morton & Malone, PLLC, by Travis K. Morton, for plaintiff-appellant.

Hedrick Murray Bryson Kennett Mauch & Connor PLLC, by Josiah S. Murray, III, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

STATE OF NORTH CAROLINA v. MARIO LLAMAS-HERNANDEZ

No. 220A08

(Filed 6 February 2009)

Evidence— lay opinion testimony—substance was cocaine

The decision of the Court of Appeals finding no error in defendant's trial and conviction of trafficking in cocaine by possession of 28 grams or more but less than 200 grams is reversed for the reason stated in the dissenting opinion that the trial court erred by allowing two detectives to express lay opinions that a white powder substance found in an apartment leased by defendant was cocaine.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 189 N.C. App. 640, 659 S.E.2d 79 (2008), finding no error in a judgment entered 14 September 2006 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court 18 November 2008.

Roy Cooper, *Attorney General*, *by LaToya B. Powell*, *Assistant Attorney General*, *for the State.*

Kevin P. Tully, *Public Defender*, *by Julie Ramseur Lewis*, *Assistant Public Defender*, *for defendant-appellant.*

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

IN RE E.X.J. & A.J.J.

[363 N.C. 9 (2009)]

IN THE MATTER OF E.X.J. AND A.J.J., MINOR CHILDREN

No. 341A08

(Filed 6 February 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 191 N.C. App. ——, 662 S.E.2d 24 (2008), affirming a judgment and order entered 31 July 2007 by Judge Laura A. Powell in District Court, Rutherford County. Heard in the Supreme Court 17 November 2008.

Goldsmith, Goldsmith & Dews, P.A., by James W. Goldsmith, for petitioner-appellee Rutherford County Department of Social Services.

Pamela Newell Williams for appellee Guardian ad Litem.

*Susan J. Hall for respondent-appellant fath*er.

PER CURIAM.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. RYAN GABRIEL GARCELL

No. 465A06

(Filed 20 March 2009)

1. Appeal and Error; Jury— preservation of issues—challenge for cause of prospective juror—failure to follow statutory requirements

Although defendant contends the trial court abused its discretion in a capital first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by denying defendant's challenge for cause to the twelfth juror seated based on her personal knowledge of the victim, the victim's son, and defendant's ex-girlfriend, defendant failed to properly preserve this issue because: (1) although defendant met two of the three requirements of N.C.G.S. § 15A-1214(h) when he exhausted all of his peremptory challenges and had his renewal motion denied, he failed to satisfy the remaining requirement to renew his challenge as provided in N.C.G.S. § 15A-1214(i); and (2) the statutory procedure is mandatory and must be followed precisely.

2. Jury— capital selection—excusal for cause—death penalty views

The trial court did not abuse its discretion in a capital first-degree murder case by excusing three prospective jurors for cause based on their answers to questions concerning the death penalty because: (1) each of the three potential jurors made statements raising a substantial question regarding his or her ability to follow the law on the death penalty; and (2) the answers from all three prospective jurors ultimately revealed an unequivocal denial of their personal ability to consider the death penalty in the instant case.

3. Jury— voir dire—life sentence without parole

The trial court did not abuse its discretion in a capital first-degree murder case by sustaining the State's objections to voir dire questions concerning the prospective juror's views of a sentence of life without parole and whether the juror felt that the death penalty is more or less harsh than life in prison without parole because: (1) a defendant does not have a constitutional right to question the venire about parole; (2) defendant is guar-

anteed under N.C.G.S. § 15A-2002 that the trial court shall instruct the jury that a sentence of life imprisonment means a sentence of life without parole; and (3) the form of the questions defense counsel posed resembled those the Supreme Court previously analyzed and concluded the trial court rationally sustained the objections.

4. Evidence— letter from jail—relevancy

The trial court did not abuse its discretion in a capital first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by admitting into evidence under N.C.G.S. § 8C-1, Rule 401 the letter defendant wrote to his mother from jail, and concluding it was not unduly prejudicial under N.C.G.S. § 8C-1, Rule 403, because: (1) the letter constituted defendant's admission to the crime in his own words and thus was relevant to defendant's involvement in the crime and his deliberation of the murder; (2) defendant's account of the crime in the letter, although partly fictional, reflected a calculated murder of the victim for her money and goods without any provocation; (3) the letter was not needlessly cumulative because it was the only piece of evidence originating directly from defendant reflecting his acute memory of significant details from the crime scene; (4) defendant's brief dissected statements out of the letter highlighting their emotional nature that misrepresented the overall nature, relevancy, and use of the letter at trial; and (5) any emotional impact from the letter might have benefitted defendant since it could have suggested the nonstatutory mitigator defendant proposed that at the time of the offense defendant had developed to the mental/emotional age of only a 10-12 year old child, and defendant has little ground to complain on appeal regarding the letter's effect when defense counsel at trial asked the jury to study its significance as supportive of defendant's mitigating evidence.

5. Evidence— testimony—number of prior killings—plain error analysis

The trial court did not commit plain error in a capital first-degree murder case by allowing a witness's testimony concerning an extrajudicial question regarding how many people defendant had killed because: (1) defendant acknowledged the comment was brief, and the prosecutor immediately moved on to a different line of questioning; (2) nowhere else in nearly 1,400 pages of transcript does the question of defendant's prior involvement in

any other killings arise, and defendant points to nothing else to indicate the jury inferred defendant had been involved in killing other individuals; and (3) absent this statement, there was no probability the jury would have found defendant not guilty based on the overwhelming evidence of guilt, nor was the error so fundamental that it constituted a miscarriage of justice.

6. Evidence— testimony—violent acts and fear of defendant after crimes committed—plain error analysis

The trial court did not commit plain error in a capital first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by admitting the testimony of two witnesses concerning defendant's violent acts and their fear of defendant after the crimes occurred, because: (1) testimony of their fear had some tendency as circumstantial evidence to make the existence of defendant's guilt more probable; (2) the testimony exhibited the tension and stress defendant and his girlfriend displayed after committing the crimes; (3) defendant's outlandish response to an undercooked meal could have indicated nervousness, stress, or tension due to his suffering under the burden of committing the crimes and was relevant since it bore on defendant's relationship with his girlfriend, which was central to the defense's theory of the case at trial that his girlfriend could manipulate defendant into doing anything; (4) the evidence was not offered as mere character evidence for the purpose of proving that defendant acted in conformity therewith on a particular occasion; and (5) even assuming *arguendo* that the evidence was prejudicial, it cannot be concluded that the danger of unfair prejudice substantially outweighed the evidence's probative value, that absent its admission the jury would have probably found defendant not guilty, or that its admission caused a miscarriage of justice.

7. Evidence— extrajudicial witness statements—corroboration

The trial court did not err or commit plain error in a capital first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by admitting into evidence extrajudicial statements from three State witnesses because: (1) the trial court informed the jurors at length that they could consider statements made during the interviews only for corroboration purposes when they weighed the credibility of the witnesses' trial testimony; (2) the trial court explained that any statement made prior to this trial not under

oath cannot be used as evidence of anything that the State is complaining of or as substantive evidence of anything that occurred or did not occur; (3) the pertinent testimony was not hearsay since it was offered as corroboration evidence and not substantive evidence, and variations affect only the credibility of the evidence which is always for the jury; and (4) the testimony recounting the interviews reflected that the narration of events was substantially similar to each witness's in-court testimony.

8. Witnesses— sequestering—exposure to prior testimony

The trial court did not abuse its discretion in a capital first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by failing to sequester certain witnesses, which led to at least one witness testifying based on exposure to prior testimony, because: (1) despite citing due process concerns to the trial court, defendant failed to adequately develop a constitutional claim on appeal and has thus abandoned any such argument; and (2) defendant only raised a specific concern regarding the ability of the codefendants to hear one another's testimony, the trial court made a rational decision to sequester the codefendants, and beyond that, the trial court had little, if any, reason to conclude that sequestering all witnesses was beneficial to the administration of justice.

9. Criminal Law— prosecutor's argument—coparticipant not proud of crime and scared to death—broader context of describing how defendant was apprehended

The trial court did not abuse its discretion in a capital first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by failing to intervene *ex mero motu* during the guilt-innocence phase closing arguments when the prosecutor stated that defendant's girlfriend, a coparticipant in the crimes, was probably not proud of the crimes, she was probably scared to death, and that was why she told defendant's sister, because, (1) the prosecutor made this comment in the broader context of describing how defendant was apprehended by law enforcement partly since he confessed to the murder and partly because his girlfriend spoke with his sister about the crimes; (2) the comment regarding the girlfriend's emotional state and motive for speaking with defendant's sister was brief, and the statement had little bearing on the jury's ultimate determination of defendant's guilt; and (3) the prosecutor's com-

ment was brief and was not an unreasonable inference in light of the testimony from the sister's boyfriend concerning how "tense" the situation was after the date of the crimes at the residence he shared with defendant's sister, defendant, and defendant's girlfriend, and the boyfriend testified that defendant was "kind of touchy" and more easily angered.

10. Sentencing— polling jurors—failure to inquire why jurors requested reference to individual juror numbers

The Court of Appeals exercised its discretion under N.C. R. App. P. 2 and determined that the trial court did not err in a capital first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by failing to inquire why jurors requested to be referred to by individual juror numbers before the sentencing proceeding began the day after they returned verdicts of guilty and were polled by name because: (1) defendant's argument was based on pure speculation, any number of reasons could have motivated jurors' request for anonymity, and defendant acknowledged that ultimately the jurors' concern was unspecified and unknown; (2) without the trial court's receiving any information other than the bare request from the jury, it cannot be said that the trial court had a substantial reason to question jurors as to whether they had been exposed to improper and prejudicial matters; and (3) a request from the jury to be referred to by number and not by name is neither a de facto indicator that the jury has been improperly exposed to an external influence nor a de facto indicator of prejudice against defendant.

11. Sentencing— aggravating circumstances—previous violent felony conviction—second-degree kidnapping

The trial court did not commit plain error by submitting second-degree kidnapping convictions to the jury as support for finding the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person because: (1) it is logical to view the two counts of second-degree kidnapping as involving an inherent use or threat of violence when committed in the same course of action as the inherently violent crime of common law robbery that was also submitted to support this circumstance; (2) even assuming *arguendo* it was error to submit the kidnapping convictions, any possible error was harmless beyond a reasonable doubt and not unduly prejudicial to defendant's case when

defendant's conviction for common law robbery was sufficient alone for the jury to find the existence of the (e)(3) aggravator; and (3) there was no reasonable possibility the jury would have returned a different sentencing recommendation had the kidnapping convictions not been submitted to the jury when the jury found the N.C.G.S. § 15A-2000(e)(5) and (e)(9) aggravators, and the jury deliberated on defendant's punishment for approximately two and one-half hours.

12. Sentencing— aggravating circumstances—previous violent felony convictions—second-degree kidnapping—instructions

The trial court did not commit plain error in a capital sentencing proceeding in its definition of second-degree kidnapping in the instruction permitting the jury to use kidnapping convictions as support for finding the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance of a previous conviction of a felony involving the use or threat of violence to the person because: (1) the trial court's partial description of second-degree kidnapping was a correct statement of the law and was only a definition, not a peremptory instruction that defendant had in fact acted in any manner reflected therein; (2) in light of its inherent element of violence, submitting the common law robbery conviction alone was sufficient to support the (e)(3) aggravator, and that was the sole focus of the prosecutor during his closing argument when asking the jury to find that aggravating circumstance; (3) the jury found two other aggravating circumstances in addition to the (e)(3) aggravator to weigh against the mitigating circumstances, and jurors deliberated for approximately two and one-half hours before recommending death; and (4) no reasonable possibility existed that the jury's recommendation would have been different had no error occurred, the instruction was not so unduly prejudicial as to lead to the conclusion that justice was not done, and any possible error was harmless beyond a reasonable doubt.

13. Sentencing— motion for appropriate relief—second-degree kidnapping instruction—effective assistance of counsel

Defendant's motion for appropriate relief in a capital first-degree murder case regarding alleged errors, including the second-degree kidnapping instruction in a sentencing proceeding instruction on the prior violent felony aggravating circumstance and alleged ineffective assistance of counsel based on failure to object to submission of the kidnapping charges to the jury

or to the jury instruction regarding those charges, is denied because: (1) the pertinent instruction simply contained a partial definition based on N.C.G.S. § 14-39(a) that was a correct statement of the law and was not a peremptory instruction on any specific acts defendant had in fact committed; (2) in light of a prior common law robbery conviction and its inherent element of violence, the instruction did not tilt the scales of justice against defendant and constitute plain error when the jury would have come to the same result regardless of any error; (3) given defendant's description of the facts, the image of defendant placing the barrel of a firearm on the neck of a middle-aged female store clerk and ordering her to lie on the floor while she begs for her life so the robbery can be carried out left little, if any, doubt that violence or the threat of violence was used during the commission of these crimes; and (4) in regard to the ineffective assistance of counsel claim, defense counsel's performance at trial was objectively reasonable, and even assuming it was not, defendant clearly cannot demonstrate the requisite component of prejudice.

14. Sentencing— aggravating circumstances—prior violent felonies—mitigating circumstances—no significant history of prior criminal activity—effective assistance of counsel

The trial court did not commit plain error in a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(3) aggravator concerning prior violent felonies to the jury based on crimes including common law robbery and two counts of second-degree kidnapping that occurred before defendant was eighteen years old, and by its instruction stating the jury could consider the crimes in determining whether the (f)(1) mitigator of no significant history of prior criminal activity existed, because: (1) contrary to defendant's assertion, *Roper v. Simmons*, 543 U.S. 551 (2005), held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed; it concerned a defendant's age at the time he committed a capital crime instead of when his case was tried and he was sentenced; it did not preclude, or even address, the jury's ability during the sentencing proceeding to consider a defendant's acts or behavior that occurred before the age of eighteen; and defendant in this case committed a capital crime after he turned eighteen years old; (2) the jury was asked to consider the relevance of defendant's age at the time of the capital crime as a statutory and nonstatutory mit-

igating circumstance; and (3) in regard to defendant's alleged ineffective assistance of counsel claim pertaining to this issue, defendant can establish neither deficient performance by counsel nor prejudice when *Roper* has no application to this case and defense counsel specifically referred to *Roper* during the closing arguments of the penalty proceeding to persuade the jury to view defendant's age as mitigating.

15. Sentencing— statutory mitigating circumstances—defendant's age—instruction—effective assistance of counsel

The trial court did not commit plain error in a capital first-degree murder case by its instruction on the N.C.G.S. § 15A-2000(f)(7) mitigating circumstance regarding defendant's age at the time of the crime because: (1) the State did not stipulate to defendant's age as constituting a mitigating circumstance, and thus, a mandatory peremptory instruction was not required; (2) unless a defendant's age has mitigating value as a matter of law, a juror need consider the defendant's age as mitigating only if that juror finds by a preponderance of the evidence that his age has mitigating value; (3) although a forensic psychiatrist testified about defendant's "immaturity" and stated that defendant's emotional age was more of a 10 to 12 year old child who had not grown up, cross-examination drew out potential indicators of maturity in defendant's behavior including that defendant's prison record reflected calculated acts of violence committed against other inmates, and defendant was seen as a leader by some of his friends; and (4) in regard to defendant's alleged ineffective assistance of counsel claim pertaining to this issue, defendant can establish neither deficient performance by counsel nor prejudice when the jury instruction mirrored the pattern instruction and complied with the precedent of the Court of Appeals, defense counsel vigorously argued to the jury that defendant's age had mitigating value, and counsel submitted nonstatutory mitigators based on his client's age and immaturity for the jury's consideration.

16. Sentencing— nonstatutory mitigating circumstances—failure to request instruction at trial—effective assistance of counsel

The trial court did not err or commit plain error in a capital sentencing proceeding by failing to provide peremptory instructions *ex mero motu* on four nonstatutory mitigating circumstances because: (1) defense counsel did not request peremptory

instructions at trial and thus waived any entitlement defendant may have had to them; (2) while N.C. R. App. P. 10(c)(4) allows criminal defendants to make alleged errors not objected to at trial the basis of assignments of error when plain error is distinctly contended, the Court of Appeals has previously held that a trial court is not required to sift the evidence for every possible mitigating circumstance which the jury might find, nor must it determine on its own which mitigating circumstance is deserving of a peremptory instruction in defendant's favor; and (3) in regard to defendant's alleged ineffective assistance of counsel claim pertaining to this issue, defendant cannot demonstrate the requisite component of prejudice since even when a peremptory instruction is given, jurors may reject a nonstatutory mitigating circumstance if they do not deem it to have mitigating value.

17. Sentencing— nonstatutory mitigating circumstances—failure to give individualized instructions

The trial court did not commit plain error in a capital sentencing proceeding by failing to give individualized instructions on each of the nonstatutory mitigating circumstances submitted to the jury after having given individualized instructions on the three statutory mitigating circumstances submitted because: (1) contrary to defendant's assertion, the trial court in no way, explicitly or implicitly, suggested that the nonstatutory mitigators were of less significance or were less worthy of consideration; (2) all of the mitigators were referred to as being equal in importance, and the manner in which they were presented did nothing to value some below others; and (3) if anything, the trial court's manner of presentation spared the jury the experience of hearing the same individualized instruction repeated twenty-four times.

18. Sentencing— prosecutor's arguments—references to defendant's constitutional rights

The trial court did not abuse its discretion in a capital sentencing proceeding by failing to intervene *ex mero motu* to halt the prosecutor's references to defendant's constitutional rights during the closing argument because: (1) the Court of Appeals has declined to find gross impropriety in similar cases; (2) the prosecutor encouraged the jury to consider that the victim as a human being possessed certain "rights," and the jury needed to contemplate its decision in light of those rights and in light of defendant's complete disregard for his victim's rights; and (3) the prosecutor never disparaged defendant for exercising his rights

as an accused criminal, nor did he imply defendant somehow deserved the death penalty because he had exercised his rights.

19. Sentencing— prosecutor's arguments—community standard—personalized jurors to the crime

The trial court did not abuse its discretion in a capital sentencing proceeding by failing to intervene *ex mero motu* when the prosecutor allegedly urged the jury to deter crime in general and allegedly personalized the crime to the jurors during closing arguments because: (1) regarding the prosecutor's reference to a community standard, it is not improper for the State to remind the jurors that they are the voice and conscience of the community, and jurors may also be urged to appreciate the circumstances of the crime; (2) regarding comments that allegedly personalized the jurors to the crime, it is permissible for the prosecution to ask the jury to imagine the emotions and fear of a victim, and the prosecutor asked the jury to appreciate the circumstances of the crime and permissibly made arguments related to the nature of defendant's crime; (3) particularly when a prosecutor is arguing that the murder was especially heinous, atrocious, and cruel, it is permissible to ask jurors to imagine the situation based on the evidence and to facilitate a thorough and meticulous contemplation of the crime; (4) the prosecutor never descended to degrading comments or conclusory "name-calling"; and (5) even assuming *arguendo* the prosecutor's remarks were improper, it cannot be concluded that they were grossly improper to the extent they violated defendant's rights when viewed in the larger context of the prosecution's entire closing argument.

20. Sentencing— death penalty—proportionality

The trial court did not err by sentencing defendant to death in a first-degree murder case because: (1) the jury found three aggravating circumstances including under N.C.G.S. § 15A-2000(e)(3) that defendant had been previously convicted of a felony involving the use or threat of violence to the person; under N.C.G.S. § 15A-2000(e)(5) that the murder was committed while defendant was engaged in the commission of a robbery; and under N.C.G.S. § 15A-2000(e)(9) that the murder was especially heinous, atrocious, or cruel; (2) defendant manhandled, brutally choked, and strangled his victim, a seventy-one year old woman, to death within the perceived sanctuary of her own residence; (3) defendant's sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (4)

defendant's sentence of death was not excessive or disproportionate when compared to the penalties imposed in similar cases; (5) defendant was convicted of first-degree murder on the basis of malice, premeditation and deliberation and felony murder; and (6) the victim was needlessly murdered, only for the sake of defendant's desire for material possessions.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered on 4 April 2006 by Judge James U. Downs in Superior Court, Rutherford County, upon a jury verdict finding defendant guilty of first-degree murder. On 19 July 2007, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. On 7 December 2007, defendant filed a motion for appropriate relief in this Court. Heard in the Supreme Court 5 May 2008.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *and Daniel P. O'Brien*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Anne M. Gomez*, *Assistant Appellate Defender; and Center for Death Penalty Litigation*, *by Thomas K. Maher*, *for defendant-appellant.*

BRADY, Justice.

On 22 June 2004, defendant Ryan Gabriel Garcell robbed seventy-one year old Margaret Hutchins Bennick (Mrs. Bennick or victim) in her residence with the use of a firearm and then strangled her to death. On 30 March 2006, a Rutherford County jury declared defendant guilty of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant was sentenced to death for the first-degree murder. After reviewing the record and arguments of counsel, we find no error in defendant's convictions or sentences.

PROCEDURAL BACKGROUND

The Rutherford County Grand Jury returned a true bill of indictment on 12 July 2004 charging defendant with robbery with a dangerous weapon, a true bill of indictment on 27 September 2004 charging defendant with conspiracy to commit armed robbery, and a superseding true bill of indictment on 8 February 2006 charging defendant with first-degree murder. Defendant was tried capitally, and the jury returned verdicts of guilty on all charges on 30 March

2006. Following the required penalty proceeding, the jury made a binding recommendation on 4 April 2006 that defendant be sentenced to death, and the trial court entered judgment accordingly. The trial court also sentenced defendant to consecutive prison terms of 77 to 102 months for robbery with a dangerous weapon and 29 to 44 months for the conspiracy conviction. Defendant appeals the judgment of the trial court sentencing him to death pursuant to N.C.G.S. § 7A-27(a). Defendant's additional judgments are also before us because we allowed his motion to bypass the Court of Appeals as to his noncapital convictions.

FACTUAL BACKGROUND

In June 2004 defendant and his girlfriend, Kaylee Proctor, resided in a mobile home belonging to defendant's half sister and her boyfriend in Rutherford County. Proctor was pregnant with defendant's child. Neither defendant nor Proctor was gainfully employed, and the couple were in need of cash. Proctor initiated discussions with defendant about robbing Mrs. Bennick, who resided several miles from them on Old Caroleen Road. Mrs. Bennick had lived in Rutherford County all her life and worked part-time at a Goody's Family Clothing store. Proctor knew Mrs. Bennick from Proctor's earlier relationship with Mrs. Bennick's grandson.

The Crimes

Defendant and Proctor agreed to rob Mrs. Bennick. At their residence on 22 June 2004, defendant and Proctor divulged their plan to three of their friends, Jerome, Anthony, and Quntia Davis.[1] As defendant described the plan, he pointed a firearm at one of the boys, saying they could go along or stay at the residence "and be dead too." The three friends felt intimidated into accompanying defendant and Proctor. Shortly before leaving to carry out the robbery, defendant telephoned Mrs. Bennick's residence to confirm she was at home.[2] Defendant stated he would have to kill Mrs. Bennick after robbing her.

Defendant, Proctor, Jerome, Anthony, and Quntia traveled to Mrs. Bennick's residence in defendant's vehicle, with Proctor providing

1. Jerome and Anthony are brothers, and Quntia is their cousin. Their ages at the time of the crimes were 18, 16, and 14, respectively. The three often spent time with defendant, sometimes eating meals and spending the night at defendant's residence.

2. A record of the telephone calls received at the victim's residence on 22 June 2004 reflects a one minute phone call shortly before 4:00 p.m. initiated from defendant's residence.

directions. When they arrived, defendant made them wear latex gloves that he had brought. Defendant and Proctor went to the side door of the residence. When Mrs. Bennick came to the door, Proctor asked if Mrs. Bennick's grandson, Proctor's ex-boyfriend, was at the residence and then asked to use the telephone. Mrs. Bennick welcomed Proctor and defendant into her residence. At first they were pleasant with Mrs. Bennick, but Proctor became upset when Mrs. Bennick stated several times that she did not have any money. Defendant then grabbed the victim and placed his firearm to her head.

Proctor motioned for Jerome, Anthony, and Quntia to leave the vehicle and come inside the residence. Inside, Jerome and Anthony saw the victim lying facedown on the floor in a bedroom at the rear of the residence, and defendant was pointing his firearm at her. Jerome heard the victim begging, "Don't kill me," and promising she would not "call the cops" if defendant let her live. Defendant told his victim to be quiet or he would kill her. Defendant and Proctor told Jerome, Anthony, and Quntia to search for valuables. They ransacked the residence and carried groceries, a VCR, a game console, jewelry, a coin collection, and clothes outside to the vehicle. The victim pleaded with defendant to take anything he wanted as long as he did not kill her. Defendant stole the victim's automated teller machine (ATM) card and retrieved from her checkbook the personal identification number (PIN) required to access the victim's bank account.

Defendant then asked Proctor what she thought they should do with Mrs. Bennick. Proctor stated, "She can point me out. You are going to have to kill her. They are going to know who I am." For approximately ten minutes, defendant contemplated what to do while Proctor repeatedly encouraged him to kill the victim. Defendant told Jerome to come to the rear bedroom of the residence and to send Anthony and Quntia to the vehicle. As Anthony was leaving for the vehicle, he heard a gurgling sound coming from the rear bedroom. Jerome held the firearm while defendant sat on his victim's back and strangled her with his right arm around her neck. Proctor went outside to smoke a cigarette. When his victim ceased struggling or moving at all, defendant retrieved Proctor so she could check the victim's pulse. Jerome went to wait in the vehicle.

Approximately five minutes later, and after ransacking the residence, defendant and Proctor returned to the vehicle where Jerome, Anthony, and Quntia waited. With a smile on his face, defendant told them how he had "choked" and "killed" his victim and warned that

they better not "get cold feet" or they might "end up dead like that woman." Anthony testified defendant told them how, after strangling the victim, he wrapped an electrical extension cord around her neck and rode her limp body like a horse, saying, "Giddy up, giddy up." Defendant tied one end of the cord around his victim's neck and the other end around a bedpost in an attempt to make the murder appear like a suicide.

The group returned to defendant's residence for a short time and stored some of the stolen items in defendant's bedroom. They then went to defendant's mother's residence and presented her with some of the victim's jewelry, the coin collection, and the VCR as birthday presents. Defendant's mother inquired about his activities, and defendant confessed to the murder. Defendant's mother suggested ways to conceal his identity so he could use the stolen ATM card without being apprehended by law enforcement. The group traveled to various locations that night and the next night and used the ATM card. Before access to the victim's bank account was blocked on 25 June 2004, $1,790.35 in cash was fraudulently obtained.

The day after the murder, 23 June 2004, the victim's coworkers called her sister when she failed to arrive for her 5:00 p.m. work shift. Mrs. Bennick's grandson went to her residence and found it in disarray. He found her body in a rear bedroom of the residence with an electrical extension cord wrapped around her neck and tied to a bedpost.

Law enforcement immediately began an investigation. The crime scene yielded several items of direct and circumstantial evidence. The kitchen and other rooms were ransacked; a latex glove was found on the kitchen counter; latent fingerprint impressions indicated that the perpetrators wore gloves; and an ashtray with cigarette butts laid on the floor next to the victim's body.

During the last week of June 2004, defendant and his friend, Nate Whiteside, were shopping at a retail store when Nate noticed a newspaper story reporting the murder. Nate knew the victim, so he discussed the story with defendant. Defendant's reaction seemed unusual, making Nate suspicious. In response to Nate's persistent questioning, defendant confessed to the murder, described how he committed it, and showed Nate his firearm.

On 2 July 2004, the day after defendant's confession to him, Nate contacted law enforcement officials who asked him to telephone

defendant and speak with him more about the crimes so that the conversation could be recorded. That evening Nate telephoned defendant. Defendant made incriminating statements that were recorded and subsequently admitted into evidence at trial.

Law enforcement received additional information on 2 July 2004. Francia Lopez, defendant's older half sister with whom defendant and Proctor resided, learned of the victim's death and suspected defendant and Proctor may have been involved. She remembered their arrival at the residence on the evening of the murder carrying bags of groceries and other items. Several days after the murder, Lopez and Proctor traveled in defendant's vehicle to a retail store. Lopez asked Proctor if she and defendant were involved in the murder, and eventually, Proctor admitted the details of the crimes. Worried that defendant would harm anyone he suspected of reporting him to law enforcement, Lopez contacted her cousin in Florida who telephoned members of defendant's and Lopez's extended family. An out-of-state family member informed law enforcement in North Carolina about the details of Proctor's conversation with Lopez. Defendant was arrested the next day, 3 July 2004.

After defendant's arrest, law enforcement received several more pieces of critical evidence. Some of the victim's jewelry and her VCR were discovered at defendant's mother's residence. On 5 July 2004, defendant's mother gave a statement to law enforcement that included the following:

> On Tuesday after they killed that woman they came to my house with the stuff they stole. Ryan had an ATM card he had stolen. Ryan laid a pistol on the table to ask me how he could use the card at a ATM. I told him . . . he couldn't do it without getting caught. . . . I told him to cover his face and his body. . . .
>
> Ryan stole three hats from my boyfriend Luis . . . . Luis recognized the hat from the ATM [photos]. . . . They left to go to ATM and came back around 2:00 to 3:00 a.m.
>
> . . . They had a thousand dollars in a cigarette case. . . . Ryan gave me $160 and said, "If you know what's good for you, don't you say anything."

During the last week of June 2004, defendant visited a friend, Christopher Jamell Joiner, wearing new clothes and jewelry and carrying a new cell phone. Joiner asked defendant how he acquired the

items. Defendant told him, "Don't worry about it." On 2 July 2004, defendant visited Joiner again and gave his firearm to Joiner without explanation. After Joiner learned of defendant's arrest, he wrapped the firearm in a plastic bag and threw it into a wooded area on 4 July 2004. Joiner also contacted friends and members of the victim's family to tell them he had possessed the firearm. When requested, Joiner led law enforcement to the weapon on 6 July 2004 and identified the firearm at trial.

On 8 or 9 July 2004, Francia Lopez retrieved her mail, which at the time was being delivered to her mother's residence. Lopez discovered an envelope addressed to her mother having Rutherford County Jail as the return address. Lopez opened the envelope and found a letter written in defendant's handwriting to their mother. After reading the letter, Lopez turned it over to law enforcement. In the letter, defendant expressed his love for Proctor and for his unborn child. He told his mother he believed he would receive a sentence of death and Proctor would receive a sentence of life imprisonment. Defendant begged his mother to "take the charge for me," so that he and Proctor could be free to marry and raise their child. Defendant unfolded a story his mother was to tell law enforcement if she agreed to help him. In doing so, defendant corroborated evidence from the crime scene and corroborated many of the salient facts testified to by the State's witnesses, including that an "ashtray was right beside" the victim's body when she was killed and "an extension cord" was used to "tie[] her neck to the end of the bed, the post."

Forensic pathologist Donald Jason, M.D., conducted an autopsy on the victim's remains for the State Medical Examiner System. The autopsy revealed numerous bruises and abrasions on the victim's arms, legs, and face. Two sets of ligature grooves were found on the victim's neck, one in the front and another that went all the way around her neck. The marks around the neck were consistent with the testimony received regarding the electrical extension cord defendant wrapped around the victim's neck. The cause of death was strangulation due to either the closing of the victim's airway or the closing of the arteries that carried blood to her brain, or both.

After deliberating on the evidence presented by the State,[3] the jury returned guilty verdicts for first-degree murder, robbery with a dangerous weapon, and conspiracy to commit armed robbery. The trial then advanced to the penalty proceeding as required by statute.

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3. Defendant presented no evidence during the guilt phase of his trial.

Penalty Proceeding Evidence

At the penalty proceeding, the State presented certified copies of judgments from Carteret County showing defendant's convictions on 3 September 2002 for common law robbery and second-degree kidnapping. The State also presented victim impact evidence from the victim's brother-in-law, Bob Freeman; the victim's sister, Doris Huntsinger; and the victim's friend and coworker for two and a half years at Goody's Clothing Store, Joannie Davis. Huntsinger testified that she missed her sister every day and stated that she often thought about how her sister was "pleading" for her life but defendant "would not spare it." Davis related that she and the victim enjoyed shopping and eating meals together and that the victim had assisted Davis financially when she attended cosmotology school. Because of "too many memories," Davis quit working at Goody's after the murder.

Defendant presented evidence from various witnesses concerning his background. Defendant's mother, aunt, half sister, sister, and cousin testified concerning defendant's childhood relationship with his father. According to them, defendant's father was a strict disciplinarian who did not allow defendant to show emotion, and he sometimes would strike defendant for "insubordination" or make him do push-ups. They further testified that defendant's father appeared to have little time for defendant after defendant's parents separated and that after defendant was hospitalized for alcohol poisoning when he was seventeen years old, defendant resided with his aunt for about a year. Defendant's aunt could not believe defendant was capable of what he had done. She believed defendant's crimes were a product of his difficult childhood, of his never receiving proper help as a child, and of his relationship with Proctor, who often manipulated defendant. Defendant's mother and cousin also testified that Proctor alienated defendant from his family and that he was at Proctor's "beck and call" whenever she wanted something.

Several witnesses testified to defendant's tendency for outbursts of anger, including a case manager at Rutherford County Mental Health who diagnosed defendant with "intermittent explosiveness disorder" in December 2003. Defendant attended anger management counseling sessions and took medication for a chemical imbalance for a period of time. Nathan Robert Strahl, M.D., a forensic psychiatrist, approximated defendant's emotional age at the time of the crimes to be that of a ten to twelve year old child. Nonetheless,

defendant has never been determined to have a mental illness or to lack the mental capacity to commit a crime.

The jury found three statutory aggravating circumstances: the (e)(3) factor that defendant had been previously convicted of a felony involving the use or threatened use of violence to a person; the (e)(5) factor that defendant committed the murder while engaged in the commission of a robbery; and the (e)(9) factor that the murder was especially heinous, atrocious, or cruel. *See* N.C.G.S. § 15A-2000(e) (2007). One or more jurors found the statutory mitigating circumstance that defendant acted under duress or under the domination of another person. *See id.* § 15A-2000(f)(5) (2007). Additionally, one or more jurors found the existence of eight nonstatutory mitigating circumstances. The jury found the mitigating circumstances were insufficient to outweigh the aggravating circumstances and the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty when considered with the mitigating circumstances. The jury then returned a binding recommendation of death, and the trial court entered judgment accordingly.

ANALYSIS

Jury Selection Issues

Defendant asserts several assignments of error related to the jury selection process. At the outset, we note that "[o]ur trial courts have traditionally been afforded broad discretion to rule upon the manner and extent of jury voir dire, and this Court will not disturb such a ruling on appeal absent an abuse of that discretion." *State v. Murrell*, 362 N.C. 375, 388-89, 665 S.E.2d 61, 71 (2008) (citation omitted).

> A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record.

State v. Cummings, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (citations and internal quotation marks omitted), *cert. denied*, ––– U.S. –––, 128 S. Ct. 1888 (2008). Furthermore, "[t]o obtain relief relating to jury *voir dire*, a defendant must show not only an abuse of discretion, but also prejudice." *State v. Campbell*, 359 N.C. 644, 698-99, 617 S.E.2d 1, 35 (2005) (citation omitted), cert. denied, 547 U.S. 1073 (2006).

[1] Defendant first argues the trial court erred in denying his challenge for cause to the twelfth juror seated, Anita Bryant. During voir dire questioning, Ms. Bryant stated she knew defendant's ex-girlfriend and she knew the victim's son, Tommy, through her husband who had met Tommy in high school. She spoke with defendant's ex-girlfriend briefly about defendant's arrest after the crimes took place, but she had not had contact with Tommy for about six years. Additionally, roughly eighteen years ago, Ms. Bryant met the victim when visiting the victim's residence with her husband and Tommy. Ms. Bryant believed she would have an emotional reaction to being involved in the trial, but stated that she could be fair and "would not judge [defendant] before the evidence." Midway through the questioning, defense counsel requested that Ms. Bryant be excused for cause. The State objected, and the trial court denied defendant's request. After additional questioning and more assurances from Ms. Bryant that she would be fair and objective, defense counsel stated, "We're satisfied with this juror." However, defendant renewed his challenge for cause of Ms. Bryant orally and in writing before the jury was impaneled. Again, the State objected to the challenge, and the trial court denied defendant's request. Defendant argues the trial court violated his federal and state constitutional rights by allowing Ms. Bryant to sit on the jury panel. After review, we find defendant has failed to properly preserve this issue.

The procedure defendant was required to follow is established by N.C.G.S. § 15A-1214(h) and (i). Defendant met two of the three requirements of subsection (h) when he exhausted all of his peremptory challenges and had his renewal motion as to Ms. Bryant denied. However, defendant failed to satisfy the remaining requirement under subsection (h): that he renew his challenge as provided in subsection (i). The statutory procedure is mandatory and must be followed precisely. *See State v. Ball*, 344 N.C. 290, 304, 474 S.E.2d 345, 353 (1996), *cert. denied*, 520 U.S. 1180 (1997); *State v. Moseley*, 338 N.C. 1, 27, 449 S.E.2d 412, 428 (1994), *cert. denied*, 514 U.S. 1091 (1995); *State v. Sanders*, 317 N.C. 602, 607-08, 346 S.E.2d 451, 455 (1986). Because defendant failed to preserve this issue for appellate review, this assignment of error is overruled.

[2] Second, defendant asserts the trial court erred and violated his federal constitutional rights by excusing three prospective jurors for cause based on their answers to questions concerning the death penalty. On this issue, the Supreme Court of the United States has articulated that the

> standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." . . . [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. . . . [M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear" . . . . Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . *[T]his is why deference must be paid to the trial judge who sees and hears the juror.*

Wainwright v. Witt, 469 U.S. 412, 424-26 (1985) (emphasis added) (footnotes omitted). The test is essentially codified by N.C.G.S. § 15A-1212(8), which provides that a juror may be challenged for cause "on the ground that the juror . . . [a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." N.C.G.S. § 15A-1212(8) (2007). As *Wainwright* indicates, the trial court is afforded deference in this matter, and our standard of review is for abuse of discretion. *See State v. Garcia*, 358 N.C. 382, 403-04, 597 S.E.2d 724, 740-41 (2004), *cert. denied*, 543 U.S. 1156 (2005).

After reviewing their entire responses, we observe that each potential juror defendant claims was erroneously excused made statements raising a substantial question regarding in his or her ability to follow the law on the death penalty. We note, for instance, that prospective juror Mr. Park expressed a moral objection to the death penalty and stated he did not believe he could vote "for somebody's life to be taken away." Mr. Park also acknowledged that his feelings would interfere with, or make it extremely difficult for him to consider, the death penalty even if he found the aggravating circumstances outweighed the mitigating circumstances. Prospective juror Mr. Wilson stated several times he had a problem with, or did not believe in, capital punishment on religious and moral grounds. He added that although he believed the death penalty could be appropriate when a child was the victim, to him there was no other situation in which a sentence of death would ever be appropriate. Morever, Mr. Wilson indicated he was not willing to follow the trial court's instructions to even possibly consider the death penalty in the present case. Finally, prospective juror Ms. Wilson stated she believed the death

penalty was warranted in some situations, but she could never vote for that sentence herself because of her religious beliefs. She said she could never vote for the death penalty under any circumstance.

The statements of each of these prospective jurors support our conclusion that the trial court did not abuse its discretion in excusing them for cause. The trial court excused each one only after lengthy questioning from both the prosecution and the defense. The answers from each prospective juror ultimately revealed an unequivocal denial of their personal ability to consider the death penalty in the instant case. As such, the present case is similar to numerous others in which this Court found no abuse of discretion. *See*, *e.g.*, *State v. Rouse*, 339 N.C. 59, 76, 451 S.E.2d 543, 552 (1994) (noting prospective juror's statement that " 'I don't believe I could vote for the death penalty' "), *cert. denied*, 516 U.S. 832 (1995), *overruled in part on other grounds by State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309, *cert. denied*, 549 U.S. 875 (2006); *State v. Skipper*, 337 N.C. 1, 17-18, 446 S.E.2d 252, 260 (1994) (noting that juror's thoughts and views regarding death penalty seemed conflicting, but evinced a substantial impairment in her ability to follow the law), *cert. denied*, 513 U.S. 1134 (1995), *superseded on other grounds by statute*, N.C.G.S. § 15A-2002, *as recognized in State v. Price*, 337 N.C. 756, 448 S.E.2d 827 (1994), *cert. denied*, 514 U.S. 1021 (1995). The trial court made a rational decision to excuse the prospective jurors in question, and these assignments of error are overruled.

[3] Third, defendant claims the trial court erred by sustaining the State's objections to particular voir dire questions. During voir dire, defense counsel attempted to question a prospective juror in the following manner:

> [Defense counsel]: Do you also believe there are instances of first-degree murder—
>
> . . . .
>
> [Defense counsel]: —where life sentence is appropriate.
>
> [Answer]: Yes, if that's what the evidence shows.
>
> [Defense counsel]: Do you have any—well, tell me what you think of that sentence of life in prison without parole. Do you have any views about that?
>
> [Answer]: No.

[Prosecutor]: Well, objection.

THE COURT: Sustained.

[Defense counsel]: [The prosecutor] asked you about your views of the death penalty, did he not?

[Answer]: Yes.

[Defense counsel]: Do you have a feeling whether the death penalty is more or less harsh than life in prison without parole?

[Prosecutor]: Objection.

THE COURT: Sustained.

After this exchange, defense counsel continued questioning the prospective juror without objection for what amounted to several pages of transcript until he was satisfied with her.

Citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992), defendant alleges the trial court violated his right to adequately identify unqualified jurors. *Accord State v. Wiley*, 355 N.C. 592, 611-12, 565 S.E.2d 22, 37 (2002) (citing *inter alia*, *Morgan*), *cert. denied*, 537 U.S. 1117 (2003). Defendant contends his inability to engage in an adequate voir dire impaired his ability to exercise his challenges intelligently, and thus, based on *Wiley*, the trial court's action provides " 'grounds for reversal, irrespective of prejudice.' " *Id.* at 612, 565 S.E.2d at 37 (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986). In *Wiley*, this Court explained:

> [A] defendant in a capital trial must be allowed to make inquiry as to whether a particular juror would automatically vote for the death penalty. Within this broad principle, however, the trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled; its rulings in this regard will not be reversed absent a showing of abuse of discretion.

Id. (citations and internal quotation marks omitted). There are several rational grounds for the trial court's sustaining the objections. In *State v. Neal*, the defendant made similar arguments concerning his ability to question prospective jurors "as to their understanding of the meaning of a sentence of life without parole." 346 N.C. 608, 617, 487 S.E.2d 734, 739 (1997), *cert. denied*, 522 U.S. 1125 (1998). This Court noted that a defendant does not have a " 'constitutional right to question the venire about parole.' " *Id.* at 617, 487 S.E.2d at 740 (quoting

State v. Spruill, 338 N.C. 612, 638, 452 S.E.2d 279, 292 (1994), *cert. denied*, 516 U.S. 834 (1995)). To the extent defense counsel's questions were sufficiently covered under *Neal*, they were objectionable and the trial court did not abuse its discretion. Furthermore, defendant is guaranteed that the trial court "shall instruct the jury . . . that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002 (2007). The trial court in this case followed its responsibilities under Section 15A-2002 by utilizing the proper North Carolina Pattern Jury Instruction. *See* 1 N.C.P.I.—150.10 (1997).

Additionally, the form of the questions defense counsel posed resemble those this Court analyzed in *State v. Simpson*, 341 N.C. 316, 337, 462 S.E.2d 191, 203 (1995), *cert. denied*, 516 U.S. 1161 (1996). In *Simpson*, this Court concluded that the trial court did not abuse its discretion when sustaining objections to the questions, "Do you think that a sentence to life imprisonment is a sufficiently harsh punishment for someone who has committed cold-blooded, premeditated murder?" and "Do you think that before you would be willing to consider a death sentence for someone who has committed cold-blooded, premeditated murder, that they would have to show you something that justified that sentence?" *Id.* The trial court rationally sustained the objections and did not abuse its discretion. This assignment of error is overruled.

Guilt-Innocence Phase Issues

Evidentiary Issues

[4] The trial court admitted into evidence the letter defendant wrote to his mother from jail. Defendant assigns error to admission of the letter and contends the State's evidence was so strong as to his involvement in the crime that the letter was: (1) irrelevant to "the only real issue" in the case, namely whether defendant acted with deliberation in committing the murder; (2) a needless presentation of cumulative evidence; and (3) unfairly prejudicial to defendant because of its "repeated references" to the death penalty. Defense counsel objected to the letter's admission under North Carolina Rules of Evidence 401 and 403.

A trial court's decisions on objections based on evidentiary rules 401 and 403 are reviewed for abuse of discretion. *See State v. Chapman*, 359 N.C. 328, 348, 611 S.E.2d 794, 811 (2005) (citing *Garcia*, 358 N.C. at 417, 597 S.E.2d at 749). We find no abuse of discretion here for several reasons. First, it was rational for the trial

court to determine the letter was relevant evidence. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2007). The letter constituted defendant's admission to the crime in his own words; thus, it was relevant to defendant's involvement in the crime and even relevant to defendant's deliberation of the murder, in that defendant's admission to involvement in the crime would have *some tendency* to make his deliberation of the murder more probable. Furthermore, defendant's account of the crime in the letter, although partly fictional, reflected a calculated murder of Mrs. Bennick for her money and goods, without any provocation. As such, the letter had some tendency to make the fact of defendant's real deliberation of the murder more probable.

Second, it was rational for the trial court to determine that admitting the letter did not violate Rule of Evidence 403. The letter was not needlessly cumulative because it was the only piece of evidence originating directly from defendant reflecting his acute memory of significant details from the crime scene. For instance, the letter revealed defendant's recollection that the murder occurred in the rear bedroom, that the victim's body lay facedown with an electrical cord from the living room wrapped around her neck, and that an ashtray laid beside the victim's body.

Additionally, the letter was not *unfairly* prejudicial. "Unfair prejudice, as used in Rule 403, means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Chapman*, 359 N.C. at 348, 611 S.E.2d at 811 (citations and internal quotation marks omitted). Defendant highlights portions of the letter that may have suggested to the jury that defendant himself agreed the death penalty was the appropriate punishment for his crime. In the letter, defendant pleaded with his mother to take the charge for him. For example, he wrote: "They are saying I am going to get the death penalty and Kaylee is looking at life and my baby is going to get took. Mama, I don't want to die and I don't want Kaylee or my baby to be harmed." Again, he wrote: "Mama, I love you so much, I don't want to die and Kaylee to do life and my baby get took."

Defendant's argument is unpersuasive. The letter was first admitted into evidence during the guilt phase of defendant's trial without any assertion from the prosecution that defendant himself believed he should receive the death penalty. On cross-examination, defense

counsel singled out these exact statements to persuade the jury to note the disparity between Kaylee Proctor's maximum potential sentence of life imprisonment because she was seventeen years old at the time of the crime versus defendant's maximum potential sentence of death because he was eighteen at the time of the crime. The prosecutor referred to the letter in his closing argument during the guilt phase as substantive evidence of defendant's guilt and as corroborative of other testimony the jurors heard. The prosecutor's focus, though, was on the detailed references in the letter to physical evidence of the crime, such as defendant's reference to the side door of the residence, to Old Caroleen Road, to the fence at the back of the property in which two pit bulls were confined, to the electrical extension cord, and to the ashtray beside the victim. In this way, the case *sub judice* is entirely distinguishable from the cases on which defendant relies, such as *State v. Kimbrell*, 320 N.C. 762, 768, 360 S.E.2d 691, 694 (1987). In *Kimbrell*, we held that the trial court committed reversible error in permitting the district attorney, over objection, to ask the defendant repeated questions about devil worship. We observed that these questions were irrelevant to the alleged crimes and that their "real effect . . . [could] only have been to arouse the passion and prejudice of the jury." *Id.* at 768, 360 S.E.2d at 694. Here, defendant's brief dissects statements out of the letter, highlighting their emotional nature; however, doing so misrepresents the overall nature, relevancy, and use of the letter at trial.

Moreover, any emotional impact from the letter might have benefitted defendant. During the sentencing proceeding, the defense called as a witness forensic psychiatrist Nathan Robert Strahl, M.D. Dr. Strahl emphasized the potentially mitigating effect of the letter, as it exhibited "an ultraimmature behavioral aspect" to defendant's personality. Although the letter's impact as substantive evidence of defendant's guilt was unquestionable, its emotional impact could have suggested the nonstatutory mitigator defendant proposed that "at the time of offense" defendant "had developed to the mental/emotional age of only a 10-12 year old child." The prosecutor did not even mention the letter during closing arguments of the sentencing proceeding, while defense counsel emphasized how the letter showed defendant was too young and immature to be held to the ultimate penalty. Defense counsel encouraged the jury to "look into that letter and look, look into the sole [sic] of my client when you do that. Look at where it came from. Study the significance." Defendant has little ground to complain on appeal regarding the letter's effect when

defense counsel at trial asked the jury to "study [its] significance" as supportive of defendant's mitigating evidence.

The letter did not constitute needless cumulative evidence, nor was it unfairly prejudicial to defendant. It was rational for the trial court to conclude the letter was relevant and did not run afoul of Rule 403. Defendant's assignments of error are overruled.

[5] Next, defendant claims the trial court committed plain error by allowing Quntia Davis' testimony concerning an extrajudicial question regarding how many people defendant had killed. During direct examination, Quntia recounted a conversation after defendant murdered Mrs. Bennick and returned to his vehicle:

> Q: What did [defendant] say?
>
> A: He said, "I killed her. I choked her out."
>
> Q: Didn't tell you anything else?
>
> A: No, sir. And Jerome had asked—was trying to ask Ryan how many people did he kill. And Ryan—*Kaylee was about to tell Jerome*, and Ryan said, "Don't be telling my business."
>
> Q: Okay. Now, you stayed with Ryan for a day or two at least after this killing took place; is that right?
>
> A: Yes, sir.

(Emphasis added.) Defense counsel did not object to this testimony; thus, our review is for plain error. N.C. R. App. P. 10(c)(4). Plain error analysis applies to evidentiary matters and jury instructions. *See*, *e.g.*, *Cummings*, 361 N.C. at 469, 648 S.E.2d at 807 (citations omitted). " 'A reversal for plain error is only appropriate in the most exceptional cases.' " *State v. Raines*, 362 N.C. 1, 16, 653 S.E.2d 126, 136 (2007) (citation omitted). The plain error rule is critical in the context of admitting physical evidence or testimony without an objection because the trial court is not expected to second-guess a party's trial strategy. The possibility always exists that a party intentionally declines to object for some strategic reason. *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983). To show plain error, " ' "defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result," ' " *State v. Allen*, 360 N.C. 297, 310, 626 S.E.2d 271, 282, *cert. denied*, 549 U.S. 867 (2006) (quoting, *inter alia*, *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988 (2003));

or we must be convinced that any error was so "fundamental" that it caused "a miscarriage of justice," *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and quotation marks omitted).

Jerome's question, as recorded in Quntia's testimony, was not speculation because it was merely a question. It was speculation, though, for Quntia to testify that Kaylee was about to tell Jerome how many people defendant had killed. Testimony that is mere speculation is inadmissible. *See* N.C.G.S. § 8C-1, Rule 602 (2007) ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.") However, there was no apparent hearsay in this section of Quntia's testimony because nothing was offered to prove the truth of a matter asserted. *See id.* Rule 801(c) (2007).

Defendant acknowledges the comment was brief, and the prosecutor immediately moved on to a different line of questioning. Moreover, nowhere else in nearly 1,400 pages of transcript does the question of defendant's prior involvement in any other killings arise, and defendant points to nothing else to indicate the jury inferred defendant had been involved in killing other individuals. Concluding that absent this statement the jury probably would have found defendant not guilty, or that admitting this testimony as evidence was error so fundamental it constituted a miscarriage of justice, is simply untenable as the substantive evidence of defendant's guilt is overwhelming. These assignments of error are overruled.

[6] Defendant next assigns error to the trial court's admission of portions of testimony from defendant's sister, Francia Lopez, and Lopez's boyfriend, Angel Akers. Defendant contends their testimony concerning defendant's violent acts and their fear of defendant after the crimes occurred was irrelevant and unfairly prejudicial and constituted improper character evidence. Because defense counsel did not object to this testimony, our review is for plain error. *See, e.g.*, N.C. R. App. P. 10(c)(4); *Cummings*, 361 N.C. at 469, 648 S.E.2d at 807.

Lopez, Akers, and their four year old daughter resided at the same location with defendant and Proctor at the time of the crimes. Lopez and Akers witnessed defendant's behavior and interactions with Proctor after the crimes. Both Lopez and Akers attested to Lopez's fear of defendant and of what he might do if she contacted law enforcement. For instance, Lopez was asked, "But you were scared of Ryan?" and she answered, "Yeah, I don't deny I was scared. Anybody would be after finding out someone murdered somebody.

It's scary." Additionally, defendant challenges the admission of Akers' testimony regarding an incident between defendant and Proctor one evening after the crimes. Defendant believed Proctor had undercooked his meat for a meal and thought perhaps Proctor was trying to poison him. Akers' testified as follows in response to the prosecutor's questions:

> Q. Okay. Let me ask you about this time that you're talking about things being tense there in the trailer. . . .
>
> A. Yeah. . . .
>
> Q. What did Ryan do?
>
> A. He had—he was pretty upset. He went in his room, Kaylee was sitting on the bed. He had took his gun and he pointed it at her. He said—
>
> . . . .
>
> Q. . . . What did he do with this gun?
>
> A. I don't know if he cocked it, but I know he just pointed it at her and said, "Give me ten bucks, I will shoot her." But he was laughing. And man, I was like, "Man, put that down." I was kind of nervous because I mean, he was drinking. And I don't trust anybody sober with a gun, let alone being drunk.
>
> Q. Did you tell him you weren't going to let him shoot—
>
> A. Yeah.
>
> Q. —anybody?
>
> A. I told him, I said "I can't let you do that, man."
>
> Q. What happened after that?
>
> A. Stuff had calmed down for a little bit. And then like I heard Kaylee make a cough sound. He went—I went in there and Ryan had Kaylee down on the bed and he had his hands on her chest or her neck, I don't know, and I went over there and got him off. And he ended up going to sleep shortly after that.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401. The fear Lopez and Akers expressed was natural and understandable in light of Proctor's confes-

sion to Lopez that defendant and she were involved in the crimes. Fear was a product of their belief in defendant's guilt at the time, and it explained why Lopez did not contact law enforcement directly or more immediately after Proctor's confession to her. As such, testimony of their fear had some tendency as circumstantial evidence to make the existence of defendant's guilt more probable. Similarly, Akers' testimony of the incident between defendant and Proctor was relevant because it exhibited the tension and stress defendant and Proctor displayed after committing the crimes. The prosecutor's line of questioning sought to uncover whether defendant or Proctor or both exhibited any unusual behavior after the date of the crimes. Defendant's clearly outlandish response to an undercooked meal could have indicated nervousness, stress, or tension due to his suffering under the burden of committing the crimes. Further, the incident was relevant because it bore on defendant's relationship with Proctor, which was central to the defense's theory of the case at trial that Proctor could manipulate defendant into doing anything. The weight of this evidence was for the jury to determine.

We are satisfied the evidence was admissible because of its relevance as explained above, and accordingly, it was not offered as mere character evidence "for the purpose of proving that [defendant] acted in conformity therewith on a particular occasion." *Id.* Rule 404 (2007); *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990) (explaining that relevant evidence of acts by a defendant is inadmissible "if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged"). The essence of the State's argument was not that defendant was a violent person; therefore, he must have acted violently toward Mrs. Bennick and murdered her. Rule of Evidence 404 was not violated.

The question still remains, however, whether the evidence was so unfairly prejudicial that the trial court committed plain error in admitting it. "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree." *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). Here, even assuming *arguendo* that the evidence was prejudicial, we cannot conclude the danger of unfair prejudice *substantially* outweighed the evidence's probative value, *see* N.C.G.S. § 8C-1, Rule 403 (2007), nor can we conclude that absent its admission the jury would have probably found defendant not guilty of first-degree murder or that its admission caused a miscarriage of justice. The trial

court did not commit plain error by allowing the testimony. Defendant's assignments of error are overruled.

[7] Next, defendant assigns error to the trial court's admitting into evidence extrajudicial statements from State witnesses Anthony, Quntia, and Jerome Davis. On 5 July 2004, Anthony, Quntia, and Jerome voluntarily went to the Rutherford County Sheriff's Department and individually spoke with different law enforcement officers. The State proffered the testimony of each of the officers recounting their interviews. Defense counsel objected to the officer's account of Anthony's interview on the grounds that Anthony was not given *Miranda* warnings and statements in the interview went beyond Anthony's trial testimony and thus were not properly corroborative. Defense counsel also objected prior to the testimony recounting the interviews of Quntia and Jerome and requested limiting instructions for the jury. The trial court overruled each objection and informed the jurors at length that they could consider statements made during the interviews only for corroboration purposes when they weighed the credibility of the Davises' trial testimony. The trial court also properly explained: "[A]ny statement made prior to this trial not under oath cannot be used as evidence of anything that the State is complaining of or as substantive evidence of anything that occurred or didn't occur." The trial court then allowed each officer to testify from their notes taken at the interviews.

Defendant develops a host of arguments in his brief alleging error on hearsay and constitutional grounds and alleging plain error. We note that defendant makes arguments before us that were not grounds for objection at trial, and defendant identifies as prejudicial specific statements from the interviews that were not specifically objected to at trial. As such, we conclude that defendant's arguments are not properly preserved for appeal; however, we choose to review the alleged errors for plain error. N.C. R. App. P. 2.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c). The testimony at issue was not hearsay because it was offered as corroboration evidence and not substantive evidence. " 'Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.' " *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303 (1991) (quoting *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980)). Deciding whether to receive or exclude corroborative testimony, " 'so

as to keep its scope and volume within reasonable bounds, is necessarily a matter which rests in large measure in the discretion of the trial court.' " *State v. Henley*, 296 N.C. 547, 551, 251 S.E.2d 463, 466 (1979) (quoting *Gibson v. Whitton*, 239 N.C. 11, 17, 79 S.E.2d 196, 201 (1953)). This Court has held that

> "prior statements of a witness can be admitted as corroborative evidence if they tend to add weight or credibility to the witness' trial testimony. New information contained within the witness' prior statement, but not referred to in his trial testimony, may also be admitted as corroborative evidence if it tends to add weight or credibility to that testimony."

State v. Davis, 349 N.C. 1, 28, 506 S.E.2d 455, 469-70 (1998) (citations omitted), *cert. denied*, 526 U.S. 1161 (1999). "[I]f the testimony offered in corroboration is generally consistent with the witness's testimony, slight variations will not render it inadmissible. Such variations affect only the credibility of the evidence which is always for the jury." *State v. Warren*, 289 N.C. 551, 557, 223 S.E.2d 317, 321 (1976) (citations omitted).

Here, the testimony recounting the interviews contains slightly varied or slightly new information compared with the trial testimony of Anthony, Quntia, and Jerome Davis. The case *sub judice* is dissimilar to *State v. Warren*, in which proffered corroborative testimony directly contradicted a witness's trial testimony. *Id.* at 556-57, 223 S.E.2d at 320-21; *see also State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991) (explaining "the State cannot introduce prior statements which 'actually directly contradicted . . . sworn testimony' " (quoting *State v. Burton*, 322 N.C. 447, 451, 368 S.E.2d 630, 632 (1988) (alteration in original))). After reviewing the record, we cannot conclude that admitting the testimony constituted error, plain or otherwise, because the trial court properly instructed the jury at length to only consider the testimony for corroboration purposes. Furthermore, the testimony recounting the interviews reflected that "the narration of events [was] substantially similar to the witness' in-court testimony," and the weight of the Davises' in-court testimony was strengthened. *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992) (citations omitted). Accordingly, defendant's assignments of error are overruled.

[8] Defendant next assigns error to the trial court's failure to sequester certain witnesses, which led to at least one witness's testifying based on exposure to prior testimony. Citing due process con-

cerns, defendant moved before trial pursuant to N.C.G.S. § 15A-1225 that witnesses be sequestered. The motion was granted only as to the three testifying codefendants, Anthony, Quntia, and Jerome Davis. During the trial, Nathaniel Whiteside testified on direct examination that defendant told him that after tying the victim to the bedpost, defendant rode the victim like a horse and said, "Giddy up, giddy up." On cross-examination, Whiteside admitted that defendant had not described riding the victim like a horse to him personally, and Whiteside acknowledged he had heard that detail for the first time in the courtroom that day. Earlier in the day that Whiteside testified, a law enforcement officer read to the jury as corroboration evidence an account of his interview with Anthony Davis on 5 July 2004. Anthony's extrajudicial statement from 5 July 2004 contained a reference to defendant's riding the victim like a horse while saying, "Giddy up, horsey, giddy up."

A trial court's ruling on a motion to sequester witnesses pursuant to N.C.G.S. § 15A-1225 "rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Anthony*, 354 N.C. 372, 396, 555 S.E.2d 557, 575 (2001) (citations and quotation marks omitted), *cert. denied*, 536 U.S. 930 (2002). Despite citing due process concerns to the trial court, defendant fails to adequately develop a constitutional claim on appeal and has thus abandoned any such argument. N.C. R. App. P. 28(a), (b)(6).

After reviewing the record, it is apparent the trial court gave defendant's motion "thoughtful consideration." *Anthony*, 354 N.C. at 396, 555 S.E.2d at 575 (citation omitted). While defendant requested all witnesses be sequestered, he particularly took issue with the four codefendants to the crimes and noted that three were expected to testify (referring to Anthony, Quntia, and Jerome Davis). For reasons of efficiency, the trial court chose not to sequester all witnesses, but agreed to sequester the testifying codefendants.

Defendant unsuccessfully attempts to distinguish this case from prior cases in which this Court found no abuse of discretion when examining a trial court's refusal to sequester witnesses. For instance, in *State v. Anthony*, this Court found no abuse of discretion and noted that defendant pointed to no instance "in the record where a witness conformed his or her testimony to that of another witness." *Id.* at 396, 555 S.E.2d at 575. Defendant argues here that a witness for the State clearly conformed his testimony to that of another witness.

Defendant's argument, however, ignores that when dealing with this issue in *Anthony*, this Court also noted how the defendant in his motion "gave no specific reason to suspect that the State's witnesses would tailor their testimony to fit within a general consensus." *Id.* Here, defendant only raised a specific concern regarding the ability of the codefendants to hear one another's testimony. Accordingly, the trial court made a rational decision to sequester the codefendants. Beyond that, the trial court had little, if any, reason to conclude the sequestering of all witnesses was beneficial to the administration of justice. The trial court made a reasoned decision, and the assignment of error is overruled.

Closing Argument Issues

[9] Defendant argues the trial court erred by failing to intervene *ex mero motu* during the guilt-innocence phase closing arguments when the prosecutor stated: "Kaylee Proctor was talking about [the alleged crimes]. *Probably was not proud of what had happened, probably was scared to death.* That's why she went to Francia [Lopez] and told her about it." (Emphasis added.) Defendant argues these statements have no basis in the evidence presented and were grossly improper because they were designed to rebut the central theme of the defense that Proctor was cold, selfish, and manipulative, and defendant could not have "truly deliberated" Mrs. Bennick's killing.

Defense counsel did not object to the statements; thus, under our standard of review, we will not conclude the trial court erred by not intervening "unless the remarks were so grossly improper they rendered the trial and conviction fundamentally unfair." *Allen*, 360 N.C. at 306-07, 626 S.E.2d at 280 (citation omitted). Trial counsel is granted " 'wide latitude' " during arguments to the jury. *Id.* at 306, 626 S.E.2d at 280 (citation omitted). "Counsel may argue any facts in the record and any reasonable inference that may be drawn from any facts in the record." *Id.* (citation omitted).

An examination of the record shows that the prosecutor made this comment in the broader context of describing how defendant was apprehended by law enforcement. Defendant was ultimately apprehended partly because he confessed to the murder and partly because Proctor spoke with Lopez about the crimes. The comment regarding Proctor's emotional state and motive for speaking with Lopez was brief, and it appears the statement would have had little bearing on the jury's ultimate determination of defendant's guilt. The comment in no way rose to the character of impermissible forms of

closing arguments delineated by the General Assembly. *See* N.C.G.S. § 15A-1230(a) (2007).

Furthermore, Angel Akers, Lopez's boyfriend at the time, testified to how "tense" the situation was after 22 June 2004 at the residence he shared with Lopez, defendant, and Proctor. Akers testified that defendant was "kind of touchy" and more easily angered. Akers described the violent incident between defendant and Proctor the evening defendant believed Proctor tried to poison him by undercooking his meal. As already discussed above, defendant and Proctor argued with each other, and defendant pointed his firearm at Proctor, stating, "Give me ten bucks, I will shoot her." The situation defused a bit, but after hearing Proctor make a coughing sound, Akers discovered defendant hovering over Proctor on their bed with his hands on her chest or neck. Akers physically restrained defendant. Based on Akers' testimony, it is not unreasonable to suggest that Proctor was "probably [] scared to death" during the last week of June 2004 after the commission of the murder, regardless of her participation in the crimes.

The prosecutor's comment was brief and was not an unreasonable inference in light of Akers' testimony. Accordingly, we determine the prosecutor's comments were not "so grossly improper [as to] render[] the trial and conviction fundamentally unfair." *Allen*, 360 N.C. at 306-07, 626 S.E.2d at 280. This assignment of error is overruled.

Jury Issues

[10] Defendant assigns error to the trial court's failure to inquire why jurors requested to be referred to by individual juror numbers the day after they returned verdicts of guilty and were polled by name. Immediately before the beginning of the sentencing proceeding, the trial court explained:

> The jurors sent a note to the Court by way of the bailiff stating that they want the Court to please call the jurors by number instead of name. It was very upsetting to some of the jurors to be named, I assume, when they were polled. So if and when that becomes an issue again, I will address it then.

Knowing of the jurors' request, defendant argues the trial court was obligated to inquire whether the jurors were able to proceed in a fair and impartial manner because the request may have resulted from an improper exposure to some external influence. The absence of a fair and impartial jury would, of course, violate multiple constitutional

guarantees afforded to defendant. *See*, *e.g.*, *State v. Chandler*, 324 N.C. 172, 185-86, 376 S.E.2d 728, 737 (1989) ("Both defendant and the State are entitled to a fair trial and a fair trial requires an impartial jury."); *see also* U.S. Const. amend. VI; N.C. Const. art. I, § 24.

Initially, we note that "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted). Defense counsel did not object or make a motion for a mistrial pursuant to N.C.G.S. § 15A-1061 on this point. Despite the lack of an objection, we address this assignment of error in the interest of preventing any manifest injustice. N.C. R. App. P. 2.

In general, the trial court "possesses broad discretionary powers" to conduct a fair and just trial. *State v. Britt*, 285 N.C. 256, 272, 204 S.E.2d 817, 828 (1974) (citations omitted). "When there is a *substantial* reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *State v. Barts*, 316 N.C. 666, 683, 343 S.E.2d 828, 839 (1986) (emphasis added) (citations omitted). When error is alleged in this manner, it is typically because the possibility of some type of improper external contact involving a juror or jurors is brought to the trial court's attention. *See*, *e.g.*, *Hurst*, 360 N.C. at 186-87, 624 S.E.2d at 315-16 (in which a prospective alternate juror stated during *voir dire* he had read a newspaper article concerning the case in the jury room); *State v. Willis*, 332 N.C. 151, 172, 420 S.E.2d 158, 168 (1992) (in which the trial court learned " 'one of the family members of one of the parties may have talked to one of the jurors' "). "An inquiry into possible [juror] misconduct is generally required only where there are reports indicating that some prejudicial conduct has taken place." *State v. Barnes*, 345 N.C. 184, 226, 481 S.E.2d 44, 67 (1997) (citing *State v. Harrington*, 335 N.C. 105, 115, 436 S.E.2d 235, 240-41 (1993)) (defense counsel alleged but showed nothing to substantiate the claim that a juror telephoned a minister to ask questions about the death penalty), *cert. denied*, 523 U.S. 1024 (1998). "The trial court retains sound discretion over the scope of any such inquiry." *State v. Murillo*, 349 N.C. 573, 599, 509 S.E.2d 752, 767 (1998) (citing *Willis*, 332 N.C. at 173, 420 S.E.2d at 168), *cert. denied*, 528 U.S. 838 (1999).

Here, although there were no reports that any improper or prejudicial matters reached the jurors, defendant speculates two events

possibly influenced them. First, after the jury returned verdicts of guilty on all charges, the transcript reflects that a commotion occurred in the courtroom because defendant's mother suffered a seizure. The trial court observed the need for medical assistance and asked the members of the jury to leave the courtroom. Jurors returned after defendant's mother received medical care, and they were then polled by name concerning the verdicts. Second, on that same day, after the jury was excused for the day, the transcript reflects that defendant "attacked" a law enforcement officer in the courtroom "and was subsequently handcuffed." The jury members requested to be referred to by number the next morning.

In the end, defendant's argument is based on pure speculation. Any number of reasons could have motivated jurors' request for anonymity, and defendant acknowledges that ultimately the jurors' concern was unspecified and unknown. Without the trial court's receiving any information other than the bare request from the jury, we cannot say the trial court had a substantial reason to question jurors as to whether they had been exposed to improper and prejudicial matters. Moreover, the trial judge was present when defendant's mother suffered the seizure, and he was in the best position to determine that the incident did not prejudicially influence the jury. *See State v. Turner*, 330 N.C. 249, 263-66, 410 S.E.2d 847, 855-57 (1991). A request from the jury to be referred to by number and not by name is neither a de facto indicator that the jury has been improperly exposed to an external influence nor a de facto indicator of prejudice against defendant. This assignment of error is overruled.

Penalty Proceeding Issues

Jury Instruction Issues

At the beginning of the penalty proceeding, the trial court admitted into evidence as exhibits for the State certified copies of judgments from the Superior Court of Carteret County showing defendant was convicted by guilty pleas of one count of common law robbery and two counts of second-degree kidnapping on 3 September 2002. The State did not introduce any further evidence describing the facts surrounding the convictions. Defense witness, forensic psychiatrist Dr. Strahl, commented that the kidnappings occurred "where [defendant] broke into a flea market and there was an armed robbery." Additionally, while discussing the proposed jury instructions on mitigating circumstances, defense counsel explained to the trial court that the common law robbery and two counts of second-degree kid-

napping occurred as "one event. But there were . . . three charges that grew out of it . . . . [I]t [is] all one set of charges that occurred at one time on one day."

[11] The trial court instructed jurors they could consider the common law robbery conviction or second-degree kidnapping convictions or both as support for finding the (e)(3) aggravating circumstance that "defendant had been previously convicted of a felony involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3). Defendant contends the trial court violated his federal and state constitutional rights and committed plain error by submitting the second-degree kidnapping convictions to the jury because second-degree kidnapping does not by definition involve the use or threat of violence to the person.[4]

Because defense counsel declined to object at trial to submission of the kidnapping convictions to the jury, we review whether the trial court committed plain error.[5] N.C. R. App. P. 10(c)(4). After reviewing the record, we cannot conclude the trial court committed plain error in this instance. "The (e)(3) prior violent felony aggravating circumstance requires proof that the defendant was convicted of either a felony in which the use or threat of violence to the person is an element of the crime or a felony which actually involved the use or threat of violence." *State v. Flowers*, 347 N.C. 1, 34, 489 S.E.2d 391, 410 (1997) (citing *State v. McDougall*, 308 N.C. 1, 18, 301 S.E.2d 308, 319, *cert. denied*, 464 U.S. 865 (1983)), *cert. denied*, 522 U.S. 1135 (1998). Both parties agree this Court has never squarely ruled that second-degree kidnapping is an inherently violent offense despite the argument that kidnapping always involves at least the implicit use or threatened use of violence.[6] Despite the well-reasoned

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4. Defendant concedes that by definition the crime of common law robbery involves the use, or threatened use, of violence. *See State v. Jones*, 339 N.C. 114, 164, 451 S.E.2d 826, 854 (1994), *cert. denied*, 515 U.S. 1169 (1995). As such, these assignments of error only relate to the kidnapping convictions.

5. Defense counsel not only declined to object when the State offered the judgments, but commented: "I think they are admissible for this purpose."

6. In *State v. Campbell*, this Court was presented with the issue of whether kidnapping was an inherently violent offense, but declined to answer that question. 359 N.C. at 685, 617 S.E.2d at 26-27. Instead, the Court held the trial court did not abuse its discretion by allowing the State to present evidence of the circumstances surrounding the defendant's previous conviction for second-degree kidnapping. *Id.* The defendant's argument in *Campbell* was the opposite of the one made in the present case: in *Campbell*, the defendant asserted that kidnapping is inherently violent and that the State's "introduction of the conviction [alone] was sufficient to satisfy the State's burden of proof." *Id.* Previously, this Court came close to acknowledging the inherent vio-

conclusions of federal courts[7] and despite the State's urging us to do so, we need not hold today that second-degree kidnapping is an inherently violent offense.

"[I]t is well established that two or more criminal offenses may grow out of the same course of action . . . ." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). The two judgments introduced into evidence by the State informed the jury that defendant committed the common law robbery and kidnappings as separate and complete acts, independent of each other. *See State v. Smith*, 359 N.C. 199, 213-14, 607 S.E.2d 607, 618-19, *cert. denied*, 546 U.S. 850 (2005). However, the jury also heard Dr. Strahl tie the crimes together as transpiring during the same course of events. Additionally, at trial defense counsel explained to the court that all of the crimes were in essence "one event." At oral argument before this Court, counsel for defendant acknowledged that the purpose of the restraint defendant perpetrated during the kidnappings was to facilitate the commission of the common law robbery. *See* N.C.G.S. § 14-39(a)(2) (2007). It is entirely logical to view the two counts of second-degree kidnapping as involving an *inherent* use or threat of violence when committed in the same course of action as the inherently violent crime of common law robbery. Defendant asserts that fraud is a nonviolent, legally cognizable means of committing a kidnapping, *see*, *e.g.*, *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351; however, in light of the robbery conviction and the comments of Dr. Strahl and defense counsel that tied the crimes together, it is untenable in this situation to maintain that the trial court committed plain error by submitting the kidnapping convictions in support of the (e)(3) aggravating circumstance.

Even assuming *arguendo* it was error to submit the kidnapping convictions, for several reasons we are convinced that any possible error was harmless beyond a reasonable doubt and not unduly prejudicial to defendant's case. *See* N.C.G.S. § 15A-1443(b) (2007); *Odom*,

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lence in kidnapping by noting in *State v. Tucker* that every kidnapping exposes the victim to an inherent degree of danger. 317 N.C. 532, 535-36, 346 S.E.2d 417, 419-20 (1986).

7. *See*, *e.g.*, *United States v. Williams*, 110 F.3d 50, 53 (9th Cir.) (holding that "kidnapping which occurs 'without consent' of the victim . . . involves an inherent risk of physical injury" under U.S. Sentencing Guidelines), *cert. denied*, 522 U.S. 856 (1997); *United States v. Kaplansky*, 42 F.3d 320, 324 (6th Cir. 1994) (noting that even when "deception may be used to effect [a] kidnapping [that] does not erase the ever-present possibility that the victim may figure out what's really going on and decide to resist, in turn requiring the perpetrator to resort to actual physical restraint if he is to carry out the criminal plan. Thus, the potential for violence against the victim is an inherent aspect of the crime of kidnapping . . . .").

307 N.C. at 660, 300 S.E.2d at 378. First, because common law robbery involves an inherent element of violence, defendant's conviction for common law robbery was sufficient alone for the jury to find the existence of the (e)(3) aggravator. *See State v. Jones*, 339 N.C. 114, 164, 451 S.E.2d 826, 854. Indeed, during the State's closing argument at the end of the penalty proceeding, the prosecutor did not even mention defendant's convictions for second-degree kidnapping, but argued for the existence of the (e)(3) aggravating circumstance solely on the basis of defendant's prior conviction for common law robbery. The prosecutor was very succinct and straightforward in stating that common law robbery by definition involves "the use or threat of violence." Thus, had the trial court not submitted the kidnapping convictions to the jury, we cannot find a "reasonable possibility that . . . the jury would have reached a different result and rejected the existence of the (e)(3) aggravating circumstance." *See Flowers*, 347 N.C. at 31, 489 S.E.2d at 408. Similarly, there is no reasonable possibility the jury would have returned a different sentencing recommendation had the kidnapping convictions not been submitted to the jury. Besides (e)(3), the jury also found the (e)(5) and (e)(9) aggravators, and unlike *State v. Robbins*, in which the jury seemed to have "difficulty" recommending death, 319 N.C. 465, 516, 356 S.E.2d 279, 309, *cert. denied*, 484 U.S. 918 (1987), the jury here deliberated on defendant's punishment for approximately two and one-half hours. Any possible error in submitting the kidnapping convictions was harmless beyond a reasonable doubt and did not unfairly tip the scales of justice toward the death penalty. These assignments of error are overruled.

[12] As separate and distinct assignments of error relating to the submission of the convictions for kidnapping to the jury, defendant contends the trial court's instruction to the jury included theories of guilt that were wholly unsupported by any evidence. Defense counsel did not object to this issue at trial; therefore, we limit our review to plain error. N.C. R. App. P. 10(c)(4). "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997) (citation omitted), *cert. denied*, 522 U.S. 1126 (1998).

In the trial court's charge to the jury during the penalty proceeding, it instructed that

> [s]econd degree kidnapping is the unlawful confining and/or restraining and/or removal of a person from one place to another

> without that person's consent, or if under 16 without the consent of the parent or guardian, for the purpose of holding that person for hostage or ransom or using that person as a shield or terrorizing that person from [sic] any other purpose.

Although not verbatim, this partial definition of second-degree kidnapping is based on N.C.G.S. § 14-39(a). The parties did not request, and the trial court did not utilize, the pattern jury instruction established for the (e)(3) aggravating circumstance. *See* 1 N.C.P.I.—Crim. 150.10. Use of the pattern instructions is encouraged, but is not required. *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004), *cert. denied*, 546 U.S. 830 (2005).

Just as we could not find plain error in the submission of the kidnapping convictions to the jury, we fail to find plain error in the trial court's jury instructions here. In spite of the less than exemplary definition of second-degree kidnapping provided in this case, numerous factors prevent us from concluding defendant suffered a manifest injustice or that the jury probably would have reached a different result had a more laudable instruction been given. The trial court's partial description of second-degree kidnapping was a correct statement of the law and was only a definition, not a peremptory instruction that defendant had in fact acted in any manner reflected therein. Further, in light of its inherent element of violence, submitting the common law robbery conviction alone was sufficient to support the (e)(3) aggravator, and that was the sole focus of the prosecutor during his closing argument when asking the jury to find that aggravating circumstance. Finally, the jury found two other aggravating circumstances in addition to the (e)(3) aggravator to weigh against the mitigating circumstances, and jurors deliberated for approximately two and one-half hours before recommending death.

No reasonable possibility exists that the jury's recommendation would have been different had no error occurred, and the instruction was not so unduly prejudicial as to lead us to conclude that justice was not done. Further, any possible error was harmless beyond a reasonable doubt. These assignments of error are overruled.

Motion for Appropriate Relief

[13] Pursuant to N.C.G.S. §§ 15A-1411, -1415, -1418, and -1420, defendant filed a motion for appropriate relief (MAR) in this Court the same day he filed his brief with this Court. With his MAR, defendant

attached materials related to his prior convictions for second-degree kidnapping and the affidavit of one of his trial attorneys. After careful review, we conclude the merits of this motion may be determined on the basis of the materials before us. *See* N.C.G.S. § 15A-1418(b) (2007).

In his MAR, defendant argues two points. First, he expands on the issue just addressed above and claims that not only did the trial court's jury instructions list theories of guilt of second-degree kidnapping that were wholly unsupported by the evidence, but that the theories of guilt listed are contradicted by record evidence of what actually occurred. Second, defendant claims in his MAR he was afforded ineffective assistance of counsel on two occasions: (1) when counsel failed to object to submission of the (e)(3) aggravator on the grounds that second-degree kidnapping is not a violent crime by definition and the State presented insufficient evidence that these kidnappings included the use or threatened use of violence; and (2) when counsel failed to object to the trial court's including in the jury instruction for the (e)(3) aggravator a definition of kidnapping based on theories of guilt contradicted by record evidence. Defendant asserts these errors violated his rights under both the federal and state constitutions. For the reasons stated below, defendant's MAR is denied.

Regarding defendant's first argument, part of the trial court's instruction defining second-degree kidnapping described the crime as "the unlawful confining and/or restraining and/or removal of a person . . . under 16 without the consent of the parent or guardian, for the purpose of holding that person for hostage or ransom or using that person as a shield or terrorizing that person from [sic] any other purpose." Through a police report and the facts stipulated at the plea hearing, defendant recounts the details of the actual crimes committed on 24 January 2002 in his MAR. Defendant relates how he and a companion entered a business at the Indoor Outdoor Flea Mart in Newport, North Carolina, and ordered two women working behind the store counter to lie down on the ground. Defendant placed the barrel of his firearm on the neck of one of the women to make her lie down so the robbery could be carried out. Both women lay on the floor, begging for their lives. Defendant and his companion left the store with approximately eighty-one dollars, but were arrested shortly thereafter. Defendant stresses that, according to the factual basis for his guilty pleas, one woman at the flea market was sixty-three years old and the other was fifty years old at the time, meaning

neither was under sixteen. Further, defendant stresses that the kidnappings were for the purpose of facilitating a felony, robbery with a dangerous weapon, and not for holding the women "for hostage or ransom or using [them] as a shield or terrorizing" them.

Defendant's argument misses the mark. As noted above, the instruction simply contained a partial definition based on N.C.G.S. § 14-39(a) that was a correct statement of the law and was not a peremptory instruction on any specific acts defendant had in fact committed. In light of the common law robbery conviction and its inherent element of violence, we are convinced the instruction did not tilt the scales of justice against defendant and constitute plain error because the jury would have come to the same result regardless of any error. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citation omitted). Moreover, defendant's argument is a bit puzzling in light of the actual facts as submitted by him. The image of defendant placing the barrel of a firearm on the neck of a middle-aged female store clerk and ordering her to lie on the floor while she begs for her life so the robbery can be carried out leaves little, if any, doubt that violence or the threat of violence was used during the commission of these crimes. Even if it was erroneous, the instruction in question was harmless beyond a reasonable doubt and cannot be viewed as constituting plain error.

Defendant also asserts in his MAR that he was denied effective assistance of counsel when no objections were made to submission of the kidnapping convictions to the jury or to the jury instruction regarding those convictions. This argument is without merit. The components necessary to show ineffective assistance of counsel are (1) "counsel's performance was deficient," meaning it "fell below an objective standard of reasonableness," and (2) "the deficient performance prejudiced the defense," meaning "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)); *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) ("expressly adopt[ing] the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution").

Defendant's trial counsel states in an affidavit attached to the MAR that he did not object to submission of the kidnapping convictions because he did not consider the possibility that second-degree kidnapping could be committed without inherently involving the use

or threat of violence. He did not object to the jury instruction in question because he did not focus on those parts of the instruction defendant now claims contain error and because it did not occur to him that the instruction might have been prejudicial to defendant's case. As well, he states he did not have any strategic reasons for not objecting to either item.

The performance of defense counsel did not sink to the level of that described in *Rompilla v. Beard*, 545 U.S. 374 (2005), which defendant cites as support. In *Rompilla*, the Commonwealth of Pennsylvania sought the death penalty against the defendant and planned to introduce the defendant's prior convictions for rape and assault at the postconviction evidentiary hearing to support an aggravating circumstance. *Id.* at 377-78, 383. Despite defense counsel's knowledge of the Commonwealth's intentions, she failed to even examine the defendant's prior conviction file. *Id.* at 383-85. Counsel's failure to examine the "readily available file . . . seriously compromis[ed] [the defendant's] opportunity to respond to a case for aggravation," *id.* at 385, and "fell below the level of reasonable performance," *id.* at 383.

Here, defendant's trial counsel states he had reviewed the evidence from defendant's prior crimes before trial, but he did not believe submitting the kidnapping convictions or the jury instruction regarding them was error or unfairly prejudicial to defendant's case. On appeal, defendant's brief makes an elaborate legal argument asserting that the use or threatened use of violence is not inherent in every crime of kidnapping, and the brief dissects the jury instruction and record with precision. It is not obvious to us that defense counsel's performance at trial was objectively unreasonable; however, even assuming it was, defendant clearly cannot demonstrate the requisite component of prejudice necessary to prevail on this argument. The prejudice necessary to show ineffective assistance of counsel is demonstrated by a reasonable probability that the result would have been different had the performance of counsel not been deficient. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* We cannot find that probability here considering that (1) the common law robbery conviction alone was sufficient for the jury to find the (e)(3) aggravator; (2) the jury knew the kidnapping convictions were part of the same course of action as the common law robbery; (3) the prosecutor never even mentioned the kidnapping convictions in his closing argument, and (4) the jury also found

two other aggravating circumstances. Any deficient performance on the part of defendant's counsel was not sufficiently prejudicial for defendant to succeed on this claim. Defendant's assignments of error regarding these issues are overruled, and defendant's motion for appropriate relief is denied.

[14] Next, defendant assigns error to the trial court's submission of the (e)(3) aggravator (prior violent felony) to the jury based on crimes that occurred before defendant was eighteen years old and assigns error to the trial court's instruction stating the jury could consider the crimes in determining whether the (f)(1) mitigator (no significant history of prior criminal activity) existed. Defendant committed common law robbery and two counts of second-degree kidnapping on 24 January 2002, when he was sixteen years and two days old. Relying on *Roper v. Simmons*, 543 U.S. 551 (2005), defendant asserts violations of both the federal and state constitutions, and he claims he was denied effective assistance of counsel on this issue. Defendant failed to object to these matters at trial, so our review is limited to that of plain error. N.C. R. App. P. 10(c)(4).

Defendant's reliance on *Roper v. Simmons* is misplaced. The Supreme Court of the United States held in *Roper* that the "Eighth and Fourteenth Amendments [to the United States Constitution] forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." 543 U.S. at 578. The Court created a bright line, categorical rule. *Id.* at 574 (explaining that "a line must be drawn"). Furthermore, the Court was very clear that the issue before it concerned a defendant's age at the time he committed a capital crime, not when his case was tried and he was sentenced. *Id.* at 556. *Roper* does not preclude, or even address, the jury's ability during the sentencing proceeding to consider a defendant's acts or behavior that occurred before the age of eighteen. *Accord United States v. Wilks*, 464 F.3d 1240, 1243 (11th Cir.), *cert. denied*, 549 U.S. 1066, (2006); *England v. State*, 940 So. 2d 389, 406-07 (Fla. 2006), *cert. denied*, 549 U.S. 1325 (2007). Here, defendant committed a capital crime after he turned eighteen years old, and that simple fact carries defendant's case over the bright line drawn by *Roper*. Defendant was sixteen when he committed common law robbery and two counts of second-degree kidnapping, but he is not being sentenced to death as an additional punishment for those crimes. At most, *Roper* might suggest that a jury may still find as a mitigating factor for sentencing that a defendant committed a capital crime shortly after having passed the age of eighteen. 543 U.S. at 574. Indeed, here the jury was asked to

consider the relevance of defendant's age at the time of the capital crime as a statutory and nonstatutory mitigating circumstance. *See* N.C.G.S. § 15A-2000(f)(7) (2007). The holding of *Roper* is inapposite to the instant case, and the trial court did not commit plain error.

Additionally, defendant alleges ineffective assistance of counsel pertaining to this issue, asserting that counsel at trial should have objected to submission of the (e)(3) aggravator and to the jury instruction for the (f)(1) mitigator based on *Roper v. Simmons*. We determine we can decide the merits of this claim here because " 'the cold record reveals that no further investigation is required.' " *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004), *cert. denied*, 546 U.S. 830 (2005) (citation omitted). On this issue, defendant can establish neither deficient performance by counsel nor prejudice. *See Strickland*, 466 U.S. at 687. As stated, *Roper* has no application to this case, and accordingly, defendant's counsel did not deficiently perform by failing to object on the basis of *Roper*. Defense counsel specifically referred to *Roper* during the closing arguments of the penalty proceeding, attempting to persuade the jury to view defendant's age as mitigating. It was not deficient performance, much less prejudicial, for counsel to not object on the basis of *Roper*. Defendant's federal and state constitutional rights were not violated, and these assignments of error are overruled.

[15] Next, defendant assigns error to the trial court's instruction to the jury regarding the (f)(7) mitigating circumstance. N.C.G.S. § 15A-2000(f)(7) (age at the time of the crime). Defendant was eighteen years, five months old when he murdered Mrs. Bennick. He makes three arguments regarding the potentially mitigating value of his age. He contends the trial court committed plain error by failing to direct a verdict to the jury, by failing to give a peremptory instruction, and by instructing the jury they could assign no weight to the circumstance of defendant's age even if they found it to exist. Defendant's trial counsel did not request a peremptory instruction or object to the instruction as given; therefore, our review is for plain error. N.C. R. App. P. 10(c)(4).

This Court has recognized the appropriateness of a mandatory peremptory instruction when a defendant and the State stipulate to the existence of a mitigating circumstance. *See Holden*, 346 N.C. at 427-28, 488 S.E.2d at 526 (distinguishing *State v. Flippen*, 344 N.C. 689, 477 S.E.2d 158 (1996), in which the State and the defendant stipulated that the defendant had no significant history of prior criminal

activity).[8] Here, the State did not stipulate to defendant's age as constituting a mitigating circumstance. Thus, a mandatory peremptory instruction was not required.

A peremptory instruction should be given when requested if any statutory or nonstatutory mitigating circumstance is supported by " 'uncontroverted and manifestly credible evidence,' " *State v. Forte*, 360 N.C. 427, 440, 629 S.E.2d 137, 146, *cert. denied*, 549 U.S. 1021 (2006) (citation omitted); however, "[t]he general rule is that 'even where all of the evidence supports a finding that the mitigating circumstance exists and a peremptory instruction is given, the jury may nonetheless reject the evidence and not find the fact at issue if it does not believe the evidence' " to be credible. *Holden*, 346 N.C. at 427, 488 S.E.2d at 526 (citation omitted).

Defendant did not request a peremptory instruction, nor did the trial court give one. Now, for the first time on appeal, defendant argues his age had mitigating value as a matter of law, which required the trial court to give a peremptory instruction or at least required an instruction that if the jury found the evidence satisfied them as to defendant's chronological age, youthfulness, and immaturity, then the jury was required to find the (f)(7) mitigator and give it mitigating value. Defendant's argument is meritless. The trial court's instruction to the jury mirrored the pattern jury instruction, titled "Death Penalty—Issues and Recommendation as to Punishment,"[9] which faithfully reflects our case law regarding mitigator (f)(7). *See* 1 N.C.P.I.—Crim. 150.10. It is well settled under this Court's precedent that " '[u]nless a defendant's age has mitigating value as a matter of law, a juror need consider the defendant's age as mitigating only if that juror finds by a preponderance of the evidence that his age has mitigating value.' " *State v. Maske*, 358 N.C. 40, 59, 591 S.E.2d 521, 533 (2004) (quoting *Rouse*, 339 N.C. at 105, 451 S.E.2d at 569 (alteration in original)).

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8. A mandatory peremptory instruction on a particular circumstance is akin to a directed verdict, but a directed verdict is not the appropriate device in this context. *Holden*, 346 N.C. at 427, 488 S.E.2d at 526 (citation omitted).

9. The trial court stated:

> Consider whether the age of the defendant—or consider the age of the defendant at the time of the crime.
>
> Members of the jury, the mitigating affect [sic] of the age of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence. Age is a flexible and relative concept. The chronological age of the defendant is not always a determinative factor.

Contrary to defendant's lengthy argument in his brief that *Roper v. Simmons* should alter our understanding of youth for purposes of the (f)(7) mitigator, defendant's age at the time of the crime does not have mitigating value as a matter of law in this instance. *Roper* established a bright line rule that defendants who commit capital offenses while under the age of eighteen are not eligible for the death penalty. 543 U.S. at 574. As discussed above, *Roper's* categorical rule does not shield defendant. Accordingly, there is no reason to alter our previous holding that " 'chronological age is not the determinative factor in concluding [the (f)(7)] mitigating circumstance exists.' " *Thompson*, 359 N.C. at 99, 604 S.E.2d at 867 (citation omitted). We reiterate that " '[a]ny hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances.' " *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983) (citation omitted).

In the case *sub judice*, defendant presented evidence from forensic psychiatrist Dr. Strahl, who testified to defendant's "immaturity" and stated that defendant's "emotional age was more of a 10 to 12 year old child who had not grown up." Yet, on cross-examination of Dr. Strahl, the prosecutor drew out potential indicators of maturity in defendant's behavior. For instance, defendant's prison record reflected calculated acts of violence committed against other inmates. As well, the prosecutor highlighted that defendant was seen as a leader by some of his friends. All of this testimony was proper for the jurors to consider when deciding whether the (f)(7) mitigator existed. That mere age alone is not determinative of the (f)(7) mitigator reasonably explains why no juror found that mitigator to exist while at least one juror found defendant's age alone was a nonstatutory mitigator.[10] In sum, the trial court's instruction to the jury comported with this Court's precedent, did not run afoul of the holding in *Roper v. Simmons*, and was not error, much less plain error.

Additionally, defendant argues that the failure of defense counsel to object to the jury instruction deprived him of his constitutional right to the effective assistance of counsel. We can decide the merits of this claim based on the record. *See Thompson*, 359 N.C. at 122-23, 604 S.E.2d at 881. Neither deficient performance on the part of counsel nor prejudice to defendant's case can be established here. *See*

10. At least one juror found the nonstatutory mitigating circumstance "[t]hat Ryan Garcell's involvement and commission of the instant offense(s) occurred when he was five months over the age of 18 years old."

Strickland, 466 U.S. at 687. As explained above, the jury instruction mirrored the pattern instruction and complied with the precedent of this Court. Thus, it was not unreasonable for defense counsel to refrain from objecting to the instruction at trial. Moreover, defense counsel vigorously argued to the jury that defendant's age had mitigating value, and counsel submitted nonstatutory mitigators based on his client's age and immaturity for the jury's consideration. The performance of defense counsel was not deficient. Defendant's assignments of error are overruled.

[16] Defendant next assigns error to the trial court's failure to provide peremptory instructions *ex mero motu* on four nonstatutory mitigating circumstances. Defendant argues that failing to give these peremptory instructions prevented the jury from giving certain evidence its full mitigating value and resulted in constitutional error. Defendant contends the following four nonstatutory mitigators were supported by uncontroverted and manifestly credible evidence: (1) "That at an early age, [defendant] was raised in a home where his mother was the victim of domestic violence and was forced to seek the assistance of a battered women's shelter for protection"; (2) "That [defendant] was the subject of physical and emotional abuse growing up as a child by his father"; (3) "That six months prior to this offense, [defendant] complied with the request of his probation officer to seek mental health treatment"; and (4) "That [defendant's] involvement and commission of the instant offense(s) occurred when he was five months over the age of 18 years old." At least one juror found the first and fourth circumstances listed above to exist and to have mitigating value.

A defendant must timely request a peremptory instruction to be entitled to it. *See, e.g.*, *State v. Roache*, 358 N.C. 243, 324, 595 S.E.2d 381, 432 (2004) (citations omitted). Here, defense counsel did not request peremptory instructions at trial and thus waived any entitlement defendant may have had to them. While appellate procedure Rule 10(c)(4) allows criminal defendants to make alleged errors not objected to at trial the basis of assignments of error when plain error is distinctly contended, this Court has held that a trial court is not required "to sift the evidence for every possible mitigating circumstance which the jury might find," nor must it "determine on [its] own which mitigating circumstance is deserving of a peremptory instruction in defendant's favor." *State v. Johnson*, 298 N.C. 47, 77, 257 S.E.2d 597, 618-19 (1979), *overruled in part on other grounds by State v. Williams*, 339 N.C. 1, 452 S.E.2d 245 (1994), *cert. denied*, 516

U.S. 833 (1995)). Therefore, we decline to review these assignments for even plain error because counsel did not request any peremptory instructions at trial and the trial court did not have any independent duty to determine whether defendant was entitled to peremptory instructions on mitigating circumstances.

Further, defendant argues he was denied the effective assistance of counsel on this issue. After reviewing the record, we determine " 'no further investigation is required' " to decide this claim. *Thompson*, 359 N.C. at 122-23, 604 S.E.2d at 881 (citation omitted). We decline to comment on counsel's performance because we conclude defendant clearly cannot demonstrate the requisite component of prejudice. *See Strickland*, 466 U.S. at 687. To establish the prejudice necessary to meet the second component of the *Strickland* test, a defendant must show that a reasonable probability exists that the result would have been different had counsel's performance not been deficient. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Defendant is unable to show the requisite prejudice because even when a peremptory instruction is given, "jurors may reject [a] nonstatutory mitigating circumstance if they do not deem it to have mitigating value." *State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854 (1993) (citations omitted). It is mere speculation to suggest that any jurors would have found the nonstatutory mitigators at issue to have mitigating value had defense counsel requested and been awarded the peremptory instructions at issue. Defendant's assignments of error are overruled.

[17] Next, defendant assigns error to the trial court's failure to give individualized instructions on each of the nonstatutory mitigating circumstances submitted to the jury. The trial court gave individualized instructions on each of the three statutory mitigating circumstances, plus the (f)(9) "catch-all" mitigator. Defendant contends this action improperly "placed the nonstatutory circumstances on a lesser footing with the jury, suggesting they were of less significance or were less worthy of consideration than the statutorily enumerated circumstances." Defendant did not object to the instructions at trial, so we will review for plain error. N.C. R. App. P. 10(c)(4).

After reviewing the record, we find that defendant's argument is simply meritless. Certainly, mitigating circumstances should not be submitted to the jury "in a manner which makes some seemingly less worthy of consideration than others." *Johnson*, 298 N.C. at 74, 257 S.E.2d at 617. However, in this case, the trial court submitted

all of the mitigating circumstances "on equal footing before the jury," *id.*, though with a slight, practical difference in the manner of delivery. When first explaining the mitigating circumstances to the jury during the penalty proceeding, the trial court stated: "Members of the jury, there are 27 possible mitigating circumstances listed on the form. And you should consider each and every one of them . . . ." Later, the trial court appropriately noted that the first three mitigating circumstances on the list were statutory and the others were nonstatutory in order to explain the different analytical process the jurors would use to find each. *See State v. Williams*, 339 N.C. at 44-45, 452 S.E.2d at 270-71 (citations omitted). Then, after the trial judge gave individualized instructions on each of the three statutory mitigators, he said:

> Now, those three are statutory circumstances.
>
> Now, for the remainder of the circumstances you will consider them arising from the evidence which you find to have mitigating value.
>
> If one or more of you find by a preponderance of the evidence that any of those circumstances, any of the rest of the circumstances exist and also are deemed by any one or more of you to have mitigating value, you would so indicate by having your foreperson write "yes" in the space provided.
>
> If none of you find the circumstances to exist, then you would so indicate by having your foreperson write "no" in that same space.
>
> Now, members of the jury, I will go over each of those as stated.
>
> [The trial court then read the twenty-four nonstatutory mitigating circumstances]
>
> If any one or more find by a preponderance of the evidence one or more of the mitigating circumstances and have so indicated by writing "yes" in the space provided after whichever one or ones of that mitigating circumstance or circumstances there were on the Issue and Recommendation form, then you would go back and answer primary Issue No. 2 "yes."

The trial court in no way, explicitly or implicitly, suggested that the nonstatutory mitigators were of less significance or were less worthy of consideration. All of the mitigators were referred to as being equal

in importance, and the manner in which they were presented did nothing to value some below others.

Defendant's reliance on *State v. Johnson* is misplaced. In *Johnson*, this Court stated that submitting to the jury "some mitigating circumstances in writing and leav[ing] others to the jury's recollection *might* be constitutionally impermissible under the reasoning of *Lockett*." *Johnson*, 298 N.C. at 74, 257 S.E.2d at 616-17 (emphasis added) (referring to *Lockett v. Ohio*, 438 U.S. 586, 593-94, 597, 602-05, 608 (1978) (plurality), in which an Ohio statute that allowed a capital sentencing authority to only consider three statutory mitigating factors and no others was deemed unconstitutional); *see also State v. Cummings*, 326 N.C. 298, 321-25, 389 S.E.2d 66, 79-81 (1990) (ordering a new sentencing proceeding when the trial court ignored defendant's request and failed to submit nonstatutory mitigators in writing to jury). In the present case, unlike *Johnson* and *Cummings*, all of the mitigators were in writing, and after each one was written the following:

> ANSWER: ____ One or more of us finds this mitigating circumstance to exist and one or more of us deems this circumstance to have mitigating value.

Defendant alleges the nonstatutory mitigators received "rushed treatment." However, if anything, the trial court's manner of presentation spared the jury the possibly mind-numbing, trance-inducing experience of hearing the same individualized instruction repeated twenty-four times. Jurors need adequate instructions, but they do not need to hear them repeated *ad nauseam*. *See State v. Gainey*, 355 N.C. 73, 107, 558 S.E.2d 463, 485, *cert. denied*, 537 U.S. 896 (2002). These assignments of error are overruled.

Closing Argument

[18] Defendant contends the trial court should have intervened *ex mero motu* to halt the prosecutor's references to defendant's constitutional rights during the closing argument of the sentencing proceeding. In context, the prosecutor stated:

> Mrs. Bennick, Margaret Bennick, had a right to live beyond June 22nd of 2004. She had a right to be secure in her own home. And this man did not care about her rights. He violated her rights.
>
> He is big on rights now. He wants his right to a trial, his right to two very good lawyers, his right to due process, to the pre-

sumption of innocence, to reasonable doubt. Yes, he wants all of his rights now. But what about Mrs. Bennick? What about her rights? What are we going to do about that?

" '[W]e will not find error in a trial court's failure to intervene in closing arguments *ex mero motu* unless the remarks were so grossly improper they rendered the trial and conviction fundamentally unfair.' " *Raines*, 362 N.C. at 14, 653 S.E.2d at 134 (citations omitted). "[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Mann*, 355 N.C. 294, 307, 560 S.E.2d 776, 785 (2002) (citations and quotation marks omitted), *cert. denied*, 537 U.S. 1005).

We have declined to find gross impropriety in similar cases. For instance, in *State v. Basden*, the prosecutor pointed out to the jury that the defendant was "getting every right in the book. He's been fed. He's had a warm place to stay. He's had the best health care money can buy. He's not got one lawyer, but he's got two lawyers to defend him." 339 N.C. 288, 306, 451 S.E.2d 238, 248 (1994), *cert. denied*, 515 U.S. 1152 (1995). The prosecutor in *Basden* further contrasted the defendant's treatment with that of the victim who "never had the opportunity to be presumed innocent" and "never had the lawyers, two lawyers to plead for his life" and so on. *Id.* We did not find gross impropriety in *Basden* or similar cases. *See*, *e.g.*, *State v. Geddie*, 345 N.C. 73, 101, 478 S.E.2d 146, 160 (1996), *cert. denied*, 522 U.S. 825 (1997).

After properly reviewing the broader context of the prosecutor's argument, *see Raines*, 362 N.C. at 14, 653 S.E.2d at 135, we find no gross impropriety. The prosecutor encouraged the jury to consider that Mrs. Bennick as a human being possessed certain "rights," and the jury needed to contemplate its decision in light of those rights and in light of defendant's complete disregard for his victim's rights. The prosecutor argued that defendant cared about his own rights, but did not care about his victim's rights, and so the jury needed to vindicate Mrs. Bennick's rights. The prosecutor never disparaged defendant for exercising his rights as an accused criminal, nor did he imply defendant somehow deserved the death penalty because he had exercised his rights. This assignment of error is overruled.

[19] Defendant challenges another aspect of the prosecutor's closing argument during the penalty proceeding by assigning error to the trial court's failure to intervene *ex mero motu* when the prosecutor allegedly urged the jury to deter crime in general and allegedly personalized the crime to the jurors. Defendant asserts the prosecutor's following statements contained grossly improper remarks:

> You folks . . . are the voice of the community. You're going to set a standard here in this case. . . . Not how it's going to be handled in California, New York, or even Chapel Hill, Durham, but in Rutherford County. . . . Are we going to tolerate a crime like this, actions like this against elderly ladies? . . . What is the standard going to be in this community?
>
> . . . .
>
> . . . It didn't matter to Ryan Garcell who that was that he killed. He didn't care. It could have been me, it could have been you, it could have been your grandmother. . . .
>
> . . . .
>
> Remember Dr. Jason's testimony about what it's like as you're being strangled to death. Think about that instant when you hold your breath too long. What does that feel like? Imagine that. What did he tell us? At a minimum, 10 to 15 seconds of excruciating pain and unbelievable terror. And depending on how it was done, it may have lasted for minutes.
>
> . . . .
>
> . . . You can give [defendant] the lesser punishment if you want to. Slap him on the wrist with a little old life sentence. Is that the message you want to go out of this courtroom? . . .
>
> . . . .
>
> . . . [A death verdict] would be a verdict which says that in this community we're not going to put up with this. You do this in Rutherford County, . . . and you will be punished as harshly as the law allows.

Defendant asserts the comments fall into two general categories, in that they either request the jury to set a community standard or make an emotional appeal encouraging jurors to personalize the crimes. We examine the comments within the frameworks of these two categories.

First, regarding the prosecutor's reference to a community standard, this Court has held that "arguments based on general deterrence—that is, that the jury should impose the death penalty in the case before it to deter others from committing similar crimes—are improper. However, it is not improper for the State to 'remind the jurors that "they are the voice and conscience of the community." ' " *State v. Fletcher*, 354 N.C. 455, 484, 555 S.E.2d 534, 552 (2001) (citations omitted), *cert. denied*, 537 U.S. 846 (2002). In *Fletcher*, the prosecutor made similar comments to the jury, including: " 'Your voice, through this verdict, will ring out loud and clear . . . . Say, through your verdict, We will not tolerate one bit of murder or assault and battery. If you do this, you will pay the ultimate price. That's the right message that needs to come out of this case . . . .' " *Id.* at 483-84, 555 S.E.2d at 551-52. This Court in *Fletcher* noted that these comments, taken in context, were "arguably a reference to general deterrence," but did not constitute gross impropriety warranting intervention *ex mero motu*. *Id.* at 484, 555 S.E.2d at 552. The case at bar is nearly identical.

Second, regarding comments that allegedly personalized the jurors to the crime, this Court has stated that " 'asking the jurors to put themselves in place of the victims will not be condoned,' " *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993) (citation omitted), *cert. denied*, 512 U.S. 1254 (1994); however, it is permissible for the prosecution to "ask[] the jury to imagine the emotions and fear of a victim, " *State v. Wallace*, 351 N.C. 481, 529, 528 S.E.2d 326, 356 (citation omitted), *cert. denied*, 531 U.S. 1018 (2000). Jurors may also be urged to "appreciate the circumstances of the crime." *State v. Artis*, 325 N.C. 278, 325, 384 S.E.2d 470, 497 (1989) (citation and quotation marks omitted), *sentence vacated on other grounds*, 494 U.S. 1023 (1990).

In *McCollum*, jurors were "repeatedly asked . . . to imagine the victim as their own child." 334 N.C. at 224, 433 S.E.2d at 152. This Court, in *McCollum*, assumed *arguendo* such arguments were improper, but concluded the defendant's rights were not violated when the statements were considered in context. *See id.* at 225, 433 S.E.2d at 152-53. In *Artis*, we found no error when jurors were asked to imagine the victim's strangulation and rape in an isolated section of woods and were asked to hold their breath as long as possible during a four minute interval while they considered the evidence in the case. 325 N.C. at 324, 384 S.E.2d at 496. In *State v. Gregory*, we found no error when the prosecutor vividly described the strangulation,

rape, and murder of two women and told the jury, "[T]ry to imagine—I don't believe any of us are capable of imagining the pure horror that was going on there . . . that night." 340 N.C. 365, 425, 459 S.E.2d 638, 673 (1995), *cert. denied*, 517 U.S. 1108 (1996).

As in *Artis* and *Gregory*, we conclude here that the prosecutor asked the jury to appreciate the circumstances of the crime and permissibly made arguments "related to the nature of defendant's crimes." *Id.* at 426, 459 S.E.2d at 673. Particularly when a prosecutor is arguing the murder was especially heinous, atrocious, and cruel, it is permissible to ask jurors to imagine the situation based on the evidence and to facilitate a thorough and meticulous contemplation of the crime. The prosecutor never descended to degrading comments or conclusory "name-calling." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (finding it grossly improper and prejudicial when the prosecutor referred to the defendant, stating: "You got this quitter, this loser, this worthless piece of—who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly."). Even assuming *arguendo* the prosecutor's remarks were improper, similar to *McCollum*, we cannot conclude they were grossly improper to the extent they violated defendant's rights when viewed in the larger context of the prosecution's entire closing argument. Defendant's assignments of error are overruled.

PRESERVATION ISSUES

Defendant alleges: (1) the first-degree murder indictment was insufficient to charge him with first-degree murder because it did not allege all the elements of first-degree murder; (2) the first-degree murder indictment was insufficient to support a sentence of death because it failed to allege any aggravating circumstances; (3) the trial court erred by giving the jury vague and confusing instructions as to Issue Three of the Issues and Recommendation as to Punishment Form; (4) the trial court erred by denying defendant's motion to prohibit death qualification *voir dire* questions of the jury; (5) the trial court erred by instructing the jury that at Issues Three and Four on the Issues and Recommendation as to Punishment Form, each juror may consider the mitigating circumstances found by that juror, rather than any mitigating circumstance found by any juror; (6) the trial court erred by instructing the jury at Issue Four on the Issues and Recommendation as to Punishment Form that each juror may, rather than must, consider the mitigating circumstances found by that juror; (7) the trial court erred by instructing the jurors that they must be

unanimous to answer "No" to Issues One, Three, and Four on the Issues and Recommendation as to Punishment Form; (8) the trial court erred by denying defendant's motion to allow defense counsel to question any potential jurors who were challenged for cause by the State based on opposition to the death penalty; (9) the trial court erred by instructing jurors to give no effect to proffered nonstatutory mitigating circumstances if the jurors found them to have no mitigating value; and (10) the death penalty is inherently cruel and unusual, and North Carolina's sentencing procedure is unconstitutionally arbitrary, vague, and overbroad. We have considered all of defendant's arguments and decline to overrule our precedent holding them to be without merit. *See State v. Duke*, 360 N.C. 110, 141-42, 623 S.E.2d 11, 31-32 (2005), *cert. denied*, 549 U.S. 855 (2006).

PROPORTIONALITY REVIEW

[20] Because we have concluded defendant's trial and capital sentencing proceeding were free from prejudicial error, we turn to the three requirements of N.C.G.S. § 15A-2000(d)(2) and consider:

> (1) whether the record supports the aggravating circumstances found by the jury and upon which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the facts of the crime and the defendant.

Raines, 362 N.C. at 24, 653 S.E.2d at 141 (citing N.C.G.S. § 15A-2000(d)(2) (2005)).

First, we find that the record supports the aggravating circumstances the jury found. The jury found three aggravating circumstances: (1) Defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) The murder was committed while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); and (3) The murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

In support of the aggravating circumstances, the State introduced certified copies of judgments from Carteret County showing defendant's prior convictions on 3 September 2002 for common law robbery and second-degree kidnapping. This evidence was sufficient to support the (e)(3) aggravating circumstance. Furthermore, the record

indicates defendant stole various items from the victim's residence, including groceries, a VCR, a game console, jewelry, a coin collection, clothes, and an ATM card. This evidence was sufficient to support the (e)(5) aggravator. Finally, this Court has characterized the types of murders for which the (e)(9) aggravator is appropriate. "One type includes killings physically agonizing or otherwise dehumanizing to the victim. A second type includes killings less violent but conscienceless, pitiless, or unnecessarily torturous to the victim, including those which leave the victim in her last moments aware of but helpless to prevent impending death." *State v. Elliott*, 360 N.C. 400, 424, 628 S.E.2d 735, 751 (citation and internal quotation marks), *cert. denied*, 549 U.S. 1000 (2006). The present case fits both of these categories. Similar to *State v. Elliott*, in which the victim was beaten and strangled to death in her home, *id.* at 424-25, 628 S.E.2d at 751, defendant manhandled, brutally choked, and strangled his victim, a seventy-one year old woman, to death within the perceived sanctuary of her own residence. "[S]trangulation [is] a method of murder which takes" a length of time, during which a victim is "aware of [] impending death but helpless to prevent it." *Id.* at 425, 628 S.E.2d at 751. Mrs. Bennick struggled and waved her arms, trying to get loose, while defendant strangled her. Moreover, defendant tied an electrical extension cord around Mrs. Bennick's neck and further desecrated her remains by riding her limp body like a horse, saying, "Giddy up, giddy up." The evidence was sufficient to support the (e)(9) aggravator.

Second, we find that defendant's sentence of death was not imposed "under the influence of passion, prejudice, or any other arbitrary factor." N.C.G.S. § 15A-2000(d)(2) (2007). Defendant suggests three items as indicative of the arbitrary nature of his sentence: the alleged errors concerning the (e)(3) aggravating circumstance; the alleged inconsistent jury findings on the mitigating value of defendant's age; and the alleged inconsistent jury findings regarding the significance of defendant's prior criminal activity. However, as already discussed, we have overruled defendant's assignments of error relating to the (e)(3) aggravator, and we have found rational explanations for the jury's conclusions regarding the relevance of defendant's age and his prior criminal activity. Further, defendant argues it is inconsistent that no juror found the (f)(1) mitigator (no significant history of prior criminal activity) but at least one juror found the nonstatutory mitigator that defendant's "only prior felony convictions arose from his participation in crimes which occurred when he was one day over the age of 16 years old and was [sic] committed in the company of older co-defendants." However, the two circumstances are not

identical and can be easily harmonized. It is rational for all jurors to find that defendant's prior criminal activity was significant, and yet, for at least one juror to conclude defendant's age and the presence of older companions to have mitigating value. In essence, to at least one juror, defendant's prior criminal activity was not as significant as it could have been, but it was significant nonetheless. Consequently, our review of the record and transcripts leads us to conclude that a sentence of death was not imposed against defendant arbitrarily or capriciously. Therefore, defendant's assignments of error asserting as much are overruled.

Third, we find that defendant's sentence of death was not excessive or disproportionate when compared to the penalties imposed in similar cases. We have the unique responsibility of considering defendant and his crimes and determining whether defendant's sentence is proportionate. *Raines*, 362 N.C. at 25, 653 S.E.2d at 142 ("The determination of proportionality . . . is ultimately dependent upon the sound judgment and experience of the members of this Court." (citations omitted)). "In making this determination, we consider 'all cases which are roughly similar in facts to the instant case, although we are not constrained to cite [or discuss] each and every case we have used for comparison.' " *Id.* at 25, 653 S.E.2d at 141 (citations omitted). " '[O]nly in the most clear and extraordinary situations may we properly declare a sentence of death which has been recommended by the jury and ordered by the trial court to be disproportionate.' " *Id.* at 25, 653 S.E.2d at 142 (quoting *State v. Chandler*, 342 N.C. 742, 764, 467 S.E.2d 636, 648, *cert. denied*, 519 U.S. 875 (1996)) (alteration in original).

This Court has determined that a defendant's sentence of death was disproportionate in only eight cases: *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

The present case is dissimilar to any of the cases in which we have found a sentence of death disproportionate. Indeed, this Court has only found the death sentence disproportionate in two cases in

which the jury concluded the murder was "especially heinous, atrocious, or cruel" under N.C.G.S. § 15A-2000(e)(9). *See Stokes*, 319 N.C. 1, 352 S.E.2d 653; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. Additionally, this Court has only found the death sentence disproportionate in two cases in which the jury found more than one aggravating circumstance. *See Young*, 312 N.C. 669, 325 S.E.2d 181; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170.

In *Stokes*, multiple factors not present in the instant case persuaded this Court that the death sentence was disproportionate. Those factors included that the defendant was a juvenile at the time of the murder; there was evidence of the defendant's impaired capacity to appreciate the criminality of his conduct and that he was under the influence of a mental or emotional disturbance; and the defendant was the only one of four assailants to receive the death penalty. 319 N.C. at 3-4, 11, 21, 352 S.E.2d at 654-55, 658, 664; *see also Duke*, 360 N.C. at 144, 623 S.E.2d at 33 (discussing and applying *Stokes*). In *Bondurant*, the defendant exhibited remorse immediately after the victim was shot and aided the victim in receiving treatment at the nearest hospital. 309 N.C. at 694, 309 S.E.2d at 182-83; *see also Duke*, 360 N.C. at 144, 623 S.E.2d at 33 (discussing and applying *Bondurant*). In *Young*, the defendant committed the murder with the assistance of accomplices. Specifically, the defendant stabbed the victim twice in the chest but one of his companions " 'finished him' by stabbing him several more times." 312 N.C. at 688, 325 S.E.2d at 193.

The instant case is distinguishable from *Stokes*, *Bondurant*, and *Young*. Here, defendant was not a juvenile at the time of the murder, and although Proctor encouraged him in the murder, defendant alone strangled his victim to death. Furthermore, defendant did not exhibit any remorse after the murder; rather, after the victim's body lay limp on the floor, defendant wrapped a brown electrical extension cord around Mrs. Bennick's neck and, in his own words, rode her like a horse. Immediately after the murder, defendant described the killing to his friends with a "smile on his face."

"[C]onsidering both the crime and the defendant," N.C.G.S. § 15A-2000(d)(2), we view the case *sub judice* to be factually similar to cases in which this Court has held the death sentence proportionate. Defendant was convicted of first-degree murder on the basis of malice, premeditation and deliberation and felony murder. "[T]his Court has *repeatedly* noted that a finding of first-degree murder based on theories of premeditation and deliberation and of felony

murder is significant." *State v. Watts*, 357 N.C. 366, 380, 584 S.E.2d 740, 750 (2003) (emphasis added) (citations and internal quotation marks omitted), *cert. denied*, 541 U.S. 944 (2004). Moreover, "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *Id.* (citations and quotation marks omitted).

The present case is also similar to *State v. Brown*, 357 N.C. 382, 584 S.E.2d 278 (2003), *cert. denied*, 540 U.S. 1194 (2004), in that the defendant in *Brown* "committed a premeditated and deliberate murder" within the sanctity of the victims' residence. *Id.* at 394, 584 S.E.2d at 285-86. Murder of a victim within his or her own home "shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious invasion of an especially private place, one in which a person has a right to feel secure." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34 (citation omitted), *cert. denied*, 484 U.S. 970 (1987). In *State v. Elliott*, we also noted that the defendant strangled the victim to death within the victim's residence. 360 N.C. at 424-25, 628 S.E.2d at 751. As in *Brown* and *Elliott*, defendant in the present case violated the safety and sanctuary of Mrs. Bennick's residence to commit this murder. Moreover, as in *Elliott*, defendant in this case committed the brutal murder by strangulation. Strangulation causes a particularly agonizing death, in which a victim is "aware of her impending death but helpless to prevent it." *Id.* at 425, 628 S.E.2d at 751; *see also State v. Sexton*, 336 N.C. 321, 377, 444 S.E.2d 879, 911 (noting that "a brutal strangulation, found by the jury to be especially heinous, atrocious, or cruel" was a "[s]alient characteristic[]" of the case), *cert. denied*, 513 U.S. 1006 (1994).

This case is also similar to *State v. Smith*, 359 N.C. 199, 607 S.E.2d 607. In *Smith*, the defendant attacked his seventy-three year old victim in the victim's home, and choked the victim to death by pressing his forearm against the victim's throat. *Id.* at 223-24, 607 S.E.2d at 624-25. The defendant "bound the victim's hands and legs and wrapped tape around the victim's face," *id.* at 224, 607 S.E.2d at 625, in addition to using a "clock's extension cord [] to bind [the victim's] wrists and then his ankles," *id.* at 203, 607 S.E.2d at 612. The defendant in *Smith* committed the murder in the course of a robbery, ending the life of the victim for nothing more than money. *Id.* Here, defendant choked his seventy-one year old victim in the perceived safety of her own home, then wrapped an extension cord around her neck while unconscionably riding her body like a horse. Furthermore,

like the victim in *Smith*, Mrs. Bennick was needlessly murdered, only for the sake of defendant's desire for material possessions.

Finally, this Court has concluded that both the (e)(5) and the (e)(9) aggravators standing alone are sufficient to sustain a death sentence. *See Watts*, 357 N.C. at 381, 584 S.E.2d at 751 (citations omitted). Here, the jury found both the (e)(5) and (e)(9) aggravators. Defendant's sentence is not excessive or disproportionate.

CONCLUSION

Defendant has made other assignments of error, but has not provided any argument or supporting authority for these assignments in his brief. Consequently, we consider those assignments of error abandoned, and they are dismissed. *See* N.C. R. App. P. 28(b)(6); *Raines*, 362 N.C. at 26, 653 S.E.2d at 142.

For the foregoing reasons, we conclude defendant received a fair trial and sentencing proceeding, and we find no error in his convictions or his sentences. Moreover, we conclude that defendant's sentence of death is not disproportionate and should remain undisturbed.

NO ERROR; MOTION FOR APPROPRIATE RELIEF DENIED.

WILLIE D. GILBERT, II v. THE NORTH CAROLINA STATE BAR

No. 41PA07

(Filed 20 March 2009)

1. Appeal and Error— appealability—prosecution of attorney enjoined—protection of bar and public—substantial right

An immediate appeal could be taken from an injunction prohibiting disciplinary prosecution of an attorney before the Disciplinary Hearing Commission, despite its interlocutory nature, where it affected the State Bar's substantial right to carry out its duties to protect the bar and the public.

2. Malicious Prosecution— notice—vindictive prosecution in civil case—reviewed as malicious prosecution

Plaintiff's complaint under 42 U.S.C. § 1983 for vindictive prosecution by the State Bar could have been dismissed because

vindictive prosecution is limited to criminal cases. However, North Carolina is a notice pleading state, the import of the complaint is unmistakable, and defendant responded as if plaintiff had pleaded malicious prosecution. The matter is reviewed as alleging malicious prosecution.

3. Jurisdiction— subject matter—42 U.S.C. § 1983—pleading defect

Defendant's argument that the superior court lacked subject matter jurisdiction to hear plaintiff's 42 U.S.C. § 1983 action because defendant's disciplinary prosecution of plaintiff was still pending identifies a pleading defect in plaintiff's procedural due process claim rather than implicating a defect in the trial court's jurisdiction.

4. Civil Rights— due process—repeated disciplinary hearings by State Bar

Plaintiff did not allege a due process violation for which relief might be granted under 42 U.S.C. § 1983 where his allegation concerned malicious prosecution in repeated disciplinary actions against him by the State Bar. Any right plaintiff has to be free of malicious prosecution does not arise from substantive due process rights under the Fourteenth Amendment, and postdeprivation remedies adequately safeguard plaintiff's right to procedural due process.

Justice TIMMONS-GOODSON dissenting.

Justice HUDSON dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 180 N.C. App. 690, 639 S.E.2d 143 (2006), dismissing defendant's appeal from a judgment entered on 12 September 2005 by Judge Milton F. Fitch, Jr. in Superior Court, Wilson County. Heard in the Supreme Court 11 December 2007.

Michaux & Michaux, P.A., by Eric C. Michaux, for plaintiff-appellee.

North Carolina State Bar, by Katherine E. Jean, Counsel, and David R. Johnson and A. Root Edmonson, Deputy Counsel, for defendant-appellant.

EDMUNDS, Justice.

In this case, plaintiff Willie Gilbert, a licensed attorney, alleges that defendant North Carolina State Bar acted vindictively when it filed sequential actions against him. The questions before this Court are whether plaintiff's complaint properly presents a claim under 42 U.S.C. § 1983 for deprivation of his right to due process under the Fourteenth Amendment to the Constitution of the United States and whether the trial court's permanent injunction of defendant's administrative action was proper. As to the first question, we conclude that plaintiff failed to state a § 1983 claim because (1) *substantive* due process does not provide an individual right to be free from either vindictive or malicious prosecution of an administrative action, and (2) a plaintiff's right to *procedural* due process under the Fourteenth Amendment is not violated by the tortious conduct of a state actor until and unless the State fails to provide an adequate remedy. As to the second question, because plaintiff must allow the State an opportunity to remedy the alleged deprivation of a protected right before he can state a viable § 1983 claim based on an alleged violation of his right to procedural due process, the trial court should not have imposed a permanent injunction. We vacate the decision of the Court of Appeals dismissing defendant's appeal and remand to that court for further remand to Superior Court, Wilson County, with instructions to dissolve the permanent injunction, dismiss plaintiff's substantive due process claim with prejudice, and dismiss plaintiff's procedural due process claim without prejudice.

Between February 2000 and September 2003, defendant filed three complaints against plaintiff. Two were administrative actions (*Gilbert I* and *Gilbert III*) that were brought before defendant's Disciplinary Hearing Commission (DHC), while the third was a civil action (*Gilbert II*) brought in District Court, Wake County, to recover money paid to one of plaintiff's clients by defendant's Client Security Fund (CSF). Defendant filed *Gilbert I* on 15 February 2000, alleging that plaintiff violated numerous provisions of the Revised Rules of Professional Conduct (RRPC) during his representation of three clients between 1997 and 1999. After a four-day hearing held on 17-18 July 2000 and 18-19 September 2000, the DHC entered an Order of Discipline concluding that plaintiff had violated Rules 1.5, 1.7, 1.15-2(h), 8.4(b), 8.4(c), 8.4(d), and 8.4(g) of the RRPC. The DHC suspended plaintiff's license to practice law for five years, but stayed the last three years of the suspension upon enumerated conditions. The North Carolina Court of Appeals affirmed the DHC Order of Discipline, *N.C. State Bar v. Gilbert*, 151 N.C. App. 299, 566

S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002) (unpublished), and this Court affirmed the Court of Appeals in a per curiam opinion, 357 N.C. 502, 586 S.E.2d 89 (2003).

Defendant filed *Gilbert II* on or about 18 April 2002, seeking reimbursement on behalf of the CSF for $4,627.43 that had been paid by the CSF to one of plaintiff's clients. Following a bench trial held on 7-8 January 2004, the trial court awarded defendant the double damages allowed by N.C.G.S. § 84-13, for a total of $9,254.86 plus interest. On appeal, the Court of Appeals affirmed the trial court's judgment in part and vacated in part, remanding the matter for additional findings as to plaintiff's affirmative defenses. *N.C. State Bar v. Gilbert*, 176 N.C. App. 408, 626 S.E.2d 877, 2006 N.C. App. LEXIS 574 (2006) (unpublished). On remand, the trial court again entered judgment in favor of defendant. On appeal after remand, the Court of Appeals affirmed the trial court's judgment in part and vacated in part, remanding for recalculation of interest pursuant to N.C.G.S. § 24-5(b). *N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 663 S.E.2d 1 (2008).

Defendant filed *Gilbert III* on 12 September 2003, alleging that plaintiff misappropriated funds from his trust account and failed to pay client funds promptly to third parties. The transactions at issue identified by defendant in its *Gilbert III* complaint occurred in April 1998.

While *Gilbert III* was pending before the DHC, plaintiff filed the instant action in Superior Court, Wilson County, alleging, in part, that defendant was vindictively prosecuting the *Gilbert III* administrative action. Specifically, plaintiff alleged violations of both his substantive and his procedural due process rights. Plaintiff further alleged that the conduct at issue in *Gilbert III* was known or should have been known to defendant before *Gilbert I* was heard by the DHC. Plaintiff sought injunctive and monetary relief under 42 U.S.C. § 1983 and Article I of the North Carolina State Constitution.

On 9 April 2004, the trial court granted plaintiff an *ex parte* temporary restraining order, enjoining defendant from proceeding with further prosecution of *Gilbert III*. At the subsequent hearing on plaintiff's motion for preliminary injunction, defendant argued that the trial court did not have jurisdiction to enjoin a disciplinary action that was pending before the DHC.[1] Plaintiff responded that the DHC is not

1. "Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the [State Bar] Council . . . ." N.C.G.S. § 84-28(a) (2007). "The Council is vested, as an agency of the State, with the authority to . . . investigate and prosecute matters of professional misconduct . . . ." *Id.* § 84-23(a) (2007). The DHC has

authorized to rule on the constitutional questions he raised and that superior court is an appropriate forum in which to bring a claim under § 1983.[2] After considering arguments, the trial court granted plaintiff's request for a preliminary injunction.

Defendant moved to dismiss the complaint on 3 August 2004, and plaintiff moved for summary judgment on 13 October 2004. The trial court treated defendant's motion as one for summary judgment and, after hearing argument, expressed its concern.

> THE COURT: . . . . [I]t smacks—to me, it smacks in the face of fairness when you have a man that you take a period of time, you go in and you find three people, you prosecute him on those three, and there were six people there at the same time, and instead of prosecuting him on six and doing whatever you want to do to him, you choose to do three of them, have a time of suspension to run, and then come back when that time of suspension runs and says, oh, yes, I got three more that I didn't prosecute you on so I want to now prosecute you on those matters. And that, right or wrong, in my mind is where I have the problem, because—and that's why I used the terms that the State Bar knew or should have known, having done the investigation of the trust account, that those violations were there.

The trial court entered an order on 12 September 2005 granting plaintiff's motion for partial summary judgment on the issue of liability for violation of his Fourteenth Amendment right to due process. The trial court's order permanently enjoined defendant from prosecuting *Gilbert III* and expressly retained jurisdiction over the matter for the purposes of enforcing the injunction, determining compensatory damages, and awarding attorneys' fees.

Defendant appealed. The Court of Appeals concluded that defendant had appealed from an interlocutory order not affecting a substantial right and dismissed defendant's appeal. *Gilbert v. N.C. State Bar*, 180 N.C. App. 690, 639 S.E.2d 143, 2006 N.C. App. LEXIS 2574

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jurisdiction to "hold hearings in discipline . . . matters, make findings of fact and conclusions of law after these hearings, enter orders necessary to carry out the duties delegated to it by the Council, and tax the costs to an attorney who is disciplined." *Id.* § 84-28.1(b) (2007).

2. The original civil jurisdiction of the superior court division of North Carolina is set forth, in part, by N.C.G.S. § 7A-245(a)(4), which provides: "The superior court division is the proper division without regard to the amount in controversy, for the trial of civil actions where the principal relief prayed is . . . [t]he enforcement or declaration of any claim of constitutional right." N.C.G.S. § 7A-245(a)(4) (2007).

(2006) (unpublished). This Court allowed defendant's petition for discretionary review as to two issues: (1) whether the Court of Appeals erred by dismissing defendant's appeal as interlocutory, and (2) whether the superior court had jurisdiction to enjoin permanently defendant's prosecution of plaintiff in an administrative disciplinary proceeding before the DHC.

[1] We begin with defendant's first issue. Defendant acknowledged in its brief to the Court of Appeals that the trial court's order "may be considered interlocutory," and the Court of Appeals so held. *Gilbert*, 180 N.C. App. 690, 639 S.E.2d 143, 2006 N.C. App. LEXIS 2467, at *7. Defendant argues that the order nevertheless may be appealed immediately because it affects a substantial right. *See* N.C.G.S. §§ 1-277(a), 7A-27(d)(1) (2007).

A substantial right is "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right." *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (citation and internal quotation marks omitted). We consider whether a right is substantial on a case-by-case basis. "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

Plaintiff argues that this interlocutory appeal does not affect a substantial right. The Court of Appeals agreed with plaintiff, citing precedent from that court for the proposition that an order of a trial court allowing a party's motion for summary judgment as to liability while retaining jurisdiction over the issue of damages, does not affect a substantial right. *Gilbert*, 180 N.C. App. 690, 639 S.E.2d 143, 2006 N.C. App. LEXIS 2467, at *8. In so doing, the Court of Appeals reasoned that "the most [defendant] will suffer from being denied an immediate appeal is a trial on the issue of damages." *Id.* (internal quotation marks and citation omitted).

Although we express no opinion as to the merits of defendant's *Gilbert III* complaint, we note that the trial court order from which defendant appeals includes a permanent injunction enjoining defendant from prosecuting *Gilbert III*. Ordinarily, "[a] permanent or perpetual injunction issues as a final judgment which settles the rights of the parties, after the determination of all issues raised." *Union*

Carbide Corp. v. Davis, 253 N.C. 324, 328, 116 S.E.2d 792, 794-95 (1960) (quoting *Galloway v. Stone*, 208 N.C. 739, 740, 182 S.E. 333, 333 (1935)); *Tomlinson v. Cranor*, 209 N.C. 688, 692, 184 S.E. 554, 556-57 (1936) (holding that the trial court erred in issuing a permanent injunction, which was a final judgment, because issues of material fact should have been determined by the jury). Thus, the permanent injunction issued by the trial court in this case is a remedy that forever prohibits defendant from prosecuting *Gilbert III*. In contrast, no such immediately enforceable remedy issues when a trial court merely enters partial summary judgment in a plaintiff's favor on the question of liability, as in the cases relied on by the Court of Appeals.

We conclude that defendant's right to investigate and prosecute allegations of attorney misconduct is substantial. The State Bar is an agency of the State of North Carolina. N.C.G.S. § 84-15 (2007). Prior to the incorporation of the North Carolina State Bar in 1933, *see id.*, the bar lacked legal autonomy and was not allowed to regulate itself. *See* Thomas W. Davis, President, N.C. Bar Ass'n, The Bar, Its Duties and Burdens, Address Before the North Carolina Bar Association (July 5, 1921), *in* Proceedings of the Twenty-Third Annual Session of the North Carolina Bar Association, 1921, at 6-20. As Chief Justice Stacy noted when he administered the oath of office to the first Bar Council after incorporation:

> The Legislature, in its wisdom, has provided for the incorporation of the State Bar. It has vested in the Council of that Bar, which you are, the authority and the power to administer the act. It may interest you to know that the Legislature has repealed all of the statutes relating to disbarment in the State, and has vested in you the responsibility of making rules and regulations, and administering those rules and regulations relating to the admission and to the discipline and to the disbarment of members of the Bar of this State.

Edwin C. Bryson, *The North Carolina State Bar, 1933-1950*, 30 N.C. St. Bar Q. 8, 12 (1983); *see also Baker v. Varser*, 240 N.C. 260, 267, 82 S.E.2d 90, 95-96 (1954) (The General Assembly created the State Bar "to enable the bar to render more effective service in improving the administration of justice, particularly in dealing with the problem of . . . discipl[in]ing and disbarring attorneys at law."). Thus, the power of the bar to police itself is both a privilege and a responsibility.

Defendant's action in conducting this, or any other investigation, is undertaken pursuant to statute for the benefit of both the legal pro-

fession and the citizens of North Carolina. When defendant is prevented from carrying out these duties, the bar as well as the public may be at risk. Accordingly, we conclude that defendant's right to carry out these statutory duties is substantial.

Next, we must determine whether defendant's substantial right may be lost or prejudiced if the interlocutory order is not considered on appeal. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) ("[T]he deprivation of that substantial right must potentially work injury to [defendant] if not corrected before appeal from final judgment."). The mere fact that a defendant has been enjoined does not constitute such an injury. However, because the trial court's permanent injunction may prevent defendant from executing its statutory duties while plaintiff pursues an improperly pleaded action, an injury arises. *See, e.g.*, *Freeland v. Greene*, 33 N.C. App. 537, 540, 235 S.E.2d 852, 854 (1977) ("The continuance of the injunction in effect and the denial of the motion to dismiss in this case do adversely affect important rights of [defendant North Carolina Board of Transportation] in connection with the performance by [it] of duties imposed by [statute]. We therefore consider this appeal."). In addition, execution of the bar's responsibility to protect the public requires that the bar have the ability timely to respond to allegations of wrongdoing and timely to act where those allegations prove true. As this case illustrates, a trial and subsequent appeal can consume years, leaving the public vulnerable. Accordingly, we conclude that defendant suffers the risk of injury if this interlocutory order is not considered. This interlocutory appeal is not barred.

[2] We now consider defendant's second issue. Plaintiff alleges that defendant prosecuted *Gilbert III* vindictively, as punishment both for his zealous defense of *Gilbert I* and *II* and for exercising his right to appeal the final judgments entered in those actions. Plaintiff further alleges that defendant's vindictive prosecution of *Gilbert III*, an administrative proceeding, gives rise to an independent cause of action under § 1983 for violation of his Fourteenth Amendment right to substantive and procedural due process. However, vindictive prosecution is a doctrine recognized in the context of criminal cases only.[3] In addressing vindictive prosecution, the Supreme Court of the

3. In two of the three United States Circuit Court cases cited in Justice Timmons-Goodson's dissent, the doctrine of vindictive prosecution is characterized as an affirmative defense. *Nat'l Eng'g & Contracting Co. v. Herman*, 181 F.3d 715 (6th Cir. 1999); *United States v. One 1985 Mercedes*, 915 F.2d 415 (9th Cir. 1990). The Courts issuing these decisions neither reviewed § 1983 actions nor found a vindictive prosecution of an administrative action that violated the defendant's right to substantive due process.

United States has considered two issues: (1) It has limited the ability of a judge to impose a more lengthy sentence upon a defendant who successfully appealed, *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656 (1969), and (2) it has held that, in a two-tier prosecutorial system such as we have in North Carolina, a prosecutor may not substitute a more serious charge when a defendant seeks a trial de novo on appeal from a lesser charge, *Blackledge v. Perry*, 417 U.S. 21, 40 L. Ed. 2d 628 (1974). Subsequent decisions of the United States Supreme Court have declined to expand the holdings of *Pearce* and *Blackledge*.[4] The Supreme Court of the United States has never applied the theory of vindictive prosecution to a civil action or an administrative proceeding.

We find no contrary cases in North Carolina. As a result, because the theory of vindictive prosecution is limited to criminal cases, we conclude that plaintiff proceeded on an inapplicable theory and that plaintiff's complaint could be dismissed on this ground alone. Nevertheless, North Carolina is a notice pleading state, the import of plaintiff's complaint is unmistakable, and defendant responded as if

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Although, in *Futernick*, the United States Court of Appeals for the Sixth Circuit listed elements that may comprise a claim for vindictive prosecution of an administrative proceeding, it did so in a footnote to that opinion, which reviewed a plaintiff's *selective prosecution* claim. *Futernick v. Sumpter*, 78 F.3d 1051 (6th Cir. 1996), *abrogated in part by Vill. of Willowbrook v. Olech*, 528 U.S. 562, 145 L. Ed. 2d 1060 (2000) (per curiam). In the intervening ten years, the Sixth Circuit has considered only one other case, also cited by the dissent, in which vindictive prosecution was raised as a defense to an administrative proceeding. *Nat'l Eng'g & Contracting Co.*, 181 F.3d 715. Similarly, the Ninth Circuit opinion cited by the dissent was decided in 1990. *One 1985 Mercedes*, 915 F.2d 415. The analysis undertaken by the Sixth and Ninth Circuits in these isolated decisions has not been adopted by any other United States Circuit Court or by the Supreme Court of the United States.

4. *See Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989) (considering a criminal defendant's direct criminal appeal and holding that no presumption of vindictiveness arises when defendant's first sentence was based upon a guilty plea and the second sentence follows trial); *United States v. Goodwin*, 457 U.S. 368, 73 L. Ed. 2d 74 (1982) (considering a criminal defendant's direct criminal appeal and holding that a defendant is not entitled to a presumption of vindictiveness arising from reindictment on more serious charges after he refused to plead guilty and demanded a jury trial); *Bordenkircher v. Hayes*, 434 U.S. 357, 54 L. Ed. 2d 604 (1978) (considering a criminal defendant's appeal from issuance of writ of habeas corpus and holding that due process is not violated by a defendant's reindictment on more serious charges following an accused's refusal to accept a plea bargain); *Chaffin v. Stynchcombe*, 412 U.S. 17, 36 L. Ed. 2d 714 (1973) (considering a criminal defendant's appeal from denial of writ of habeas corpus and holding that due process is not violated by a jury's recommendation of a higher sentence on retrial); *and Colten v. Kentucky*, 407 U.S. 104, 32 L. Ed. 2d 584 (1972) (considering the defendant's direct appeal from criminal conviction and holding that due process is not violated by a two-tiered criminal system that provides for trial de novo).

plaintiff had pleaded a recognized cause of action, such as malicious prosecution. Malicious prosecution is a theory applicable to criminal, civil, and administrative proceedings that have been instituted with malice and without probable cause. *See*, *e.g.*, *Carver v. Lykes*, 262 N.C. 345, 352, 137 S.E.2d 139, 145 (1964) ("[O]ne who instigates or procures investigatory proceedings against another before an administrative board which has the power to suspend or revoke that other's license to do business or practice his profession, is liable for the resulting damage if (1) the proceeding was instituted maliciously; (2) without probable cause; and (3) has terminated in favor of the person against whom it was initiated."). It is designed to discourage and remedy the type of prosecutorial misconduct alleged by plaintiff in this case and is consistent with the "bad faith prosecution" language used in the trial court's order. Accordingly, we will review plaintiff's complaint as alleging malicious prosecution.

[3] At the outset, we note that defendant argues that, because *Gilbert III* was still pending before the DHC when plaintiff filed his superior court action, the superior court lacked subject matter jurisdiction to hear plaintiff's § 1983 action. However, defendant's argument does not implicate the trial court's jurisdiction to hear plaintiff's § 1983 claim, which is established by N.C.G.S. § 7A-245(a)(4). As explained below, defendant's argument actually identifies a pleading defect in plaintiff's procedural due process claim. This is not the first time parties mistakenly have identified lack of subject matter jurisdiction as a basis for dismissal of a § 1983 action when, in fact, the actual ground supported by their argument was failure to state a claim for violation of a party's due process rights. In *Snuggs v. Stanly County Department of Public Health*, this Court reviewed a trial court's determination that it lacked subject matter jurisdiction and subsequent dismissal of the plaintiffs' § 1983 claim. 310 N.C. 739, 314 S.E.2d 528 (1984) (per curiam). Observing that the plaintiffs had failed to allege that remedies provided by the State were inadequate, we "elect[ed] to treat the defendants' [Rule 12(b)(1)] motions as motions brought under Rule 12(b)(6)," *id.* at 740, 314 S.E.2d at 529, and remanded the matter to superior court "for the entry of orders under Rule 12(b)(6) dismissing the plaintiffs' claims for failure to state a claim upon which relief may be granted," *id.* at 741, 314 S.E.2d at 529. Following this precedent, we now consider whether plaintiff has alleged a due process violation for which relief may be granted under § 1983.

[4] When Congress enacted 42 U.S.C. § 1983, it conferred upon injured plaintiffs a federal remedy for violations of federal constitu-

tional rights committed by state actors. *E.g.*, *Felder v. Casey*, 487 U.S. 131, 139, 101 L. Ed. 2d 123, 138 (1988). Section 1983 claims may be litigated in either state or federal court. *Howlett v. Rose*, 496 U.S. 356, 358, 110 L. Ed. 2d 332, 342 (1990). Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000). Liability imposed under § 1983 is expressly conditioned upon deprivation of a federal constitutional right and is distinct from liability arising from commission of a common-law tort. *Paul v. Davis*, 424 U.S. 693, 697-701, 47 L. Ed. 2d 405, 411-14 (1976) (explaining that an ordinary common-law tort claim is not transformed into a § 1983 procedural due process claim simply because the tort is committed by a state actor). Thus, tortious conduct by a state actor may be redressed through a § 1983 action only when it infringes a federal constitutional right. Such tortious conduct is commonly said to give rise to a "constitutional tort." *See*, *e.g.*, Michael K. Cantwell, *Constitutional Torts and the Due Process Clause*, 4 Temp. Pol. & Civ. Rts. L. Rev. 317, 320 (1995); James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 Harv. C.R.-C.L. L. Rev. 393, 395-96 (2003).

No definitive test exists for determining whether conduct that establishes the common-law tort of malicious prosecution also violates a federal constitutional right. *See generally* 1 Steven H. Steinglass, *Section 1983 Litigation in State Courts* § 3:2, at 3-3 (2001) (noting that "[m]any of the most difficult questions confronting courts and litigants in § 1983 litigation concern the definition of the underlying constitutional rights, and whether and when conduct that gives rise to state tort actions is also a constitutional violation actionable under § 1983"). United States circuit courts disagree over whether the common-law elements of malicious prosecution are also essential components of a constitutional tort.[5] Nevertheless, all

5. *Compare Kjellsen v. Mills*, 517 F.3d 1232, 1237-38 (11th Cir. 2008) (identifying the elements of a § 1983 malicious prosecution claim as co-extensive with the elements of the common law tort), *and Johnson v. Knorr*, 477 F.3d 75, 81-82 (3d Cir. 2007) (listing the elements of a § 1983 malicious prosecution claim as the elements of the common-law tort plus "deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding"), *and Jocks v. Tavernier*, 316 F.3d 128, 136 (2d Cir.

circuits agree that a plaintiff must show that the alleged malicious prosecution infringes a constitutional right in order to invoke § 1983. Most frequently, the federal constitutional provisions cited in § 1983 claims based upon malicious prosecution are the First and Fourth Amendments and the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, *Albright v. Oliver*, 510 U.S. 266, 274-75, 127 L. Ed. 2d 114, 124 (1994) (plurality) (explaining that the Fourth Amendment, not substantive due process, addresses deprivations of liberty resulting from criminal prosecution); *Dombrowski v. Pfister*, 380 U.S. 479, 481-87, 14 L. Ed. 2d 22, 25-29 (1965) (considering a § 1983 action in which the plaintiffs alleged criminal prosecution undertaken for the purpose of silencing speech protected under the First Amendment); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068-70 (9th Cir. 2004) (concluding that the plaintiff stated a claim under § 1983 by alleging prosecution undertaken for the purpose of depriving him of his First Amendment right to freedom of speech and Fourteenth Amendment right to equal protection). In § 1983 actions, the United States Supreme Court consistently distinguishes the protections conferred by the First Amendment, the Fourth Amendment,

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2003) (stating that the elements of a § 1983 malicious prosecution claim are the elements of the common-law tort plus "post-arraignment seizure"), *and Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001) (supposing that a § 1983 plaintiff must allege the common-law elements of malicious prosecution and "deprivation of a federally-protected right"), *and Poppell v. City of San Diego*, 149 F.3d 951, 961-62 (9th Cir. 1998) (requiring a plaintiff to establish the common-law tort elements of malicious prosecution in addition to deprivation of a constitutional right), *with Gregory v. City of Louisville*, 444 F.3d 725, 750 (6th Cir. 2006) (recharacterizing a plaintiff's § 1983 malicious prosecution claim "as the right under the Fourth Amendment to be free from continued detention without probable cause" and undertaking Fourth Amendment analysis), *cert. denied*, 549 U.S. 1114, 166 L. Ed. 2d 707 (2007), *and Pierce v. Gilchrist*, 359 F.3d 1279, 1290 (10th Cir. 2004) ("rejecting the view that a plaintiff does not state a claim actionable under § 1983 unless he satisfies the requirements of an analogous common law tort"), *and Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) (summarizing the rules of its sister circuit courts, concluding that reference to the common-law tort of malicious prosecution "invites confusion," and considering instead whether the alleged conduct "run[s] afoul of explicit constitutional protection"), *cert. denied*, 543 U.S. 808, 160 L. Ed. 2d 10 (2004), *and Newsome v. McCabe*, 256 F.3d 747, 749-50 (7th Cir. 2001) (stating that the elements of the constitutional tort of malicious prosecution, if the constitutional tort exists at all, do not "depend on state law"), *and Lambert v. Williams*, 223 F.3d 257, 260-62 (4th Cir. 2000) (explaining that the common-law elements of a malicious prosecution claim are relevant to a § 1983 malicious prosecution claim only to the extent that they are analogous to a Fourth Amendment violation), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). *See also Albright v. Oliver*, 510 U.S. 266, 270 n.4, 127 L. Ed. 2d 114, 121 n.4 (1994) (plurality) (acknowledging an "embarrassing diversity of judicial opinion" about "the extent to which a claim of malicious prosecution is actionable under § 1983" (citations and internal quotation marks omitted)).

and the Equal Protection Clause of the Fourteenth Amendment, from the protection supplied by the Due Process Clause of the Fourteenth Amendment. *E.g.*, *Parratt v. Taylor*, 451 U.S. 527, 536, 68 L. Ed. 2d 420, 429 (1981) (reasoning that a plaintiff's § 1983 procedural due process claim "differ[ed] from the claims which were before [the Court] in *Monroe v. Pape*, [365 U.S. 167, 5 L. Ed. 2d 492 (1961)], which involved violations of the Fourth Amendment, and the claims presented in *Estelle v. Gamble*, 429 U.S. 97 [50 L. Ed. 2d 251] (1976), which involved alleged violations of the Eighth Amendment"), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 88 L. Ed. 2d 662 (1986); *see also Edward Valves, Inc. v. Wake Cty.*, 343 N.C. 426, 434, 471 S.E.2d 342, 347 (1996) ("State remedies are only relevant when a Section 1983 action is brought for a violation of procedural due process." (citations omitted)), *cert. denied*, 519 U.S. 1112, 136 L. Ed. 2d 839 (1997).

Plaintiff's malicious prosecution claim is based upon allegations in his complaint that defendant violated both plaintiff's substantive due process rights and his procedural due process rights. As to plaintiff's substantive due process claim, in *Albright v. Oliver*, a plurality of Justices of the United States Supreme Court observed that "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." 510 U.S. at 272, 127 L. Ed. 2d at 122. Accordingly, the Court held that the plaintiff failed to state a § 1983 claim when he alleged that Illinois authorities violated his Fourteenth Amendment right to substantive due process by prosecuting criminal charges against him without probable cause. *Id.* at 268-69, 127 L. Ed. 2d at 120-21. In so holding, the plurality explained that the Fourth Amendment was drafted to address "deprivations of liberty that go hand in hand with criminal prosecutions." *Id.* at 274, 127 L. Ed. 2d at 124. As a result, "with its scarce and open-ended guideposts," *id.* at 275, 127 L. Ed. 2d at 124 (internal quotation marks omitted), "substantive due process may not furnish the constitutional peg on which to hang such a 'tort,' " *id.* at 271 n.4, 127 L. Ed. 2d at 122 n.4. In light of the lack of "guideposts for responsible decisionmaking," and the United States Supreme Court's reluctance to expand the boundaries of substantive due process protection, *see Collins v. City of Harker Heights*, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 273 (1992), we hold that any right plaintiff has to be free of malicious prosecution, including a claim based upon the allegedly malicious prosecution of a civil or administrative matter, does not arise from substantive due process rights under the Fourteenth Amendment.

Turning to plaintiff's procedural due process claim, we observe that, with few exceptions, United States circuit courts have considered the question of whether malicious prosecution infringes on a party's procedural due process rights only in criminal cases, and then only in dicta. *See*, *e.g.*, *Pierce v. Gilchrist*, 359 F.3d 1279, 1299 (10th Cir. 2004); *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001). We have found no holding that malicious initiation of a civil administrative proceeding, by itself, inflicts an injury giving rise to a constitutional tort. However, the Second and Tenth Circuit Courts of Appeals have each published one opinion reviewing a § 1983 claim in which a plaintiff alleged that malicious filing of an administrative action violated his or her right to procedural due process.

In *Washington v. County of Rockland*, the United States Court of Appeals for the Second Circuit considered the plaintiff correction officers' claims that a county sheriff maliciously filed unjustified disciplinary charges against them in a civil administrative proceeding. 373 F.3d 310, 313 (2d Cir. 2004). Citing *Albright v. Oliver*, the Court held that a § 1983 action based upon an allegation that the defendant had initiated a malicious prosecution "may not be premised on a civil administrative proceeding" absent a violation of Fourth Amendment rights. *Id.* at 313, 315-17.

In *Becker v. Kroll*, the United States Court of Appeals for the Tenth Circuit considered a plaintiff medical doctor's claim that Utah's Medicaid Fraud Control Unit maliciously filed unjustified civil and criminal charges against her. 494 F.3d 904, 909 (10th Cir. 2007). Construing the plaintiff's complaint liberally, the Court acknowledged that the plaintiff alleged "some injuries resulting from the filing of criminal charges against her that are outside the scope of the Fourth Amendment's substantive and procedural protections," *id.* at 918, such as infringement upon her "liberty interest in being free from unwarranted investigation and prosecution without probable cause" and "a property interest in the integrity of her medical and billing records," *id.* at 919. The Court stated, but did not hold, that "[t]hese injuries might be cognizable as due process violations through a gap in constitutional protection created by *Albright's* limitation of § 1983 malicious prosecution claims to those based on the Fourth Amendment," *id.* at 918, but then disposed of the plaintiff's appeal on alternative grounds.

In light of *Albright v. Oliver* and the apparent uncertainty among United States circuit courts over the extent to which § 1983 supports an action when a plaintiff claims procedural due process violations

based on malicious prosecution, including a claim based on prosecution of a civil or administrative action, we express no opinion whether defendant's conduct infringes a "life, liberty, or property interest" that is protected by the Fourteenth Amendment. Such a holding would be essential to the success of plaintiff's claim because "the Fourteenth Amendment does not require a remedy when there has been no 'deprivation' of a protected interest." *Davidson v. Cannon*, 474 U.S. 344, 348, 88 L. Ed. 2d 677, 683 (1986). Instead, we resolve this issue on an alternative, but settled, legal ground.[6]

Even if this Court accepts plaintiff's argument that defendant's allegedly malicious prosecution of *Gilbert III* affects a constitutionally protected "life, liberty, or property interest," plaintiff must clear the higher hurdle of showing deprivation of his constitutional rights *without due process of law*. "Nothing in [the Fourteenth] Amendment protects against all deprivations of life, liberty, or property by the State"; rather, "[t]he Fourteenth Amendment protects only against deprivations 'without due process of law.' " *Parratt*, 451 U.S. at 537, 68 L. Ed. 2d at 430 (citation omitted). When a plaintiff is deprived of a constitutionally protected interest by the unauthorized, tortious conduct of a state actor, statutory and common-law postdeprivation remedies can provide the process that is due. *Id.* at 541-44, 68 L. Ed. 2d at 432-34 (stating and applying the rule to a plaintiff's § 1983 procedural due process claim alleging deprivation of personal property); *Hudson v. Palmer*, 468 U.S. 517, 530-33, 82 L. Ed. 2d 393, 405-08 (1984) (applying the rule stated in *Parratt* to unauthorized, intentional deprivations of property); *see also Zinermon v. Burch*, 494 U.S. 113, 131-32, 108 L. Ed. 2d 100, 117-18 (1990) (extending the rule stated in *Parratt* to deprivations of liberty). In those cases, a Fourteenth Amendment procedural due process violation "is not complete until and unless" the State "refuses to provide a suitable postdeprivation remedy." *Hudson*, 468 U.S. at 533, 82 L. Ed. 2d at 407-08; *accord Edward Valves*, 343 N.C. at 434, 471 S.E.2d at 347 (contrasting the importance of available state remedies in "a Section 1983 action . . . brought for violation of procedural due process" with their inapplicability in "a Section 1983 action based on a violation of a substantive constitutional right").

The United States Supreme Court considers the existence of common-law tort actions, postdeprivation hearings, and other "pro-

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6. While many of the cases cited in the following portion of this opinion make undifferentiated reference to the Due Process Clause of the Fourteenth Amendment, we understand these opinions address procedural due process.

cedural safeguards built into the statutory or administrative procedure of effecting the deprivation," when evaluating the adequacy of a State's postdeprivation remedies. *Zinermon*, 494 U.S. at 126, 108 L. Ed. 2d at 114. A plaintiff who has access to an adequate postdeprivation remedy does not sustain a constitutional injury under the Due Process Clause of the Fourteenth Amendment and cannot state a claim for relief on that basis under § 1983. *Parratt*, 451 U.S. 527, 68 L. Ed. 2d 420.

Malicious prosecution of an administrative action is a common-law tort in North Carolina. *Carver*, 262 N.C. at 351-52, 137 S.E.2d at 145 (stating the elements of the tort). Availability of a common-law tort action, standing alone, is an adequate postdeprivation remedy, even when successful litigation of the tort does not result in all the relief to which a plaintiff would be entitled under § 1983. *E.g.*, *Hudson*, 468 U.S. at 535, 82 L. Ed. 2d at 408; *Parratt*, 451 U.S. at 544, 68 L. Ed. 2d at 434. Ancillary safeguards that protect the procedural due process rights of an attorney before the DHC include the ability to file motions and participate in a contested hearing before that tribunal; the right to be represented by counsel; the ability to petition the North Carolina Court of Appeals for prerogative writs, including prohibition; appeal of right to that court; and the ability to petition the trial division to stay an order of discipline pending resolution of an appeal. N.C.G.S. § 84-28(d1), (h) (2007); *id.* § 84-30 (2007); N.C. R. App. P. 22; 27 NCAC 1B .0114 (June 2008). Because these postdeprivation remedies adequately safeguard plaintiff's right to procedural due process, we conclude that plaintiff has failed to state a procedural due process claim for which relief may be granted under 42 U.S.C. § 1983.

This holding does not mean that plaintiff cannot pursue a properly pleaded § 1983 action, nor does it mean that such an action cannot be filed until the conclusion of defendant's administrative action against plaintiff. A properly pleaded § 1983 action may proceed in parallel with an administrative action before a regulatory body. Nevertheless, in the case at bar, plaintiff sought to have defendant's actions enjoined on the grounds that it was acting maliciously and had violated his procedural due process rights. The elements of a tort action alleging malicious prosecution of an administrative proceeding are: "(1) the proceeding was instituted maliciously; (2) without probable cause; and (3) has terminated in favor of the person against whom it was initiated." *Carver*, 262 N.C. at 351-52, 137 S.E.2d at 144-45. Plaintiff's evidence at the hearing on the parties' summary

judgment motions not only failed to forecast that plaintiff could establish these elements, it demonstrated that plaintiff could not establish them. Accordingly, no injunction was justified.

For the reasons stated above, the dismissal entered by the Court of Appeals is vacated. However, while the DHC and the Superior Court of North Carolina have concurrent jurisdiction over attorney discipline matters, *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (per curiam), the superior court division has original subject matter jurisdiction over constitutional claims, N.C.G.S. § 7A-245(a)(4) (2007). Accordingly, this matter is remanded to the Court of Appeals for further remand to Superior Court, Wilson County, with instructions to dissolve the permanent injunction, dismiss plaintiff's § 1983 substantive due process claim with prejudice, and dismiss plaintiff's § 1983 procedural due process claim without prejudice.

VACATED AND REMANDED.

Justice TIMMONS-GOODSON, dissenting.

Because I conclude that plaintiff has sufficiently alleged a § 1983 claim for vindictive prosecution to survive a Rule 12(b)(6) motion to dismiss, I respectfully dissent.

At the outset, I note that the only two questions presented by defendant's petition for discretionary review and allowed by the Court read as follows:

> 1. Did the Court of Appeals err in dismissing the State Bar's appeal of the injunction of Wilson County Superior Court as interlocutory?
>
> 2. Did the Superior Court of Wilson County have jurisdiction to permanently enjoin the State Bar's prosecution of an attorney disciplinary proceeding before the Disciplinary Hearing Commission?

The majority answers the question regarding the interlocutory nature of the appeal in the affirmative and explains that, while interlocutory, the appeal affects a substantial right that will be irreversibly injured or lost if not immediately appealed. The majority answers the question regarding the superior court's subject matter jurisdiction affirmatively. Thus, the inquiry should end.

However, the majority proceeds to discuss the failure of plaintiff to state a claim. That discussion is not necessary to answer the question regarding jurisdiction presented by the petition for discretionary review. Indeed, the majority has improperly expanded the scope of this appeal and ruled on a constitutional question in advance of the necessity of deciding it. In doing so, the majority fails to exercise the judicial restraint that we have so often proclaimed. At the heart of the majority's decision to reach the question is the concern that a ruling allowing plaintiff to pursue in the courts his § 1983 claim would permit attorneys to circumvent attorney disciplinary proceedings and obtain favorable treatment in their home districts. I am not persuaded, as we entrust our superior court judges with the ability to fairly adjudicate many weighty issues, including capital cases. Moreover, the instant case involves unique facts and procedural history not likely to arise in other disciplinary proceedings.

Interlocutory Appeal

The majority concludes that defendant's interlocutory appeal implicates defendant's substantial right to execute its statutory duties, and that this right may be lost or prejudiced if appeal is not immediately taken. I disagree. To be sure, defendant has statutory duties to promulgate and enforce the rules of professional conduct, duties of significant importance to the protection of the public and the legal profession. N.C.G.S. § 84-23 (2007). Assuming that defendant's expeditious prosecution of *Gilbert III* implicates this substantial right, it is defendant's conduct, and not the interlocutory order in the instant case, that has unnecessarily delayed the prosecution of *Gilbert III*. It is a cardinal principle that a party may not avail itself of any error created by the party itself. *See*, *e.g.*, *id.*, § 15A-1443(c) (2007) ("A defendant is not prejudiced . . . by error resulting from his own conduct.").

In the instant case, defendant generated the complaint on 12 September 2003, despite having access to all of the underlying information at least three years earlier. Although defendant had all the requisite information available to it prior to the institution of *Gilbert I*, defendant chose to proceed against plaintiff in piecemeal fashion, such that the instant proceeding is the seventh one to be litigated in various forums across the state. Thus, I find unpersuasive defendant's argument that immediate review of the trial court's interlocutory order is necessary in order to prevent the delayed prosecution of *Gilbert III*.

Moreover, defendant has failed to show that the delayed prosecution of *Gilbert III* pending the trial court's resolution of the instant case could result in irreversible injury or loss of its substantial right absent immediate review. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Indeed, defendant cannot make such a showing. As defendant's own delay in filing the complaint in *Gilbert III* for approximately three years indicates, defendant is unlikely to suffer a loss or irreversible injury merely due to the passage of time.

While conceding that an injunction is not an irreversible injury, the majority concludes that, because plaintiff has failed to properly plead his § 1983 claims, defendant should not be made to await a final judgment. This reasoning incorrectly focuses on the merits of plaintiff's underlying action instead of the possible injury to or loss of defendant's substantial rights. Yet the strength of defendant's appeal on the merits does not dictate whether defendant may immediately appeal from an interlocutory order. As we have repeatedly held, the trial court's denial of a motion to dismiss will not entitle the defendant to immediate appeal of an interlocutory order, regardless of the merits of the motion to dismiss. *E.g.*, *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437-38, 206 S.E.2d 178, 181 (1974); *Cox v. Cox*, 246 N.C. 528, 531, 98 S.E.2d 879, 883 (1957). Consequently, defendant is not entitled to immediate review of the trial court's order, and this interlocutory appeal should be dismissed.

Subject Matter Jurisdiction

The only substantive issue for which we allowed discretionary review in this case was whether the superior court had subject matter jurisdiction to hear plaintiff's § 1983 claim during the pendency of *Gilbert III* in the DHC. After recognizing that the superior court has subject matter jurisdiction in this case, the majority inexplicably proceeds to transform defendant's motion to dismiss for lack of subject matter jurisdiction into a motion to dismiss for failure to state a claim. In so doing, the majority unnecessarily expands the scope of this appeal. As the majority has addressed the issue, however, I do so as well, and I conclude that plaintiff's complaint adequately states a § 1983 claim for deprivation of substantive due process based upon allegations of vindictive prosecution by defendant.

Vindictive Prosecution

On review of a motion to dismiss for failure to state a claim under Rule 12(b)(6), we examine

> "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. In ruling upon such a motion, the complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief."

Shepard v. Ocwen Fed. Bank, 361 N.C. 137, 139, 638 S.E.2d 197, 199 (2006) (quoting *Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997) (alteration in original)).

To state a claim for relief under § 1983, the plaintiff must allege (1) the deprivation of a right under the federal constitution or statute (2) by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 101 L. Ed. 2d 40, 48-49 (1988). A vindictive prosecution is one that is designed to punish an individual for exercising statutory or constitutional rights to appeal or seek collateral relief in a prior proceeding. It is well-established that vindictive prosecution violates due process. *See*, *e.g.*, *United States v. Goodwin*, 457 U.S. 368, 372, 73 L. Ed. 2d 74, 80 (1982); *Bordenkircher v Hayes*, 434 U.S. 357, 363, 54 L. Ed. 2d 604, 610 (1978); *Blackledge v. Perry*, 417 U.S. 21, 29, 40 L. Ed. 2d 628, 635 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 724, 23 L. Ed. 2d 656, 668 (1969).

The majority incorrectly concludes that substantive due process does not protect individuals from vindictive prosecutions of administrative matters. Neither the Supreme Court of the United States nor any other federal court has issued such a holding. To the contrary, federal courts have applied the doctrine to administrative and regulatory proceedings. *See*, *e.g.*, *Nat'l Eng'g & Contr'g Co. v. Herman*, 181 F.3d 715, 722-23 (6th Cir.) (stating the elements of vindictive prosecution, which petitioner asserted as a defense to administrative proceedings by the Occupational Safety and Health Review Commission for violations of OSHA regulations), *cert. denied*, 528 U.S. 1045, 145 L. Ed. 2d 481 (1999); *Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 n.7 (6th Cir.) (describing the elements of vindictive prosecution in the context of a regulatory proceeding), *cert. denied*, 519 U.S. 928, 136 L. Ed. 2d 215 (1996), *overruled on other grounds by*, *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 1063 (per curiam) (2000); *United States v. One 1985 Mercedes*, 917 F.2d 415, 420 (9th Cir.) (stating that vindictive prosecution claims may raise due process and equal protection issues in civil forfeiture cases).

Indeed, this Court would be the first high court in the nation to conclude that the rule against vindictive prosecution does not apply to administrative proceedings. The only limitation that the Supreme Court of the United States has placed upon the doctrine has been the refusal to apply a presumption of vindictiveness in all cases. *See*, *e.g.*, *Alabama v. Smith*, 490 U.S. 794, 799, 104 L. Ed. 2d 865, 872 (1989); *Goodwin*, 457 U.S. at 384, 73 L. Ed. 2d at 87. Even in such cases, however, the proponent may establish actual vindictiveness through objective evidence. *Goodwin*, 457 U.S. at 384, 73 L. Ed. 2d at 87.

The import of the rule against vindictive prosecution is that the State may not punish an individual for the exercise of his statutory or constitutional rights. Thus, the central question in determining whether the rule applies to this case is whether attorney disbarment is punishment in the constitutional sense. The answer to this question is well-established in Supreme Court precedent: "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer." *In re Ruffalo*, 390 U.S. 544, 550, 20 L. Ed. 2d 117, 122 (1968) (citations omitted). Consequently, attorneys in such proceedings are entitled to certain constitutional protections. *See*, *e.g.*, *id.*, 390 U.S. at 550, 20 L. Ed. 2d at 122 (holding that attorney disbarment proceedings are quasi-criminal and that attorneys are entitled to procedural due process); *Spevack v. Klein*, 385 U.S. 511, 516, 17 L. Ed. 2d 574, 578 (1967) (holding that attorneys are entitled to the privilege against self-incrimination because "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege"). Because attorney disbarment amounts to punishment in the constitutional sense, I conclude that the vindictive prosecution of attorney disbarment proceedings implicates due process, notwithstanding the State's labeling of such proceedings as "administrative." The question then becomes whether plaintiff has alleged sufficient facts in his complaint to state a claim for vindictive prosecution.

Turning to the pleadings in the instant case, plaintiff's alleges, *inter alia*, the following:

> By attempting through Gilbert III to secure a disciplinary sanction . . . and by doing so in apparent bad faith and as part of a continuing effort to menace and intimidate the Plaintiff, and to exact a price for the Plaintiff's having exercised his statutory and constitutional rights to defend himself zealously against, and to seek appellate review . . . the State Bar has engaged, and is con-

> tinuing to engage, in a **vindictive prosecution** of the Plaintiff in violation of the United States and North Carolina constitutions.
>
> . . . .
>
> By attempting through Gilbert III to secure a disciplinary sanction . . . and by doing so on the basis of intentional misrepresentations of fact, in apparent bad faith, and as part of a continuing effort to menace and intimidate the Plaintiff, and to exact a price for the Plaintiff's having exercised his statutory and constitutional rights to defend himself zealously against, and to seek appellate review . . . the State Bar has deprived the Plaintiff of his right to substantive due process.

In support of these assertions, plaintiff alleges that defendant knowingly made false allegations in the underlying grievance in *Gilbert III* and notified plaintiff's attorney of its intent to deal with plaintiff in such a way as to discourage other attorneys from similarly obtaining writs of supersedeas. Plaintiff also alleges that *Gilbert III* is the latest in a series of "sharp practices" against plaintiff that include the following: (1) circumventing the procedures for instituting attorney disciplinary hearings; (2) deterring an attorney witness from testifying for plaintiff in *Gilbert I* by filing a grievance and issuing a subpoena for that attorney's trust account records days before the hearing; (3) attempting to impeach another defense witness in *Gilbert I* by suggesting that the witness was convicted of crimes, which defendant knew to be untrue; (4) knowingly making material misrepresentations of fact to this Court in oral arguments in *Gilbert I*; and (5) filing a grievance in *Gilbert III* that contained knowing misrepresentations of fact.

Treating the allegations in plaintiff's complaint as true, as is required on review of a motion to dismiss under Rule 12(b)(6), plaintiff's complaint sufficiently alleges a deprivation of substantive due process. Plaintiff clearly had statutory rights to seek appellate review and obtain writs of prohibition from the DHC's disciplinary order in *Gilbert I*.[7] Plaintiff alleges that defendant instituted *Gilbert III* to punish him for having exercised these statutory rights in a prior disciplinary proceeding. The law is well-established that the State may

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7. An attorney who is a party to a disciplinary proceeding has a statutory right to seek appellate review of the DHC's final order in the Court of Appeals. N.C.G.S. § 84-28(h). The attorney may also appeal from any decision of the Court of Appeals in which there is a dissent. *Id.*, § 7A-30(2) (2007). As part of the appellate process, the attorney may obtain writs of supersedeas to stay the execution or enforcement of any judgment or order, including those of the DHC. N.C. R. App. P. 23.

not prosecute an individual for exercising his statutory or constitutional rights to appeal or seek collateral relief. *Goodwin*, 457 U.S. at 372, 73 L. Ed. 2d at 80. Such conduct by the State would amount to a deprivation of substantive due process. *Id.* Plaintiff has adequately alleged a claim for relief under § 1983. In concluding that plaintiff's complaint contains sufficient allegations to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, I express no opinion as to whether there is merit to plaintiff's claim. I conclude only that having sufficiently *alleged* a § 1983 claim, the attorney in this case is entitled to his day in court, as the countless attorneys of our state routinely assist the public in doing.

Having abandoned judicial restraint, the majority not only expands the scope of this appeal but also incorrectly analyzes plaintiff's complaint as one for malicious prosecution. In his complaint, plaintiff seeks relief for *vindictive prosecution* only and makes no mention of either the cause or elements of malicious prosecution. The essence of a malicious prosecution is the institution of legal proceedings with malice and without probable cause. *See Best v. Duke Univ.*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994); *Greer v. Skyway Broad. Co.*, 256 N.C. 382, 389, 124 S.E.2d 98, 103 (1962). The gravamen of plaintiff's complaint is that defendant instituted *Gilbert III* to punish him for exercising his statutory rights to appeal and obtain the writs of supersedeas, not that defendant lacked probable cause and that *Gilbert I* or *II* terminated in his favor. I find no basis in the record for the majority's treatment of plaintiff's complaint as one for malicious prosecution.

In sum, because the interlocutory order in the instant case does not affect a substantial right that may be lost or irreversibly injured absent immediate review, I would affirm the decision of the Court of Appeals to dismiss the instant appeal. Assuming *arguendo* that the merits of defendant's appeal are properly before this Court, I conclude that the trial court correctly denied defendant's motion to dismiss because (1) the superior court had subject matter jurisdiction over plaintiff's § 1983 actions and (2) plaintiff adequately alleged a deprivation of substantive due process. I therefore respectfully dissent.

Justice HUDSON dissenting.

Because I conclude that the North Carolina State Bar has failed to show that this interlocutory appeal adversely affects a substantial

right, I would hold that the Court of Appeals correctly dismissed defendant's appeal and that discretionary review was improvidently allowed. Therefore I respectfully dissent.

Without citing authority, the majority concludes that "defendant's right to carry out its duties to investigate and [discipline lawyers] is substantial." The majority then acknowledges that the mere fact that defendant has been enjoined is not deprivation of a substantial right, but nonetheless concludes that "because the trial court's permanent injunction may prevent defendant from executing its statutory duties while plaintiff pursues an improperly pleaded action, an injury arises."

The only authority in support of this latter proposition is a citation to a 1977 opinion from the Court of Appeals concerning an injunction against the North Carolina Board of Transportation, barring it from removing a billboard owned by the plaintiff. *Freeland v. Greene*, 33 N.C. App. 537, 540, 235 S.E.2d 852, 854 (1977). While the Court of Appeals there stated that it was considering the Board's interlocutory appeal of the injunction because it "adversely affect[ed] important rights in connection with the performance by them of [statutory] duties," it provided no explanation. As such the *Freeland* opinion, which is not binding on this Court, gives little guidance on the analysis of this issue. The court's holding then rested on the conclusion that "plaintiff failed to exhaust his administrative remedies, [such that] this action should have been dismissed." *Id.* at 544, 235 S.E.2d at 856.

Here the Court of Appeals has described the substantial right at stake as defendant's ability to "promulgate[] rules of professional conduct to protect the public from unethical behavior by attorneys. . . .[,] conduct hearings and impose penalties in disciplinary matters." As noted by the court in its decision below, "defendant fails to articulate how delaying its appeal until the case is resolved will jeopardize its ability to enforce the Rules of Professional Conduct. Nor does defendant identify any circumstance making review of the particular claim, which alleges that plaintiff mishandled $290 in 1998, of such urgency that the appeal cannot be delayed," until the issue of damages has been determined. *Gilbert v. N.C. State Bar*, 180 N.C. App. 690, 639 S.E.2d 143, 2006 WL 3718000, at *3 (2006) (unpublished).

Likewise, my review finds no stated explanation of how the trial court's order enjoins defendant's ability to discharge its statutory

duties in general, as opposed to pursuing its specific complaint against plaintiff. Neither does the trial court's order contain any broad prohibition against defendant carrying out its statutory duties. Instead, the trial court enjoined defendant from continuing its prosecution of plaintiff in one specific action to recover $290 in client funds allegedly misused by plaintiff. In so ordering, the trial court found defendant's pursuit of that action to be "but the latest in a series of unremitting, increasingly disturbing, and, ultimately, unlawful acts and practices that have been designed and intended by the State Bar to . . . punish and retaliate against the Plaintiff . . . and otherwise harass, menace and intimidate the Plaintiff."

For those reasons, as well as a number of other fact-specific bases discussed in its seventy-seven page order, the trial court granted summary judgment to plaintiff on his claims for vindictive prosecution and violations of his rights to substantive and procedural due process, as related only to the most recent action brought by defendant against him. In addition, the trial court permanently enjoined defendant from "prosecuting or proceeding further with the prosecution of the claims and charges asserted in the case" and from publishing in any form "the past, present, or future pendency of the disciplinary action," specified by file number, against plaintiff. This language very precisely targets and enjoins only defendant's actions against plaintiff and in no way impedes or restricts its ability to discharge its general statutory duties.

More importantly, defendant has failed to articulate what injury will result from any deprivation of a substantial right, if it is not corrected now, prior to final judgment as to all claims and controversies between the parties. *See*, *e.g.*, *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (" 'Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment.' " (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (alteration in original))); *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) ("A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." (citations omitted)); *see also Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of show-

ing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." (citations omitted)).

It is also noteworthy that the trial judge here explicitly declined to certify this interlocutory appeal for our immediate review pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. *See* N.C.G.S. § 1A-1, Rule 54(b) (2007); *Gilbert*, 2006 WL 3718000, at *2 ("The defendant asked the court to certify the case for immediate appellate review, and the trial court expressly denied this request . . . ."). Furthermore, this is not a case in which the order has deprived the appellant of one of its substantive legal claims. *See*, *e.g.*, *Charles Vernon Floyd, Jr. & Sons, Inc. v. Cape Fear Farm Credit, ACA*, 350 N.C. 47, 49, 51, 510 S.E.2d 156, 158, 159 (1999) (holding that the trial court's election-of-remedies order "involved the merits and affected the judgment" because it "deprived [the] plaintiffs of one of their claims"), *overruled in part on other grounds by Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999). Defendant could still raise its issues pertaining to the trial court's order after the hearing on damages. Finally, defendant does not face the possibility here of inconsistent verdicts or outcomes at trial. *See*, *e.g.*, *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (allowing an interlocutory appeal due to "the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.").

Instead, the sole effect of our dismissing this appeal as interlocutory—beyond defendant perhaps having to wait for any recovery—would be simply to delay a determination of the substantive merits of defendant's arguments until appeal after entry of an order on damages. Simple delay does not amount to a deprivation or impairment of a substantial right; rather, preventing such delays underpins our general reluctance to hear interlocutory appeals. *See Veazey*, 231 N.C. at 363, 57 S.E.2d at 382 ("There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders."); *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 358, 261 S.E.2d 908, 913 ("The statutes and rules governing appellate review are more than procedural niceties. They are designed to streamline the judicial process, to forestall delay rather than engender it."), *appeal dismissed*, 449 U.S. 807, 66 L. Ed. 2d 11 (1980). Such a holding would also be consistent with past decisions of this Court. *See*, *e.g.*, *id.* at 355, 261 S.E.2d at 911 (dis-

missing as interlocutory an appeal from a denial of a motion to dismiss and the grant of a preliminary injunction in part because the denial of a motion to dismiss "merely serves to continue the action then pending. No final judgment is involved, and the disappointed movant is generally not deprived of any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on its merits.").

The majority's holding here goes beyond our long-standing jurisprudence describing the types of substantial rights, and possible impairment of those rights, that justify appellate review of an interlocutory order. The course it sets potentially opens floodgates that should remain closed. As such, I respectfully dissent.

STATE OF NORTH CAROLINA v. ANDRE LEVERN MILLER

No. 309A08

(Filed 20 March 2009)

Drugs— constructive possession—proximity to drugs—identifying documents in room

The evidence of possession of a controlled substance by constructive possession was sufficient where defendant was found within touching distance of the crack cocaine and his identity documents were in the same room. Although defendant did not have exclusive control of the premises, the only other individual in the room was not near any of the cocaine; the circumstances permit a reasonable inference that defendant had the intent and capability to exercise control and dominion over the cocaine in the room.

Justice BRADY dissenting.

Justice TIMMONS-GOODSON dissenting.

Justice HUDSON 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, 191 N.C. App. 124, 661 S.E.2d 770 (2008), reversing and remanding a judgment entered 15 February

2007 by Judge Catherine C. Eagles in Superior Court, Forsyth County. Heard in the Supreme Court 19 November 2008.

Roy Cooper, Attorney General, by Stanley G. Abrams, Assistant Attorney General, for the State-appellant.

Paul F. Herzog for defendant-appellee.

EDMUNDS, Justice.

In this case, we consider whether the evidence presented at defendant's trial for possession of a controlled substance was sufficient to support a finding of guilt based upon the theory of constructive possession. When the evidence showed, among other things, that defendant was found within touching distance of the crack cocaine in question and defendant's identity documents were in the same room, we conclude that the evidence was sufficient to support the jury's verdict. Accordingly, we reverse the opinion of the Court of Appeals.

At trial, the State presented evidence that on 8 December 2005, Winston-Salem Police Detective R.J. Paul obtained a search warrant for the residence at 1924 Dacian Street after citizen complaints and resulting surveillance revealed heavy vehicle and pedestrian traffic in the area. Later that day, a Winston-Salem Police Special Enforcement Team entered the residence, commanding everyone to get on the floor. The officers found several individuals in the living room. Defendant, who was sitting on the corner of a bed in an adjoining room, slid to the floor as officers entered. While he was on the floor, defendant's head lay between one to four feet from the bedroom door. Another individual in the bedroom remained seated in a chair about eight feet from the door.

Detective Paul entered the bedroom and recovered a small white rocklike substance from the end of the bed where defendant had been sitting.[1] In addition, Detective Paul recovered a plastic bag containing several small white rocks from behind the open bedroom door, about two feet from where defendant had been lying on the floor. Later testing revealed that all the material recovered from the bedroom was crack cocaine weighing a total of 1.3 grams. Defendant's birth certificate and state-issued identification card were found on a television stand in the bedroom, along with several small plastic jewelry bags.

1. The record is subject to interpretation as to whether the contraband was in plain view. As detailed in the body of this opinion, we consider evidence in the light most favorable to the State.

An officer testified that cocaine is normally packaged in some type of plastic bag and that plastic jewelry bags are sometimes used.

Two of defendant's children lived at 1924 Dacian with their mother, Alicia Johnson. Testifying on behalf of defendant, Johnson stated that defendant did not live in the house and was there at the time of the search because he was preparing to pick up the children from school. She further testified that the furnishings in the bedroom where defendant was sitting when the police entered belonged to her and that the crack cocaine found in the room with defendant also was hers. However, she had not been at the residence when police executed the search warrant.

Defendant was tried for possessing cocaine with the intent to sell and deliver, in violation of N.C.G.S. § 90-95(a)(1); maintaining a place to keep a controlled substance, in violation of N.C.G.S. § 90-108(a)(7); and attaining the status of habitual felon, as defined in N.C.G.S. § 14-7.1. At the close of the State's evidence, the trial court allowed defendant's motion to dismiss the charge of maintaining a place to keep a controlled substance, but denied defendant's motion to dismiss the possession charge. After defendant presented evidence, the court denied his renewed motion to dismiss the possession charge. The jury found defendant guilty of simple possession of cocaine and attaining habitual felon status, and the trial court sentenced him to 107 to 138 months imprisonment.

Defendant appealed. In a divided opinion, the Court of Appeals reversed, applying a totality of the circumstances test to find that the evidence was insufficient to support a conclusion that defendant constructively possessed the cocaine. *Miller*, ––– N.C. App. at –––, 661 S.E.2d at 773. The dissenting judge contended that the evidence was sufficient to support defendant's conviction. *Id.* at –––, 661 S.E.2d at 774-75 (Tyson, J., dissenting). The State appealed as of right on the basis of the dissent.

When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995). Any contradictions or conflicts in the evidence are resolved in favor of the State, *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983), and evidence unfavorable to the State is not considered, *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894, *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). The trial court must decide " 'only

whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.' " *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). " 'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *Crawford*, 344 N.C. at 73, 472 S.E.2d at 925). When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. *State v. Lee*, 348 N.C. 474, 488-89, 501 S.E.2d 334, 343 (1998). However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also "permits a reasonable inference of the defendant's innocence." *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 140 (2002).

The State prosecuted defendant upon the theory that he constructively possessed crack cocaine. A defendant constructively possesses contraband when he or she has "the intent and capability to maintain control and dominion over" it. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). The defendant may have the power to control either alone or jointly with others. *State v. Fuqua*, 234 N.C. 168, 170-71, 66 S.E.2d 667, 668 (1951). Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001).

Our cases addressing constructive possession have tended to turn on the specific facts presented. *See*, *e.g.*, *Butler*, 356 N.C. at 143-44, 147-48, 567 S.E.2d at 138-39, 141 (finding constructive possession when the defendant acted suspiciously upon alighting from a bus; hurried to a taxicab and yelled "let's go" three times; fidgeted and ducked down in the taxicab once in the back seat, then exited the taxicab at the instruction of police officers and walked back to the bus terminal without being told to do so, drawing officers away from the taxicab; and drugs were recovered from under the driver's seat of the taxicab approximately ten minutes later when the cab returned from giving another customer a ride); *Matias*, 354 N.C. at 550-52, 556 S.E.2d at 270-71 (finding constructive possession when officers, after smelling marijuana emanating from a passing automobile occupied by the defendant and three others, recovered marijuana and cocaine stuffed between the seat pad and back pad where the defendant had been seated, and an officer testified the defendant was the only occu-

pant who could have placed the package there); *State v. Brown*, 310 N.C. 563, 569-70, 313 S.E.2d 585, 588-89 (1984) (finding sufficient other incriminating circumstances when cocaine and other drug packaging paraphernalia were found on a table beside which the defendant was standing when the officers entered the apartment, the defendant had been observed at the apartment multiple times, possessed a key to the apartment, and had over $1,700 in cash in his pockets); *State v. Baxter*, 285 N.C. 735, 736-38, 208 S.E.2d 696, 697-98 (1974) (finding constructive possession when the defendant was absent from the apartment when police arrived but a search of the bedroom that the defendant and his wife occupied yielded men's clothing and marijuana in a dresser drawer, with additional marijuana found in the pocket of a man's coat in the bedroom closet); *State v. Allen*, 279 N.C. 406, 408, 412, 183 S.E.2d 680, 682, 684-85 (1971) (finding constructive possession when, even though the defendant was absent from the apartment at the time of a search, heroin was found in the bedroom and kitchen; the defendant's identification and other personal papers were in the bedroom, public utilities for the premises were listed in the defendant's name; and a witness testified that the defendant had provided heroin to him for resale). These and other cases demonstrate that two factors frequently considered are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found.

Here, police found defendant in a bedroom of the home where two of his children lived with their mother. When first seen, defendant was sitting on the same end of the bed where cocaine was recovered. Once defendant slid to the floor, he was within reach of the package of cocaine recovered from the floor behind the bedroom door. Defendant's birth certificate and state-issued identification card were found on top of a television stand in that bedroom. The only other individual in the room was not near any of the cocaine. Even though defendant did not have exclusive possession of the premises, these incriminating circumstances permit a reasonable inference that defendant had the intent and capability to exercise control and dominion over cocaine in that room.

The Court of Appeals majority found this evidence insufficient, relying in part on the absence of evidence that defendant appeared nervous or made any observed motion to hide anything. —— N.C. App. at ——, 661 S.E.2d at 773. However, proper application of the standard of review focuses our analysis on the evidence that the State did present in these highly fact-specific cases, not on evidence that a

reviewing court thinks the State should have presented. In other words, absence of evidence is not evidence of absence. Viewing the evidence admitted here in the light most favorable to the State, we hold that sufficient evidence was presented from which a reasonable mind could conclude that defendant constructively possessed cocaine. Accordingly, the trial court properly denied defendant's motion to dismiss. The decision of the Court of Appeals is reversed.

REVERSED.

Justice BRADY dissenting.

Today's majority opinion dangerously turns a blind eye to our well-established precedent setting out the law of constructive possession. The evidence the State presented against defendant was grossly insufficient to establish a charge of possession of cocaine, and therefore, the trial court should have granted defendant's motion to dismiss. Because the majority decision leads our constructive possession jurisprudence down a perilous road of guilt by mere proximity without substantial corroboration, I respectfully dissent.

BACKGROUND

On 8 December 2005, a team of seven or eight law enforcement officers with the Special Enforcement Team (SET) of the Winston-Salem Police Department raided the residence located at 1924 Dacian Street, Winston-Salem, North Carolina, in execution of a search warrant. Upon entering the small, single family residence, law enforcement officers found at least six adults inside.[2] In a bedroom in the front left corner of the residence they discovered Andre Miller (defendant) with another adult male. The record does not contain the exact dimensions of the bedroom, but it was estimated by law enforcement that the foot of the bed was approximately three feet from the door to the room.[3] Defendant was sitting on the corner of

2. Detective R.J. Paul of the Winston-Salem Police Department testified that there were six individuals, "[g]ive or take a few," at 1924 Dacian Street when the raid occurred. From the video footage taken that day by law enforcement, which was entered into evidence as State's Exhibit One, it appears that at least seven adults and at least two children were inside the residence. According to the Forsyth County Tax Administration Office the residence at 1924 Dacian Street has 1176 square feet of living space.

3. Alicia Johnson, the lessee of 1924 Dacian Street during the events in question, testified at trial that when the bedroom door was open, it came within two to three inches of the bed's mattress.

the bed, near the door, when the SET team entered the residence. The other individual was sitting in the chair next to the bed at that time. SET officers ordered everyone in the residence to lie on the ground and defendant followed these orders without hesitation or protest. After the SET team secured the residence and handcuffed defendant, detectives with the Winston-Salem Police Department entered 1924 Dacian Street to seize evidence. In the bedroom where defendant was found law enforcement seized a plastic bag, containing what was later determined to be cocaine, located in a corner behind the open bedroom door; empty plastic jewelry bags between a television and a DVD player on an entertainment center; and one small pellet of a white, rock-like substance, about the size of a BB, among the disheveled sheets and comforter of the unmade bed.[4] Defendant's North Carolina Identification Card[5] and birth certificate were found on the entertainment center. Additionally, eighty-five dollars in United States currency was found on defendant's person.

On 1 May 2006, the Forsyth County Grand Jury returned true bills of indictment charging defendant with (1) maintaining a place to keep a controlled substance in violation of N.C.G.S. § 90-108(a)(7); (2) possessing cocaine with the intent to sell and deliver in violation of N.C.G.S. § 90-95(a)(1); and (3) attaining the status of habitual felon in violation of N.C.G.S. § 14-7.1. During trial, after the close of the State's evidence, defendant moved to dismiss all charges. At this time the presiding trial judge, the Honorable Catherine C. Eagles, granted defendant's motion to dismiss the charge of maintaining a place to keep a controlled substance.

During defendant's case-in-chief, Alicia Johnson, the lessee of 1924 Dacian Street on 8 December 2005 and mother of defendant's two children, testified. Her testimony reflected that defendant did not live at 1924 Dacian Street and was at her residence on the day in question because she had asked him to pick up their children from school while she went Christmas shopping. She further stated that the con-

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4. The small plastic bag found behind the door, the plastic jewelry bags found on the entertainment center, and the white, rock-like substance found on the bed can all be seen in State's Exhibit One, as well as an image of defendant's State of North Carolina Identification Card. As the State admitted during oral arguments, the "rock" of cocaine found on the bed was not discovered in a "small corner cut from a plastic bag" as erroneously noted in the Court of Appeals opinion.

5. The trial court, Court of Appeals majority opinion, Court of Appeals dissenting opinion, and State's counsel at oral arguments incorrectly refer to defendant's North Carolina Identification Card as his driver's license. The State reluctantly admitted to this error during oral arguments, as it was clearly apparent in State's Exhibit One.

trolled substances were found in her personal bedroom and belonged to her, not defendant. At the close of evidence defendant again renewed his motion to dismiss the possession charge, which was denied. The jury returned a verdict of guilty of the lesser included offense of possession of cocaine and of being an habitual felon.

Defendant appealed to the Court of Appeals, which reversed his possession conviction after finding that "[v]iewing the evidence in the light most favorable to the State, the totality of the circumstances in this case is not sufficient to support a finding of constructive possession of cocaine sufficient to survive [defendant's] motion to dismiss." *State v. Miller*, ––– N.C. App. –––, 661 S.E.2d 770, 773 (2008). The case is before this Court on the basis of a dissent at the Court of Appeals.

ANALYSIS

As noted by several legal scholars and this Court, the law of possession is a morass of confusion and inconsistency. *See State v. McNeil*, 359 N.C. 800, 807-08, 617 S.E.2d 271, 276 (2005) (quoting *Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 67 (1914) (stating that " 'there is no word more ambiguous in its meaning than [p]ossession. It is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins.' " (quoting *Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 67 (1914) (alteration in original))); 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.1(e), at 432 (2d ed. 2003) ("The word 'possession' is often used in the criminal law without definition, which perhaps reflects only the fact that it is 'a common term used in everyday conversation that has not acquired any artful meaning.' ") (citation omitted); *and* Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 Va. L. Rev. 751, 751 (1972) ("[Possession cases] have engendered such conceptual confusion and given rise to so many conflicting rulings 'that for the practitioner the problems are difficult to understand and apparently for the courts impossible to master.' ") (citation omitted). Instead of clarifying existing law, or simply following this Court's well-established precedent, the majority's decision attempts to erase current jurisprudence by allowing any questionable circumstance to qualify as substantial evidence of constructive possession.

"When considering a motion to dismiss, the trial court's inquiry is limited to a determination of 'whether there is *substantial evidence* of each essential element of the offense charged and of the defendant

being the perpetrator of the offense.' " *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (emphasis added)). "To be substantial, the evidence need not be irrefutable or uncontroverted; it need only be such as would satisfy a reasonable mind as being 'adequate to support a conclusion.' " *Id.* (quoting *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001)).

While a trial court should view the evidence and every reasonable inference in the light most favorable to the State, the standard of substantial evidence requires more than "a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it." *In re Vinson*, 298 N.C. 640, 656-57, 260 S.E.2d 591, 602 (1979) (citing *State v. Guffey*, 252 N.C. 60, 62-63, 112 S.E.2d 734, 735-36 (1960)). If the evidence fails to rise above this threshold, "the motion for nonsuit should be allowed. . . . even though the suspicion so aroused by the evidence is strong.' " *Id.* at 657, 260 S.E.2d at 602 (citations omitted).

To convict defendant of possession of cocaine under a constructive possession theory, the State is required to present substantial evidence that defendant had the " 'intent and capability to maintain control and dominion over' the narcotics." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). To do so, the State must show either that (1) defendant had " 'exclusive possession of the place where the narcotics [were] found' "; or (2) that " 'other incriminating circumstances' " existed tending to show that defendant constructively possessed the narcotics found. *Id.* at 552, 556 S.E.2d at 271 (citations omitted). This is no insignificant hurdle for the State to clear, and in this case the State stumbled and fell flat on its face. Yet, the majority still affirms the trial court's denial of defendant's motion to dismiss, even though the State failed to produce substantial evidence to support the possession charge.

In the case *sub judice*, as both the trial court and the Court of Appeals concluded, there was no substantial evidence that defendant had "exclusive possession of the place where the narcotics were found.' " *Id.* Therefore, any analysis of whether substantial evidence exists to support the possession charge should be limited to an inquiry of whether " 'other incriminating circumstances' " were present and were substantial enough to tie defendant to the controlled substance to show that he had the intent and capability to maintain control and dominion over it. *Id.*

Examples of incriminating circumstances from this Court's case law are numerous, and the majority outlines several in its analysis. From this recitation, the majority concludes that "proximity to the contraband and indicia of the defendant's control over the place where the contraband is found" are "frequently considered" in determining what constitutes an incriminating circumstance in a constructive possession case. In the past, this Court has used these factors in this manner in cases involving alleged constructive possession; however, today the majority's expansive ruling in this case boldly stretches beyond the imagination of any of our prior cases. The majority improvidently asserts that defendant's proximity to the drugs found at 1924 Dacian Street, coupled with the fact that his North Carolina Identification Card[6] and birth certificate were found in the same room are sufficient to conclude he constructively possessed the cocaine. This scintilla of unconvincing evidence hardly establishes constructive possession.

First, the majority's use of proximity evidence to establish an incriminating circumstance is dangerously thin. While proximity to narcotics is always a *factor* in constructive possession cases, it has never been the *only* factor, as illustrated by the very cases the majority relies upon. Until today, evidence of more culpable conduct was always needed for this Court to find that a defendant constructively possessed a controlled substance. When the State can show no more than that a "defendant had been in an area where he could have committed the crimes charged," there is no substantial evidence. *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976). To consider a charge brought on this basis is to ask this Court to "sail in a sea of conjecture and surmise. This we are not permitted to do." *Id.* It has always been understood that more than mere proximity is needed to prove a theory of constructive possession.

In every case the majority cites there is ample evidence of incriminating circumstances in addition to evidence of defendant's proximity to narcotics. In *State v. Butler*, the defendant's suspicious behavior and his concerted effort to evade law enforcement officers provided incriminating evidence along with proximity evidence showing that the defendant was observed reaching into an

6. Defendant's North Carolina State Identification Card was never introduced as evidence at trial; however, it was clearly displayed in State's Exhibit One and was shown to the jury in that video. Notably, the North Carolina State Identification Card, issued less than five months before the events in question, did not list 1924 Dacian Street as defendant's address.

area where narcotics were soon discovered. 356 N.C. at 147-48, 567 S.E.2d at 141. In the instant case, defendant displayed no suspicious behavior and followed all instructions given to him by law enforcement. The majority counters that this absence of suspicious behavior is not "evidence of absence," but the majority misses the point and sidesteps the issue. Something more than proximity is needed to prove an incriminating circumstance, and the record contains no substantial evidence that suggests anything incriminating beyond defendant's proximity to the controlled substances by his mere presence in the bedroom.

The majority next relies upon *Matias*, but again ignores that additional factors, combined with proximity evidence, were considered to conclude that incriminating circumstances existed. 354 N.C. at 552-53, 556 S.E.2d at 271. In *Matias*, the defendant was a passenger in a vehicle that had the distinct odor of marijuana and contained rolling papers and marijuana seeds. *Id.* at 552, 556 S.E.2d at 271. Thus, this Court ruled that a jury could reasonably determine the defendant at least had knowledge that narcotics were in the vehicle. *Id.* This evidence was offered in addition to proximity evidence showing that the defendant was the only individual in the vehicle who was able to hide a bag of cocaine between a crease in the seat cushions where it was later discovered. *Id.*

Matias is markedly different from the instant case in that it cannot be shown here that defendant even had constructive knowledge that the narcotics were in the bedroom at 1924 Dacian Street. Video footage of the crime scene, shot immediately following the raid, reveals that the narcotics were not in plain view. The small BB-sized pellet of rock cocaine was seized from among the light-colored sheets of a disheveled bed, and the small plastic bag containing cocaine was found on the floor in a dark corner behind an open door. As the trial judge perceptively stated, this bag "could have been there for weeks."[7] Furthermore, there were at least five other adults in the residence when the items were discovered. To conclude that defendant constructively possessed these objects, let alone even knew they

7. In dismissing the charge of maintaining a place to keep a controlled substance, the trial judge noted that the constructive possession charge was primarily being allowed to go before the jury due to the evidence of cocaine found among the bed sheets. As to the bag of cocaine found behind the door, the trial judge stated, "The other cocaine was behind the door. I mean, it could have been there for weeks." This statement indicates that the trial judge did not view the bag of cocaine behind the door as substantial evidence to support the possession charge. Why the majority chooses to do so now is beyond my understanding.

were in the room, is mere conjecture and speculation. Under these circumstances defendant's proximity to the controlled substances means absolutely nothing in relation to the State's theory of constructive possession.

Next, the majority mistakenly relies upon *State v. Brown* to bolster its incriminating circumstances argument. 310 N.C. 563, 569-70, 313 S.E.2d 585, 589 (1984). Again, in *Brown*, evidence of incriminating circumstances was much stronger. In its opinion, this Court specifically found that "there [were] circumstances *other than defendant's proximity* to the contraband materials which tend[ed] to buttress the inference" that the defendant committed the crime charged. *Id.* at 569, 313 S.E.2d at 589 (emphasis added). The narcotics recovered in *Brown* were in plain view of the defendant; the defendant possessed a key to the residence; and law enforcement officers discovered over seventeen hundred dollars in United States currency on the defendant's person. *Id.* at 568-70, 313 S.E.2d at 588-89. No similar circumstances exist in this case. The State could not present any physical evidence or witness testimony indicating that defendant had visited 1924 Dacian Street at any time other than the date in question. Furthermore, law enforcement recovered a mere eighty-five dollars from defendant's person. Logic and common sense dictate that this meager amount of currency is not indicative of someone who is dealing in controlled substances. During oral argument, the State's counsel was questioned on this point and conceded that if significant amounts of currency had been seized from defendant, the prosecutor would have run this evidence up the flagpole before the jury.

Lastly, the majority attempts to use *State v. Baxter*, 285 N.C. 735, 208 S.E.2d 696 (1974), and *State v. Allen*, 279 N.C. 406, 183 S.E.2d 680 (1971), as examples of similar situations in which proximity and indicia of control were sufficient to show incriminating circumstances. Both are critically distinguishable from the present case. In *Baxter*, the State presented evidence, which included men's clothing found in dresser drawers containing marijuana and a man's jacket with marijuana in its pocket, that was sufficient to show the defendant occupied the bedroom in which the narcotics were seized. 285 N.C. at 736-38, 208 S.E.2d at 697-98. In *Allen*, the defendant's United States Uniform Services identification card and several other papers bearing the defendant's name were found in the residence; public utilities for the residence were listed in the defendant's name; and a sixteen year old witness testified that he had obtained heroin from the residence pursuant to the defendant's directions. 279 N.C. at 408, 183 S.E.2d at

684-85. No similar evidence can be found in the present record to justify a finding of incriminating circumstances. No personal effects belonging to defendant were found at the residence, and the State could offer no other proof, aside from physical presence, to suggest defendant had any control over the premises at 1924 Dacian Street.

When evidence of incriminating circumstances are lacking, as they are in the case *sub judice*, this Court has repeatedly rejected theories of constructive possession. For example, in *Minor*, the defendant helped plant a garden and occupied an abandoned residence for a short time near a field where marijuana was cultivated. 290 N.C. at 72-73, 224 S.E.2d at 183-84. Law enforcement found a container in the residence labeled with the defendant's name. *Id.* at 72, 224 S.E.2d at 183. When the defendant was arrested, two wilted marijuana leaves were found in the car in which he had been a passenger. *Id.* at 72, 224 S.E.2d at 183-84. This Court found that under these facts alone, the State had presented insufficient evidence to prove constructive possession of marijuana and ruled the defendant's motion to dismiss should have been granted. *Id.* at 74-75, 224 S.E.2d at 185.

In *State v. McLaurin*, the defendant was convicted of possession of drug paraphernalia under a constructive possession theory. 320 N.C. 143, 144, 357 S.E.2d 636, 637 (1987). Law enforcement searched the defendant's residence pursuant to a search warrant and found drug paraphernalia which contained traces of cocaine, throughout the house. *Id.* In a crawl space beneath the dwelling, law enforcement found three marked one hundred dollar bills that were used in a previous drug transaction. 320 N.C. at 145, 357 S.E.2d at 637. The defendant admitted to living in the residence, and photographs of her were found inside the house along with her Medicaid card. *Id.* However, the defendant did not have exclusive control over the premises, leading this Court to conclude that "because there was no evidence of other incriminating circumstances linking her to [the seized paraphernalia], her control was insufficiently substantial to support a conclusion of her possession of the seized paraphernalia." 320 N.C. at 147, 357 S.E.2d at 638.

In the instant case, there is even less evidence of incriminating circumstances than in *Minor* and *McLaurin*, yet the majority still insists that the State's evidence is substantial enough to maintain a charge of constructive possession. Never before has this Court so conjured up incriminating circumstances in order to justify a conviction under a constructive possession theory. The majority offers the fact that defendant was in *someone else's* bedroom, with *another*

individual, where cocaine and plastic jewelry bags were discovered to support this conviction. As previously set out, proximity to narcotics alone has never before been enough to establish an incriminating circumstance, and it should not be enough here.

Because it is well established that proximity to narcotics alone cannot substantiate a finding of constructive possession, the majority uses the fact that defendant's North Carolina State Identification Card and birth certificate were found in the bedroom with the narcotics to show indicia of his control over the room. This is not substantial evidence. There exist many innocent, plausible explanations of why defendant had two forms of identification with him while he was visiting 1924 Dacian Street and why these documents were in the room where defendant was found.[8] Additionally, these identification documents were found on top of an entertainment center near the door to the bedroom, not tucked away in a drawer or filing cabinet. In today's society who does not, as a matter of course, carry an identification card? Furthermore, how is the presence of a certificate of live birth evidence of an incriminating circumstance? To say this qualifies as incriminating, and is thus *substantial* evidence of defendant's possession of cocaine, is setting sail on the "sea of conjecture and surmise" this Court has avoided in the past. *Minor*, 290 N.C. at 75, 224 S.E.2d at 185.

Furthermore, *no other circumstance* at the residence suggests defendant had the " 'intent and capability to maintain control and dominion over' " the controlled substances. *Matias*, 354 N.C. at 552, 556 S.E.2d at 270. (citation omitted). None of defendant's personal items, save his two identification documents, were discovered. No men's clothing, shoes, or toiletry items were found in the residence. No medicines prescribed to defendant were located. No photographs of defendant were retrieved. No utility bills, cable bills, telephone bills, lease agreements, or insurance policies for the residence bore defendant's name, and no mail was found addressed to defendant at 1924 Dacian Street. No substantial evidence of any nature was introduced at trial to tie defendant to 1924 Dacian Street. To the contrary, defendant's North Carolina State Identification Card, which the majority relies upon, had been issued only five months earlier and

8. In fact, the record reveals that defendant was scheduled to pick up two of his children from school on the afternoon of the raid. Identification is often required to pick up children from school. Driver's licenses, state-issued identification cards, uniform service identification cards, birth certificates, and/or passports are the forms of identification normally associated with establishing an individual's actual identity.

listed 1309 Oak Street, Winston-Salem, North Carolina, as defendant's address. Moreover, Alicia Johnson, the lessee of the premises, testified that defendant did not live at 1924 Dacian Street. Johnson further testified that the cocaine was found in her personal bedroom and belonged to her.

I realize that the majority scoffs at the glaring absence of substantial evidence in this case and pens the phrase, "absence of evidence is not evidence of absence." This defies legal analysis, much less logic. The nexus of this entire case turns upon whether there was insufficient evidence to maintain a charge of constructive possession. The very legal definition of insufficient evidence is the *absence of evidence*. For the majority to suggest that the absence of evidence is irrelevant exceeds the farcical in legal analysis.

In the end, the only meaningful evidence we have linking defendant to the cocaine at 1924 Dacian Street is that he was found sitting on an unmade bed where a small, BB-sized pellet of crack cocaine was also discovered. Thus, the real question is, "Has the State established that defendant was aware of the 'rock-like substance' found on the bed?" The State presented no evidence of defendant's awareness, other than mere proximity, and as established above, mere proximity alone is insufficient. At best, that defendant was found sitting on a bed in someone else's bedroom where cocaine was found is suspicious.[9] But our law is clear that a defendant cannot be convicted on suspicion alone. Substantial evidence must be presented before a jury can even consider if, beyond a reasonable doubt, defendant possessed cocaine. Without this required substantial evidence the trial court must grant a defendant's motion to dismiss. *In re Vinson*, 298 N.C. at 656-57, 260 S.E.2d at 602; *see* N.C.G.S. § 15A-1227 (2007).

The majority's decision today effectively nullifies the substantial evidence requirement in constructive possession cases, thereby giving the State free reign to prosecute anyone who happens to be at the wrong place at the wrong time. The majority's annihilation of the substantial evidence requirement essentially swings open the door for prosecutors to charge, try, and convict individuals across North Carolina of possession of controlled substances or other contraband

9. The majority implies that the fact that two of defendant's children resided at 1924 Dacian Street adds weight to its analysis of incriminating circumstances. The record shows that the residence belonged to the children's mother, and that defendant did not have authority or control over the premises. I fail to see why a finding that defendant's two children resided at 1924 Dacian Street incriminates defendant, and I do not believe it should have any bearing upon the analysis.

on the basis of mere proximity. This has never been the law in this State, and it should not be so now. This unprecedented, unjustified, and unfounded expansion of the law strains credulity and dangerously exposes our citizens to prosecutorial overreaching at the expense of personal liberty. Therefore, I respectfully dissent.

Justice TIMMONS-GOODSON dissenting.

As I conclude the State presented insufficient evidence that defendant constructively possessed the cocaine discovered by law enforcement officers, I respectfully dissent.

The majority correctly notes that "unless a defendant has exclusive possession of the place where contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." Here, it is uncontroverted that defendant did not have exclusive possession of the apartment or even the bedroom in which the cocaine was discovered. Thus, the State was required to provide evidence of other incriminating circumstances to show that defendant constructively possessed the cocaine. This the State failed to do. The majority identifies only two factors in support of its conclusion that the State produced substantial evidence of defendant's possession of the cocaine: (1) defendant's proximity to the cocaine; and (2) the presence of defendant's birth certificate and identification card on top of a television stand. I do not agree with the majority that defendant's mere proximity to the cocaine, which was not in plain view, or the presence of his birth certificate and identification card, which *were* in plain view and, in fact, showed defendant lived elsewhere, constituted sufficiently incriminating circumstances to permit more than a mere suspicion of defendant's guilt. *See State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (stating that "a motion to dismiss should be allowed where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt"). I therefore respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. RANDY LEE SELLARS

No. 547A05-2

(Filed 20 March 2009)

1. Sentencing— aggravating factors—insanity—independent determinations

A jury's determination that a defendant is not insane does not resolve the presence or absence of the statutory aggravating factor of use of a weapon hazardous to the lives of more than one person. Nor does it automatically render any *Blakely* error harmless. While evidence relevant to an insanity defense and this aggravating factor might overlap, the determinations are independent and neither controls the other.

2. Sentencing— aggravating factors—use of weapon hazardous to more than one person—*Blakely* error—harmlessness

The evidence that defendant knowingly set out to use a weapon in a manner that created a risk of death to more than one person was overwhelming where defendant used a semiautomatic firearm and fired multiple shots at three police officers, and acknowledged that he planned to fire the weapon in the hope of drawing return fire and ending his suffering. Therefore, the trial court's finding of this aggravating factor was harmless beyond a reasonable doubt.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 191 N.C. App. ——, 664 S.E.2d 45 (2008), which, upon defendant's appeal from judgments entered on 25 September 2003 by Judge James C. Spencer, Jr. in Superior Court, Alamance County, and upon being ordered by this Court to reconsider its decision remanding the case to the trial court for resentencing in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, 550 U.S. 948, 167 L. Ed. 2d 1114 (2007), found no error in the judgments. Heard in the Supreme Court 24 February 2009.

Roy Cooper, Attorney General, by Daniel P. O'Brien, Assistant Attorney General, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

PER CURIAM.

[1] We affirm the decision of the Court of Appeals that found no error in defendant's trial and sentence. However, we reject the implication in that decision that a jury's determination that a defendant is not insane resolves the presence or absence of the statutory aggravating factor: "The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C.G.S. § 15A-1340.16 (d)(8) (2007). It does not. Nor does a jury's finding that a defendant is not insane automatically render any *Blakley* error on this aggravating factor harmless beyond a reasonable doubt pursuant to *State v. Blackwell*, 361 N.C. 41, *passim*, 638 S.E.2d 452, *passim*, (discussing application of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004)). While evidence relevant to an insanity defense and the section 15A-1340.16(d)(8) aggravating factor might overlap, the determinations are independent and neither controls the other.

[2] This aggravating factor may be imposed when the evidence shows that the defendant's weapon "in its normal use is hazardous to the lives of more than one person" and that "a great risk of death was knowingly created." *State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990) (citing *State v. Carver*, 319 N.C. 665, 356 S.E.2d 349 (1987)). Here, the evidence that defendant knowingly set out to use a weapon in a manner that created a great risk of death to more than one person was overwhelming. Defendant's admitted use of a semi-automatic firearm satisfies the first part of this analysis. *State v. Bruton*, 344 N.C. 381, 393, 474 S.E.2d 336, 345 (1996) (citing *Carver*, 319 N.C. at 667-68, 356 S.E.2d at 351). As to the second prong, which requires that defendant have acted knowingly, defendant fired multiple shots at three police officers who confronted him in the public parking lot of a convenience store and returned fire. At his 2003 resentencing hearing, defendant acknowledged that he planned to fire the weapon into the air at the convenience store because a police substation was located nearby. Defendant stated that he hoped to draw return fire from officers to "take [him] out" and end his suffering. Based on the evidence presented, we conclude that the trial court's finding of this aggravating factor was harmless beyond a reasonable doubt.

MODIFIED AND AFFIRMED.

THERESA D. HALL, ADMINISTRATRIX OF THE ESTATE OF MICHAEL H. HALL, AND THERESA D. HALL, INDIVIDUALLY v. TOREROS II, INC.

No. 187PA06

(Filed 20 March 2009)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 176 N.C. App. 309, 626 S.E.2d 861 (2006), affirming entry of judgment notwithstanding the verdict in defendant's favor on 1 April 2004 by Judge Abraham Penn Jones in Superior Court, Durham County. Heard in the Supreme Court 13 November 2007.

Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson; and Twiggs, Beskind, Strickland & Rabenau, P.A., by Howard F. Twiggs, Donald H. Beskind, and Jesse H. Rigsby, IV, for plaintiff-appellants.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Phillip J. Anthony and Christopher J. Derrenbacher, for defendant-appellee.

Jordan Price Wall Gray Jones & Carlton, by R. Frank Gray, for North Carolina Restaurant and Lodging Association, amicus curiae.

PER CURIAM.

Justice MARTIN took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g., Barham v. Hawk*, 360 N.C. 358, 625 S.E.2d 778 (2006).

AFFIRMED.

HEATHERLY v. STATE

[363 N.C. 115 (2009)]

CHARLES HEATHERLY, THOMAS SPAMPINATO, W. EDWARD GOODALL, JR., PAUL STAM, WAKE COUNTY TAXPAYERS ASSOCIATION, AND THE NORTH CAROLINA FAMILY POLICY COUNCIL, PLAINTIFFS, WILLIS WILLIAMS, NORTH CAROLINA FAIR SHARE, AND NORTH CAROLINA COMMON SENSE FOUNDATION, PLAINTIFF-INTERVENORS v. STATE OF NORTH CAROLINA; CHARLES A. SANDERS, BRYAN E. BEATTY, LINDA CARLISLE, ROBERT A. FARRIS, JR., JOHN R. MCARTHUR, JIM WOODWARD, AND ROBERT W. APPLETON, MEMBERS OF THE NORTH CAROLINA LOTTERY COMMISSION, IN THEIR OFFICIAL CAPACITIES; NORTH CAROLINA LOTTERY COMMISSION; THOMAS N. SHAHEEN, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA EDUCATION LOTTERY, IN HIS OFFICIAL CAPACITY; MICHAEL F. EASLEY, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; AND RICHARD H. MOORE, TREASURER OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. 317A06-2

(Filed 20 March 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 189 N.C. App. 213, 658 S.E.2d 11 (2008), affirming an order entered 21 March 2006 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Supreme Court 8 September 2008.

North Carolina Institute for Constitutional Law, by Jeanette Doran Brooks and Robert F. Orr, for plaintiff-appellants; and North Carolina Justice Center, by Jack Holtzman, for plaintiff-intervenor-appellants Willis Williams and the North Carolina Common Sense Foundation.

Roy Cooper, Attorney General, by Norma S. Harrell and Ronald M. Marquette, Special Deputy Attorneys General, for defendant-appellees.

Williams Mullen, by Charles B. Neely, Jr., for the Tax Foundation, amicus curiae.

PER CURIAM.

Justice MARTIN did not participate in the consideration or decision of this case. As to the appeal of right based on the dissenting opinion, the remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g., Barham v. Hawk*, 360 N.C. 358, 625 S.E.2d 778 (2006).

AFFIRMED.

IN THE MATTER OF N.C.H., G.D.H., D.G.H.

No. 463A08

(Filed 20 March 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 192 N.C. App. ——, 665 S.E.2d 812 (2008), affirming orders terminating parental rights entered on 18 January 2008 by Judge Mary F. Covington in District Court, Davidson County. The case was calendared for argument in the Supreme Court on 23 February 2009, but was determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(f)(1).

Charles E. Frye, III, Staff Attorney, for petitioner-appellee Davidson County Department of Social Services, and Laura B. Beck, Attorney Advocate, for appellee Guardian ad Litem.

Don Willey for respondent-appellant mother.

Annick Lenoir-Peek, Assistant Appellate Defender, for Office of the Appellate Defender, amicus curiae.

PER CURIAM.

The result reached by the Court of Appeals is affirmed. However, in light of our opinion in *In re J.T. (I)*, 363 N.C. 1, 672 S.E.2d 17 (2009), the following language from the Court of Appeals' opinion is specifically disavowed: "[S]ervice [of the summons] on the guardian ad litem constitutes service on the juvenile, which is sufficient to establish subject matter jurisdiction when combined with naming the juvenile in the caption of the summons." *In re N.C.H., G.D.H., D.G.H.*, 192 N.C. App. 445, 446, 665 S.E.2d 812, 813 (2008) (citing *In re J.A.P., I.M.P.*, 189 N.C. App. 683, 686-87, 659 S.E.2d 14, 17 (2008)). It is true in termination of parental rights cases that service of the summons on the juvenile is accomplished through the juvenile's guardian ad litem "if one has been appointed." N.C.G.S. § 7B-1106(a) (2007). We reject the notion, though, that service of the summons on any particular party is necessary to invoke the trial court's subject matter jurisdiction. *In re J.T. (I)*, 363 N.C. at 4, 672 S.E.2d at 19 ("[T]he trial court's subject matter jurisdiction was properly invoked upon the *issuance* of a summons." (emphasis added)).

AFFIRMED.

O'MARA v. WAKE FOREST UNIV. HEALTH SCIENCES

[363 N.C. 117 (2009)]

JOSEPH O'MARA, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, LARRY REAVIS; AND JANELLA O'MARA v. WAKE FOREST UNIVERSITY HEALTH SCIENCES; NORTH CAROLINA BAPTIST HOSPITAL; FORSYTH MEMORIAL HOSPITAL, INC., AND NOVANT HEALTH, INC.

No. 414PA07

(Filed 20 March 2009)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 184 N.C. App. 428, 646 S.E.2d 400 (2007), finding no error in a judgment entered on 30 November 2005 dismissing plaintiffs' complaint with prejudice and an order entered on 6 January 2006 denying plaintiffs' motion for a new trial, but reversing in part an order also entered on 6 January 2006 awarding costs to defendants, all by Judge Michael E. Helms in Superior Court, Yadkin County. Heard in the Supreme Court on 6 May 2008. On 9 May 2008, the Supreme Court further allowed plaintiffs' petition for discretionary review as to additional issues. Determined without further oral argument pursuant to N.C. R. App. P. 30(f)(1).

Law Offices of Wade E. Byrd, P.A., by Wade E. Byrd; and The Lawing Firm, P.A., by Sally A. Lawing, for plaintiff-appellants.

Wilson & Coffey, L.L.P., by Tamura D. Coffey, Linda L. Helms, and Amanda B. Palmieri, for defendant-appellees.

Patterson Harkavy LLP, by Burton Craige, for North Carolina Academy of Trial Lawyers, amicus curiae.

Yates, McLamb & Weyher, L.L.P., by John W. Minier, for North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. HERBERT EARL LAWRENCE

No. 405A08

(Filed 20 March 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 191 N.C. App. ——, 663 S.E.2d 898 (2008), finding no error in judgments entered on 13 July 2007 by Judge J.B. Allen in Superior Court, Durham County. Heard in the Supreme Court 24 February 2009.

Roy Cooper, Attorney General, by Philip A. Lehman, Assistant Attorney General, for the State.

John Keating Wiles for defendant-appellant.

PER CURIAM.

AFFIRMED.

KEITH SMITH AND MARY SMITH v. BLYTHE DEVELOPMENT COMPANY

No. 394A08

(Filed 20 March 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 192 N.C. App. ——, 665 S.E.2d 154 (2008), reversing an order granting summary judgment for defendant entered on 1 October 2007 by Judge Richard D. Boner in Superior Court, Mecklenburg County, and remanding for further proceedings. Heard in the Supreme Court 23 February 2009.

Grier Furr & Crisp, PA, by Alan M. Presel, for plaintiff-appellees.

York, Williams & Lewis, L.L.P., by Gregory C. York, Angela M. Easley and David M. Harmon, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. DON McRAE SMITH, JR.

No. 332PA08

(Filed 20 March 2009)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 191 N.C. App. ——, 662 S.E.2d 405 (2008), finding no prejudicial error in defendant's trial resulting in judgments entered on 31 May 2007 by Judge Cy A. Grant, Sr. in Superior Court, Hertford County. Heard in the Supreme Court 23 February 2009.

Roy Cooper, Attorney General, by Leonard G. Green, Assistant Attorney General, for the State.

Geoffrey W. Hosford for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. LANE

[363 N.C. 121 (2009)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ERIC GLENN LANE	)	
	)	

No. 606A05

ORDER

The Court allows the State's Motion for Clarification to the extent discussed herein. In clarification of its opinion in *State v. Lane*, 362 N.C. 667, 669 S.E.2d 321 (2008), the Court orders the following:

> (1) The question of whether defendant comes within the category of "borderline-competent" (or "gray-area") defendants, as defined by the Supreme Court of the United States in *Indiana v. Edwards*, ––– U.S. –––, –––, 128 S. Ct. 2379, 2384-88, 171 L. Ed. 2d 345, 353-57 (2008), shall be determined after hearing by Judge D. Jack Hooks, Jr.

Only if the first inquiry is answered in the affirmative should the trial court proceed to this second issue:

> (2) If Judge Hooks determines defendant is "borderline-competent," Judge Hooks shall then decide whether, in his discretion, he would have precluded self-representation for defendant and appointed counsel for him pursuant to *Indiana v. Edwards*.

Only if the second inquiry is answered in the affirmative should the trial court proceed to this third issue:

> (3) If Judge Hooks decides he would have precluded self-representation for defendant and appointed counsel for him pursuant to *Indiana v. Edwards*, the question of whether defendant was prejudiced by his period of self-representation shall be determined after hearing by Judge Gary E. Trawick.

The scope and extent of each hearing is to be determined by the trial court. The trial court is directed to hold the necessary hearings, make findings of fact and conclusions of law, and certify its findings and conclusions to this Court within 120 days of the filing date of this order.

By Order of the Court in Conference, this 9th day of March, 2009.

s/Hudson, J.
For the Court

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

Akins v. Mission St. Joseph's Health Sys., Inc. Case below: 193 N.C. App. 214	No. 497P08	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA07-1363) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 02/06/09 2. Dismissed as Moot 02/06/09
Anderson v. Crouch Case below: 191 N.C. App. 250	No. 427P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1319)	Denied 3/19/09 **Martin, J., Recused**
Bailey v. Winston-Salem State Univ. Case below: 193 N.C. App. 610	No. 549P08	Plt's Motion for Review of the Opinion of the Court of Appeals (COA08-167)	Denied 02/06/09
Bailey v. Winston-Salem State Univ. Case below: 193 N.C. App. 610	No. 549P08-2	Plt's Motion to Reconsider Denial of Petition for Review (COA08-167)	Dismissed 3/19/09
Barbee v. Johnson Case below: 190 N.C. App. 349	No. 319P08	Defs' PDR Under N.C.G.S. § 7A-31 (COA07-510)	Denied 02/06/09
Bird v. Bird Case below: 193 N.C. App. 123	No. 545A08	1. Plt's NOA (Dissent) (COA08-192) 2. Plt's PDR as to Additional Issues	1. —— 2. Allowed 02/06/09
Cagle v. P.H. Glatfelter/Eusta Div. Case below: 192 N.C. App. 275	No. 448P08	Def's (P.H. Glatfelter) PDR Under N.C.G.S. § 7A-31 (COA08-26)	Denied 3/19/09
Camara v. Gbarbera Case below: 191 N.C. App. 394	No. 383P08	Plts' PDR Under N.C.G.S. § 7A-31 (COA07-1480)	Denied 3/19/09

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

Carl v. State Case below: 192 N.C. App. 544	No. 432P08	1. Defs' Motion for Temporary Stay (COA07-1288) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Defs' PWC to Review Decision of COA 5. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 09/17/08 362 N.C. 508 Stay Dissolved 02/05/09 2. Denied 02/06/09 3. Denied 02/06/09 4. Denied 02/06/09 5. Dismissed as Moot 02/06/09
Carlisle v. CSX Transp., Inc. Case below: 193 N.C. App. 509	No. 237P08	1. Plt's PWC To Review Decision of COA (COA08-43) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 3/19/09 2. Denied 3/19/09
Carolina First Bank v. Stark, Inc. Case below: 190 N.C. App. 561	No. 369P08	1. Defs' Motion for Temporary Stay (COA07-833) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 08/12/08 362 N.C. 469 Stay Dissolved 02/05/09 2. Denied 02/06/09 3. Denied 02/06/09
City of Asheville v. State Case below: 192 N.C. App. 1	No. 244P07-2	1. Plt's NOA Based Upon a Constitutional Question (COA07-516) 2. Def's (State of NC) Motion to Dismiss Appeal 3. Def's (County of Buncombe) Motion to Dismiss Appeal 4. Plt's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 02/06/09 3. Allowed 02/06/09 4. Denied 02/06/09 **Timmons-Goodson, J., Recused**
Clontz v. Hollar & Greene Produce Co. Case below: 189 N.C. App. 403 (18 March 2008)	No. 193P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1118)	Denied 02/06/09

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

Copper v. Denlinger Case below: 193 N.C. App. 249	No. 526A08	1. Defs' (Denlinger and Durham Public School Board of Education) NOA (Dissent) (COA07-205) 2. Def's (Denlinger Individually) NOA (Dissent) 3. Defs' (Denlinger and Durham Public School Board of Education) NOA Based Upon a Constitutional Question 4. Defs' (Denlinger and Durham Public School Board of Education) PDR Under N.C.G.S. § 7A-31	1. —— 2. —— 3. Dismissed *Ex Mero Motu* 02/06/09 4. Allowed 02/06/09
Corbett v. N.C. Div. of Motor Vehicles Case below: 190 N.C. App. 113	No. 269P08	1. Def's PDR Under N.C.G.S. § 7A-31 (COA07-791) 2. Plt's Petition for Dismissal of Petition for Discretionary Review	1. Denied 3/19/09 2. Dismissed as Moot 3/19/09
Cowell v. Gaston Cty. Case below: 190 N.C. App. 743	No. 359P08	Def's (Gaston County) PDR Under N.C.G.S. § 7A-31 (COA07-1434)	Denied 02/06/09
Cross v. Capital Transaction Grp., Inc. Case below: 191 N.C. App. 115	No. 342P08	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA07-1519)	Denied 02/06/09 **Hudson, J., Recused**
Deason v. Owens-Illinois, Inc. Case below: 192 N.C. App. 275	No. 440P08	1. Defs' Motion for Temporary Stay (COA07-1159) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 09/22/08 362 N.C. 508 Stay Dissolved 03/19/09 2. Denied 3/19/09 3. Denied 3/19/09 4. Dismissed as Moot 3/19/09
Discover Bank v. Calhoun Case below: 192 N.C. App. 543	No. 467P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-69)	Denied 02/06/09

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

Emick v. Sunset Beach & Twin Lakes, Inc. Case below: 194 N.C. App. 371	No. 019P09	Plts' PDR Under N.C.G.S. § 7A-31 (COA08-184)	Denied 02/06/09
Fink v. Goodyear Tire & Rubber Co. Case below: 194 N.C. App. 200	No. 012P09	Defs' Motion for Temporary Stay (COA07-1371)	Allowed 01/08/09 **Hudson, J., Recused**
Goodman v. Holmes & McLaurin Attorneys at Law Case below: 192 N.C. App. 467	No. 464P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-199) 2. Plt's Motion to Withdraw PDR 3. Defs' (Holmes and Holmes & McLaurin) Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 3/19/09 3. Dismissed as Moot 3/19/09
Hall v. City of Asheville Case below: 191 N.C. App. 610	No. 408P08	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA07-1520)	Denied 02/06/09
Hall v. Toreros, II, Inc. Case below: 176 N.C. App. 309	No. 187PA06	Def's Motion to Dismiss Plt's Appeal (COA05-199)	Denied 3/19/09 **Martin, J., Recused**
Heinitsh v. Wachovia Bank Case below: 192 N.C. App. 570	No. 465P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1198)	Denied 02/06/09
Helms v. Landry Case below: 194 N.C. App. 787	No. 055A09	1. Plt's NOA (Dissent) (COA08-33) 2. Def's PDR as to Additional Issues 3. Def's NOA (Dissent) 4. Def's Motion for Temporary Stay (01-CVD-12314) 5. Def's Petition for Writ of Supersedeas	1. —— 2. Denied 3/19/09 3. —— 4. Denied 3/19/09 5. Denied 3/19/09

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

Hines v. Wal-Mart Stores E., L.P. Case below: 191 N.C. App. 390	No. 378P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1160)	Denied 02/06/09
Hinson v. Jarvis Case below: 190 N.C. App. 607	No. 283P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1142) 2. Def's (Linnie Jarvis) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 3/19/09 2. Dismissed as Moot 3/19/09
Holloway v. Tyson Foods, Inc. Case below: 193 N.C. App. 542	No. 541P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-930)	Denied 02/06/09
Huebner v. Triangle Research Collaborative Case below: 193 N.C. App. 420	No. 513P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-70)	Denied 02/06/09
In re D.G. Case below: 191 N.C. App. 752	No. 391A08	Appellant's (Juvenile) Notice of Mootness and Motion to Dismiss Appeal as Moot (COA07-402)	Allowed 02/18/09
In re Estate of Pope Case below: 192 N.C. App. 321	No. 462P08	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA06-1644)	Denied 02/06/09
In re Estate of Severt Case below: 194 N.C. App. 508	No. 026P09	1. Petitioner's (Mary Yearick) PDR Under N.C.G.S. § 7A-31 (COA08-203) 2. Respondent's (Edward F. Greene) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 3/19/09 2. Dismissed as Moot 3/19/09

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

In re I.D.G. Case below: 188 N.C. App. 629	No. 118P08	1. Petitioner's (Gaston Co. DSS) PDR Under N.C.G.S. § 7A-31 (COA07-1107) 2. Respondent's (Father) Motion to Dismiss PDR 3. Respondent's (Father) Motion to Stay Filing of Response Pending Court's Ruling 4. Petitioner's (Gaston Co. DSS) PWC to Review Decision of COA	1. —— 2. Allowed 02/06/09 3. Dismissed as Moot 02/06/09 4. Allowed for Limited Purpose of Remanding to COA for Reconsidera-tion in Light of *In re: J.T.* 02/06/09
In re J.G.L. Case below: 193 N.C. App. 454	No. 020P09	Respondent's (Mother) Motion for "Petition for Discretionary Review" (COA08-644)	Denied 02/06/09
In re Kitchin v. Halifax Cty. Case below: 192 N.C. App. 559	No. 468P08	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA07-965) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 02/06/09 2. Dismissed as Moot 02/06/09
In re S.F.P. Case below: 191 N.C. App. 251	No. 395P08	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA08-131)	Denied 02/06/09
In re S.R.M., C.P.S.H., S.A.M. Case below: 194 N.C. App. 820	No. 050P09	Respondent's (Father) PDR Under N.C.G.S. § 7A-31 (COA08-571)	Denied 3/19/09
In re Summons Issued to Ernst & Young, LLP Case below: 191 N.C. App. 668	No. 424PA08	1. Appellant's (Secretary of N.C. Dep't of Revenue) PDR Under N.C.G.S. § 7A-31 (COA07-1219) 2. Respondent's (Wal-Mart) Conditional PDR	1. Allowed 02/06/09 2. Allowed 02/06/09

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

Kelly v. Duke Univ. Case below: 190 N.C. App. 733	No. 324P08	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 (COA07-874)	1. Allowed 01/26/09 363 N.C. ––– Stay Dissolved 03/19/09 2. Denied 3/19/09 3. Denied 3/19/09
Kelly v. Wake Cty. Sheriff's Dept. Case below: 188 N.C. App. 165	No. 064P08	1. Def's (Sheriff's Dept.) Motion for Temporary Stay (COA06-1127) 2. Def's (Sheriff's Dept.) Petition for Writ of Supersedeas 3. Def's (Sheriff's Dept.) PDR Under N.C.G.S. § 7A-31	1. Allowed 02/21/08 362 N.C. 236 Stay Dissolved 02/05/09 2. Denied 02/06/09 3. Denied 02/06/09
Kenion v. Maple View Farm, Inc. Case below: 192 N.C. App. 275	No. 438P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1478) 2. Def's (Maple View Farm) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 02/06/09 2. Dismissed as Moot 02/06/09
King v. Lingerfelt Case below: 190 N.C. App. 674	No. 298P08	Unnamed Def's (Nationwide Mutual Ins. Co.) PDR Under N.C.G.S. § 7A-31 (COA07-1193)	Denied 3/19/09
Lynwood Found. v. N.C. Dep't of Revenue Case below: 190 N.C. App. 593	No. 300P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-945)	Denied 3/19/09
Maxwell Schuman & Co. v. Edwards Case below: 191 N.C. App. 356	No. 403P08	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA07-996) 2. Plt-Appellee's Conditional PDR	1. Denied 02/06/09 2. Dismissed as Moot 02/06/09
McDonnell v. Tradewind Airlines, Inc. Case below: 194 N.C. App. 674	No. 074P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-634)	Denied 3/19/09

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

Meares v. Dana Corp. Case below: 193 N.C. App. 86	No. 502P08	1. Defs' Motion for Temporary Stay (COA07-1401) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 11/12/08 362 N.C. 682 Stay Dissolved 02/05/09 2. Denied 02/06/09 3. Denied 02/06/09
Michael v. Huffman Oil Co. Case below: 190 N.C. App. 256	No. 325P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1293)	Denied 02/06/09
Mills v. Wachovia Bank, N.A. Case below: 191 N.C. App. 399	No. 356P08	1. Plt's NOA Based Upon a Constitutional Question (COA07-365) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's (Wachovia Bank) Conditional PDR	1. Dismissed *Ex Mero Motu* 3/19/09 2. Denied 3/19/09 3. Dismissed as Moot 3/19/09
Murray v. County of Person Case below: 191 N.C. App. 575	No. 413P08	Defs' (Janet Clayton, Harold Kelly and Adam Sarver) PDR Under N.C.G.S. § 7A-31 (COA07-1260)	Denied 02/06/09
Nuttall v. Hornwood, Inc. Case below: 194 N.C. App. 820	No. 081P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-395)	Denied 3/19/09
Oliphant Fin. Corp. v. Silver Case below: 193 N.C. App. 752	No. 557P08	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA08-27)	Denied 02/06/09
Pacific Mulch, Inc. v. Senter Case below: 193 N.C. App. 247	No. 503P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1538)	Denied 02/06/09

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

Rainey v. N.C. Dep't of Public Instruction Case below: 193 N.C. App. 243	No. 143P07-2	Respondents' PDR Under N.C.G.S. § 7A-31 (COA05-1609-2)	Denied 02/06/09
Rodriguez-Carias v. Nelson's Auto Salvage & Towing Serv. Case below: 189 N.C. App. 404	No. 231P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-570)	Allowed 02/06/09 **Hudson, J., Recused**
Shulenberger v. HBD Indus., Inc. Case below: 188 N.C. App. 847	No. 136P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-470)	Denied 3/19/09
Smith v. Smith Case below: 193 N.C. App. 753	No. 053P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-78)	Denied 3/19/09
Sprinkle v. Lilly Indus., Inc. Case below: 193 N.C. App. 694	No. 556P08	Plt-Appellant's PDR (COA08-279)	Denied 02/06/09
State Farm Mut. Auto. Ins. Co. v. Gaylor Case below: 190 N.C. App. 448	No. 271P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1421)	Denied 3/19/09
State v. Anderson Case below: 194 N.C. App. 292	No. 038P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-67)	Denied 3/19/09
State v. Ash Case below: 193 N.C. App. 569	No. 528P08	Def's PDR Under N.C.G.S. § 7A-31 (COA7-1456)	Denied 02/06/09
State v. Atkins Case below: 193 N.C. App. 200	No. 500P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1134)	Denied 02/06/09

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

State v. Bannerman Case below: 191 N.C. App. 400	No. 384P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-86)	Denied 02/06/09
State v. Beasley Case below: 191 N.C. App. 252	No. 504A04-2	1. Def's NOA Based Upon a Constitutional Question (COA07-1157) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 02/06/09
State v. Berry Case below: 193 N.C. App. 753	No. 554P08	1. Def's NOA Based Upon a Constitutional Question (COA08-262) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 3/19/09 2. Denied 3/19/09
State v. Bodden Case below: 190 N.C. App. 505	No. 295P08	1. Def's NOA Based Upon a Constitutional Question (COA07-719) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3/19/09 3. Allowed 3/19/09
State v. Boekenoogen Case below: 147 N.C. App. 292	No. 689P01-2	Def's Petition for Writ of Mandamus (COA00-1194)	Dismissed 02/06/09
State v. Booe Case below: 193 N.C. App. 753	No. 559P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-482)	Denied 02/06/09
State v. Bowden Case below: 193 N.C. App. 597	No. 514P08	State's Motion for Temporary Stay (COA08-372)	Allowed 11/21/08
State v. Brewer Case below: 194 N.C. App. 372	No. 032P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-303)	Denied 3/19/09
State v. Bridges Case below: 191 N.C. App. 611	No. 415A08	1. Def's NOA Based Upon a Constitutional Question (COA07-1326) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 02/06/09

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

State v. Canady Case below: 191 N.C. App. 680	No. 417P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1278)	Denied 02/06/09
State v. Carson Case below: 179 N.C. App. 435	No. 609P07-2	Def-Appellant's PWC (COA05-1598)	Denied 3/19/09
State v. Chapman Case below: 193 N.C. App. 610	No. 538P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-488)	Denied 02/06/09
State v. Coley Case below: 193 N.C. App. 458	No. 544A08	1. Def's NOA (Dissent) (COA07-645) 2. Def's PDR As To Additional Issues	1. —— 2. Denied 02/06/09
State v. Conway Case below: 194 N.C. App. 73	No. 548P08	1. State's Motion for Temporary Stay (COA08-106) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 12/17/08 Stay Dissolved 02/05/09 2. Denied 02/06/09 3. Denied 02/06/09 4. Dismissed as Moot 02/06/09
State v. Dale Case below: 192 N.C. App. 734	No. 475P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-180)	Denied 02/06/09
State v. Dix Case below: 194 N.C. App. 151	No. 551P08	Def's Motion for Temporary Stay (COA07-1440)	Allowed 12/18/08
State v. Epps Case below: 190 N.C. App. 823	No. 307P08	1. Def's PDR Under N.C.G.S. § 7A-31 (COA07-1234) 2. Def's Motion to Withdraw PDR	1. —— 2. Allowed 02/06/09
State v. Forte Case below: Wayne County Superior Court	No. 020A04-2	Def's PWC to Review Order of Wayne County Superior Court	Denied 02/06/09

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

State v. Garcell Case below: Rutherford County Superior Court	No. 465A06	Def's MAR	See Opinion 20 March 2009 363 N.C 10
State v. Goodwin Case below: 190 N.C. App. 570	No. 292P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1028)	Denied 3/19/09
State v. Graham Case below: 194 N.C. App. 201	No. 564P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-334)	Denied 02/06/09
State v. Grier Case below: 194 N.C. App. 373	No. 009P09	1. Def's NOA Based Upon a Constitutional Question (COA08-84) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 3/19/09 2. Denied 3/19/09
State v. Hairston Case below: 190 N.C. App. 620	No. 258P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1119)	Denied 3/19/09
State v. Harley Case below: 193 N.C. App. 610	No. 533P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-60)	Denied 02/06/09
State v. Hazelwood Case below: 187 N.C. App. 94	No. 492P08	Def's PWC to Review Decision of the COA (COA06-1667)	Denied 02/06/09
State v. Hunt Case below: 192 N.C. App. 268	No. 400P08	1. State's Motion for Temporary Stay (COA08-14) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 09/05/08 362 N.C. 511 Stay Dissolved 02/05/09 2. Denied 02/06/09 3. Denied 02/06/09

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

State v. Jackson Case below: 193 N.C. App. 247	No. 498P08	1. Def's NOA Based Upon a Constitutional Question (COA08-119) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 02/06/09 3. Denied 02/06/09
State v. Jacobs Case below: 193 N.C. App. 602	No. 617P05-2	1. State's Motion for Temporary Stay (COA04-541-2) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 11/24/08 362 N.C. 685 2. Allowed 02/06/09 3. Allowed 02/06/09 **Timmons-Goodson, J., Recused**
State v. Jenkins Case below: 191 N.C. App. 611	No. 428P08	1. Def's NOA Based Upon a Constitutional Question (COA07-1006) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 3/19/09 2. Denied 3/19/09
State v. Jennings Case below: 193 N.C. App. 753	No. 563P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-598)	Denied 02/06/09
State v. Kuegel Case below: 195 N.C. App. 310	No. 070P09	Def's Motion for Temporary Stay (COA08-587)	Allowed 02/13/09
State v. Lane Case below: 362 N.C. 667	No. 606A05	State's Motion for Clarification of Court's Opinion	See Special Order 03/09/09 Page 121
State v. Lopez Case below: 188 N.C. App. 553	No. 095P08	1. State's PDR Under N.C.G.S. § 7A-31 (COA07-422) 2. Def's NOA Based Upon a Constitutional Question 3. State's Motion to Dismiss Appeal 4. Def's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Amend NOA and PDR	1. Allowed 02/06/09 2. —— 3. Allowed 02/06/09 4. Allowed 02/06/09 5. Allowed 02/06/09

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State v. Martin Case below: 191 N.C. App. 462	No. 406P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1392)	Denied 3/19/09
State v. McCray Case below: 191 N.C. App. 253	No. 482P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1255)	Denied 02/06/09
State v. Moody Case below: 193 N.C. App. 753	No. 547P08	1. Def's Motion for "Notice of Appeal by Right" (COA08-294) 2. Def's Motion for "Petition for Discretionary Review"	1. Dismissed *Ex Mero Motu* 02/06/09 2. Denied 02/06/09
State v. Narron Case below: 193 N.C. App. 76	No. 505P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-129)	Denied 02/06/09
State v. Oxendale Case below: 193 N.C. App. 456	No. 522P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-257)	Denied 02/06/09
State v. Oxendine Case below: 193 N.C. App. 247	No. 501P08	Def's (Oxendine) PDR Under N.C.G.S. § 7A-31 (COA07-1162)	Denied 02/06/09
State v. Parks Case below: 193 N.C. App. 248	No. 507P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1495)	Denied 02/06/09
State v. Patton Case below: 194 N.C. App. 374	No. 046P09	Def's PWC To Review Decision of COA (COA08-199)	Dismissed 3/19/09
State v. Perry Case below: 195 N.C. App. 131	No. 086P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-676)	Denied 3/19/09

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

State v. Philip Morris USA, Inc. Case below: 193 N.C. App. 1	No. 002P05-3	1. State's Motion for Temporary Stay (COA07-409) 2. State's Petition for Writ of Supersedeas 3. State's PDR Based Upon N.C.G.S. § 7A-31	1. Allowed 11/10/08 362 N.C. 686 Stay Dissolved 03/19/09 2. Denied 3/19/09 3. Denied 3/19/09
State v. Philip Morris, USA, Inc. Case below: 194 N.C. App. 1	No. 002A05-4	Plts' (State of MD, et al) PDR as to Additional Issues (COA07-1592)	Allowed 3/19/09
State v. Pinson Case below: 193 N.C. App. 456	No. 516P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-31)	Denied 02/06/09
State v. Pope Case below: 193 N.C. App. 754	No. 555P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-440)	Denied 3/19/09
State v. Rankin Case below: 191 N.C. App. 332	No. 367P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1386)	Denied 02/06/09
State v. Robbs Case below: 194 N.C. App. 201	No. 561P08	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-621) 2. Def's Motion to Withdraw PDR	1. —— 2. Allowed 02/06/09
State v. Rogers Case below: 194 N.C. App. 131	No. 003P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-188)	Denied 3/19/09

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State v. Sexton Case below: 193 N.C. App. 248	No. 483P08	1. State's Motion for Temporary Stay (COA07-1438) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's NOA Based Upon a Constitutional Question 5. State's Motion to Dismiss Appeal 6. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 10/27/08 362 N.C. 687 Stay Dissolved 02/05/09 2. Denied 02/06/09 3. Denied 02/06/09 4. — 5. Allowed 02/06/09 6. Denied 02/06/09
State v. Shaffer Case below: 193 N.C. App. 172	No. 499P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-214)	Denied 02/06/09
State v. Shaw Case below: 193 N.C. App. 456	No. 523P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-97)	Denied 02/06/09
State v. Simmons Case below: 194 N.C. App. 201	No. 013P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-65)	Denied 02/06/09
State v. Smith Case below: Halifax County Superior Court	No. 396A98-2	1. Def's Motion to Hold in Abeyance the Time in Which to File Petition for Writ of Certiorari 2. State's Motion to Dissolve Order Holding Time in Which to File Certiorari Petition in Abeyance	1. Allowed 08/15/02 2. Allowed 12/31/08
State v. Smith Case below: 193 N.C. App. 457	No. 517P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-406)	Denied 02/06/09
State v. Smith Case below: 193 N.C. App. 739	No. 534P08	State's Motion for Temporary Stay (COA08-533)	Allowed 12/05/08

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

State v. Taylor Case below: 191 N.C. App. 561	No. 388P08	1. State's Motion for Temporary Stay (COA07-391) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 08/25/08 362 N.C. 479 Stay Dissolved 03/19/09 2. Denied 3/19/09 3. Denied 3/19/09
State v. Tessnear Case below: 193 N.C. App. 457	No. 510A08	1. Def's NOA Based Upon a Constitutional Question (COA08-256) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 02/06/09
State v. Thomas Case below: 195 N.C. App. 593	No. 113P09	State's Motion for Temporary Stay (COA08-599)	Allowed 03/19/09
State v. Tomlin Case below: 193 N.C. App. 611	No. 532P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1558)	Denied 02/06/09
State v. Washington Case below: 193 N.C. App. 670	No. 560P08	1. Def's NOA Based Upon a Constitutional Question (COA08-217) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 02/06/09 3. Denied 02/06/09
State v. Williams Case below: 194 N.C. App. 201	No. 006P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-554)	Denied 3/19/09
State v. Williams Case below: 180 N.C. App. 477	No. 017P08	Def's PWC to Review Decision of COA (COA06-240)	Denied 3/19/09
State v. Wooten Case below: 194 N.C. App. 524	No. 028P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-734) 2. Def's PWC To Review Decision of COA	1. Denied 3/19/09 2. Dismissed 3/19/09
State v. Yancey Case below: 190 N.C. App. 207	No. 260P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1406)	Denied 3/19/09

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

State v. Young Case below: 191 N.C. App. 612	No. 422P08	Def's PWC To Review Decision of COA (COA07-1443)	Denied 3/19/09
Ventriglia v. Deese Case below: 194 N.C. App. 344	No. 566P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA08-457) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 02/06/09 2. Dismissed as Moot 02/06/09
Washburn v. Yadkin Valley Bank & Tr. Co. Case below: 190 N.C. App. 315	No. 280P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-612 & COA07-613)	Denied 02/06/09
White Fox Constr. Co. v. Mountain Grove Baptist Church, Inc. Case below: 192 N.C. App. 276	No. 524P08	1. Plt's PWC to Review the Decision of the COA (COA07-963) 2. Plt's Motion to Suspend the Rules of Appellate Procedure Pursuant to Rule 2, N.C. R. App. P., to Allow Review	1. Denied 02/06/09 2. Denied 02/06/09
Wilkie-Fisher v. P.H. Glatfelter Co. Case below: 191 N.C. App. 613	No. 420P08	1. Def's NOA (COA08-79) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Withdraw Notice of Appeal	1. —— 2. Denied 02/06/09 3. Allowed 02/06/09

RONALD CROCKER AND PAULETTE CROCKER AS CO-ADMINISTRATORS OF THE ESTATE OF REAGAN ELIZABETH CROCKER v. H. PETER ROETHLING, M.D. AND WAYNE WOMEN'S CLINIC, P.A.

No. 374PA07

(Filed 1 May 2009)

Medical Malpractice— expert testimony—familiarity with community standard of care

The separate opinions of Justice Hudson and Justice Martin, when taken together, constitute a majority of the Court in favor of reversing and remanding a decision of the Court of Appeals that affirmed the trial court's entry of summary judgment in favor of defendants in a medical malpractice wrongful death action on the ground that plaintiffs' only expert witness was incompetent to testify because he failed to demonstrate in his deposition and affidavit that he was sufficiently familiar with the relevant "same or similar community" standard of care. N.C.G.S. § 90-21.12.

Justice MARTIN concurring with separate mandate.

Justice EDMUNDS concurrs with concurring opinion.

Justice NEWBY dissenting.

Chief Justice PARKER and Justice BRADY join in dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 184 N.C. App. 377, 646 S.E.2d 442 (2007), affirming an order granting summary judgment for defendants entered on 1 March 2006 by Judge W. Russell Duke, Jr., in Superior Court, Johnston County. Heard in the Supreme Court 18 March 2008.

The McLeod Law Firm, P.A., by Joe McLeod; and Law Offices of Wade E. Byrd, P.A., by Wade E. Byrd, for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson and William H. Moss, for defendant-appellees.

Patterson Harkavy LLP, by Burton Craige, for North Carolina Academy of Trial Lawyers, amicus curiae.

HUDSON, Justice.

In this medical malpractice case, we consider whether the trial court properly excluded plaintiffs' expert and granted summary judgment for defendants when the expert's opinions of his familiarity with the community at issue and of defendants' breach of the standard of care satisfy the requirements of N.C.G.S. § 90-21.12. We conclude that here, the expert's deposition and affidavit demonstrate "sufficient familiarity" with the "same or similar" community and that the trial court erred by excluding his testimony. Because the expert's evidence also provides opinions that create a genuine issue as to the material fact of defendants' breach of the standard of care, summary judgment should not have been granted.

Plaintiffs allege that their daughter, Reagan Elizabeth Crocker, was born to them in September 2001 in Goldsboro and died on 28 September 2003 due to severe, permanent birth-related injuries. Defendant H. Peter Roethling, M.D., an obstetrician with defendant Wayne Women's Clinic, delivered Reagan on 14 September 2001. During delivery, Reagan's shoulder became lodged against her mother's pelvis, preventing natural passage through the birth canal. This condition, called shoulder dystocia, delayed Reagan's birth and allegedly caused serious injuries. Plaintiffs contend that Dr. Roethling was negligent in failing to perform various maneuvers, including the Zavanelli maneuver, to dislodge Reagan's shoulder and hasten her delivery.

On 9 September 2004, plaintiffs, acting as co-administrators of Reagan's estate, filed a medical malpractice action in the superior court in Johnston County against Dr. Roethling, Wayne Women's Clinic, and other defendants later dismissed from the action. Plaintiffs sought damages for wrongful death, based on the alleged negligence of Dr. Roethling in delivering Reagan. On 1 March 2006, the trial court entered summary judgment for defendants after concluding that the testimony of plaintiffs' sole expert witness should be excluded. Plaintiffs appealed to the Court of Appeals, which filed a unanimous, unpublished opinion on 3 April 2007 affirming the trial court. The Court of Appeals granted a petition for rehearing on 6 June 2007 and reconsidered the case without additional briefs and without oral argument. The Court of Appeals filed a unanimous, unpublished superseding opinion on 3 July 2007, again affirming the trial court. That opinion stated that "the record before [the Court of Appeals] does not include sufficient facts tending to support [the expert's]" assertion in his 7 February 2006 affidavit "that he is 'familiar with the

prevailing standard of care for handling shoulder dystocia in the same or similar community to Goldsboro, North Carolina in 2001.' " *Crocker v. Roethling*, 184 N.C. App. 377, 646 S.E.2d 442, 2007 WL 1928681, at *3 (2007) (unpublished). On 8 November 2007, this Court allowed plaintiffs' petition for discretionary review. As discussed below, we conclude that summary judgment for defendants was not proper on this record. We reverse and remand.

The standard for granting summary judgment is well established. Summary judgment is proper when "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 a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2007). The trial court must consider the evidence in the light most favorable to the non-moving party. *E.g.*, *McCutchen v. McCutchen*, 360 N.C. 280, 286, 624 S.E.2d 620, 625 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)).

"One of the essential elements of a claim for medical negligence is that the defendant breached the applicable standard of medical care owed to the plaintiff." *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999). To meet their burden of proving the applicable standard of care, plaintiffs must satisfy the requirements of N.C.G.S. § 90-21.12, which states in full:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence *that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities* at the time of the alleged act giving rise to the cause of action.

N.C.G.S. § 90-21.12 (2007) (emphasis added). Plaintiffs must establish the relevant standard of care through expert testimony. *Ballance v. Wentz*, 286 N.C. 294, 302, 210 S.E.2d 390, 395 (1974) (citation omitted); *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003) (citations omitted). When plaintiffs have introduced evidence from an expert stating that the defendant doctor did not

meet the accepted medical standard, "[t]he evidence forecast by the plaintiffs establishes a genuine issue of material fact as to whether the defendant doctor breached the applicable standard of care and thereby proximately caused the plaintiffs' injuries." *Mozingo v. Pitt Cty. Mem'l Hosp., Inc.*, 331 N.C. 182, 191, 415 S.E.2d 341, 346 (1992) (citing *Turner v. Duke Univ.*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989)). This issue is ordinarily a question for the jury, and in such case, it is error for the trial court to enter summary judgment for the defendant. *Id.*; *see also Rouse v. Pitt Cty. Mem'l. Hosp., Inc.*, 343 N.C. 186, 197, 470 S.E.2d 44, 50 (1996).

Here, the trial court appears to have granted summary judgment to defendants on grounds that plaintiffs' only proposed medical expert, John P. Elliott, M.D., was insufficiently familiar with Goldsboro and was applying a national standard of care, thus requiring exclusion of his evidence. Having excluded the doctor from testifying, the court granted summary judgment for defendants. Ordinarily, we review the decision to exclude or admit expert testimony for an abuse of discretion. *DOT v. Haywood Cty.*, 360 N.C. 349, 351, 626 S.E.2d 645, 646 (2006); *see also* N.C.G.S. § 8C-1, Rule 104 (2007). "[T]his Court has uniformly held that the competency of a witness to testify as an expert is a question primarily addressed to the court, and his discretion is ordinarily conclusive, that is, unless there be no evidence to support the finding, or unless the judge abuse his discretion." *State v. Moore*, 245 N.C. 158, 164, 95 S.E.2d 548, 552 (1956). However, here, the pertinent inquiry is whether the trial court properly applied the statutory requirements of N.C.G.S. § 90-21.12 and the Rules of Evidence in considering Dr. Elliott's opinions at this stage of the proceedings. If we determine that the exclusion was erroneous, we then consider whether this testimony sufficiently forecast a genuine issue of material fact under *Mozingo*.

We note that the ruling at issue here occurred at the hearing solely calendared for the motion for summary judgment, not for a motion to exclude testimony. In fact, our review of the record reveals no motion to exclude, written or oral, nor was any motion to exclude listed on the calendar notice. Moreover, the reasons given in the transcript for the ruling (none appear in the order) include: that Dr. Elliott's information about Goldsboro showed that its hospital was different from the one in Phoenix where he practices; that all of the hospitals where Dr. Elliott has practiced are larger than the one in Goldsboro; and that "the Court finds that the [witness] was testifying . . . to a national standard of care and will exclude the evidence of

that expert." We conclude that this ruling and the order based thereupon result from a misapplication of Rule 702 and N.C.G.S. § 90-21.12.

The trial court must decide the preliminary question of the admissibility of expert testimony under the three-step approach adopted in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). The trial court thereunder must assess: 1) the reliability of the expert's methodology, 2) the qualifications of the proposed expert, and 3) the relevance of the expert's testimony. *Id.* at 527-29, 461 S.E.2d at 639-41). Applying *Goode* in the context of N.C.G.S. § 90-21.12, we note that North Carolina law has established a "workable" and "flexible system for assessing" the admissibility of expert testimony under Rule 702. *Id.* at 469, 597 S.E.2d at 692. Here, the first two steps of the *Goode* analysis are not at issue; there is no controversial or novel "proffered scientific or technical method of proof" which defendants challenge as unreliable, nor have they questioned Dr. Elliott's qualifications as a medical expert. 358 N.C. at 460-61, 597 S.E.2d at 687-88. Instead, defendants in essence dispute the relevance of Dr. Elliott's testimony, arguing that his testimony was not admissible because it did not address the relevant standard of care: that of Goldsboro or similar communities.

Dr. Elliott, plaintiffs' sole expert witness, practiced obstetrics in Phoenix, Arizona. In the hearing on the motion for summary judgment, counsel for defendants indicated he did not dispute Dr. Elliott's other qualifications, but that "the key issue" was whether he had " 'sufficient familiarity' with the standards of practice" in Goldsboro or similar communities. We note Dr. Elliott gave this testimony at a discovery deposition, conducted by the defense attorney, and not in response to direct examination by plaintiffs, who would later have the burden of tendering the qualifications of the expert. At such a discovery deposition, plaintiffs' attorney had no obligation to expand upon or clarify any of Dr. Elliott's qualifications or opinions; rather, the deposition was the defendants' opportunity to learn what they could about the other side's expert and his opinions. Even so, at his deposition on 30 August 2005, Dr. Elliott was able to accurately describe a number of features of the community at issue here, including the location and population of Goldsboro, and the number of obstetricians privileged at Wayne Memorial Hospital. He did testify that he believed a physician in either Phoenix or Goldsboro would have the "same" knowledge, but also correctly described the applicable standard of care as "that of a reasonably trained physician practicing in the same or similar circumstances."

On 10 February 2006, prior to the hearing on defendants' motion for summary judgment, plaintiffs filed Dr. Elliott's affidavit, which stated, in pertinent part:

> 3. I am familiar with the training, education and experience of Dr. Peter Roethling and have reviewed the transcript of Dr. Roethling's deposition wherein he discusses his training, education and experience and his practice in Goldsboro, North Carolina. . . .
>
> 4. I have reviewed information about the community of Goldsboro, North Carolina, Wayne County and Wayne Memorial Hospital for the period 2001 and am familiar with the size of the population, the level of care available at the hospital, the facilities and the number of health care providers for obstetrics. I am familiar with the prevailing standard of care for handling shoulder dystocia in the same or similar community to Goldsboro, North Carolina in 2001 by a physician with the same or similar training, education and experience as Dr. Roethling. The applicable standard in Goldsboro in 2001 for a board certified obstetrician such as Dr. Roethling who is also a clinical teacher required, among other things, that when progress is not made in delivery of a shoulder dystocia using standard maneuvers, the Zavenelli [sic] maneuver should be used.

The affidavit was discussed by plaintiffs' counsel at the argument on defendants' motion for summary judgment on 13 February 2006.

As noted above, the record does not reflect a written or oral motion to exclude the testimony of Dr. Elliott, but nevertheless defense counsel argued to the trial court, at the Court of Appeals, and again here that the doctor's testimony should be excluded because it was either based on a national standard or failed to "demonstrate that [Dr. Elliott] really [was] familiar with the standard of practice for similar communities," citing *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 624 S.E.2d 380 (2006), *Smith v. Whitmer*, 159 N.C. App. 192, 582 S.E.2d 669, and *Henry v. Se. OB-GYN Assocs.*, 145 N.C. App. 208, 550 S.E.2d 245, *aff'd*, 354 N.C. 570, 557 S.E.2d 530 (2001). On the other hand, plaintiffs' counsel has argued at every level that Dr. Elliott's affidavit, particularly paragraphs three and four quoted above, should put the issue of familiarity with the same or similar community "to rest" if viewed according to the appropriate legal standard.

We agree with plaintiffs that the cases cited by defendants are distinguishable. In *Purvis*, the Court of Appeals held that an expert's testimony was properly excluded when his only stated knowledge of the community pertained to a period more than four years after the alleged injury occurred. 175 N.C. App. at 480-81, 624 S.E.2d at 385. Here, in contrast, Dr. Elliott specifically referred to the standard in effect at the time of the alleged negligence. In *Smith*, the expert "offered no testimony regarding defendants' training, experience, or the resources available in the defendants' medical community." 159 N.C. App. at 196, 582 S.E.2d at 672. The expert further testified that "the sole information he received or reviewed concerning the relevant standard of care in [the relevant community] was verbal information from plaintiff's attorney regarding 'the approximate size of the community and what goes on there' " and that he could not even recall what he had been told. *Id.* at 196-97, 582 S.E.2d at 672. He then stated that, in any event, there was a national standard of care. *Id.* *Henry* involved an expert who testified that he knew nothing about the community at issue, but gave an opinion that the standard of care for the particular procedure was the same across the nation. 145 N.C. App. at 210, 550 S.E.2d at 246-47. In none of these cases did the plaintiffs have a qualified expert like Dr. Elliott produce an affidavit clearly stating that he was familiar with the training and experience of the defendant physician and with the specific standard of care in the relevant community at the time of the alleged injury.

We conclude that, unlike the experts in *Purvis*, *Smith*, and *Henry*, Dr. Elliott demonstrated specific familiarity with and expressed unequivocal opinions regarding the standard of care in Goldsboro and similar communities, as well as in Dr. Roethling's own practice. While Dr. Elliott did state in his deposition that he expected "a physician in Phoenix [Arizona] to have the same knowledge as Dr. Roethling irrespective of their location," his subsequent affidavit expanded and clarified his familiarity with Dr. Roethling's obstetrical practice and with Goldsboro and Wayne County. The trial court may not automatically disqualify an expert witness simply because the witness indicates reliance on a national standard of care during a discovery deposition. Where, as here, the basis of the opinion and the expert's familiarity with the same or a similar community is undeveloped, the proponent must be given an opportunity to establish the witness's competency. However, the proponent does not have the duty to do so at the discovery deposition.

Dr. Elliott's sworn affidavit states that he had reviewed information about obstetrical care in Goldsboro and Wayne County and about Dr. Roethling's background and practice. Dr. Elliott also stated that he was familiar with the standard of care for handling shoulder dystocia in the community in 2001. Any questions as to whether Dr. Elliott had actually reviewed such information or whether he was truthful in stating that he was familiar with the relevant standard of care go to the credibility of the witness. Nothing in our statutes or case law suggests that a prospective medical expert must produce documentation of his research or attempt to explain to the trial judge how his knowledge about the community enabled him to ascertain the relevant standard of care. Nor do they prescribe any particular method by which a medical doctor must become "familiar" with a given community. Many methods are possible, and our jurisprudence indicates our desire to preserve flexibility in such proceedings. The witness must show only that "other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702(a).

Further, the dissent suggests that Dr. Elliott was required to explicate the basis for his opinion of the applicable standard of care before it could be admissible. Evidence Rule 705, "Disclosure of facts or data underlying expert opinion," provides in pertinent part:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion.

N.C.G.S. § 8C-1, Rule 705 (2007). Here, defense counsel did not request the underlying basis for the opinion at the deposition. It appears that defense counsel began to ask about the basis, but then withdrew the question. After Dr. Elliott gave his opinion on the standard of care, defense counsel stated the following: "Q: And what is it that allows you—well, strike that." As such, Dr. Elliott was not required, under our Rules, to state the basis for his opinion prior to the court's ruling on its admission.

As noted in the dissent, matters of credibility are for the jury, not for the trial court. *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940). We have cautioned trial courts against "asserting sweeping pre-trial 'gatekeeping' authority . . . [which] may unnec-

essarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence." *Howerton*, 358 N.C. at 468, 597 S.E.2d at 692 (citing, *inter alia*, N.C. Const. art I, § 25 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993)).

Here, the trial court exceeded its limited function under Rule 104 by making a credibility determination about Dr. Elliott's testimony. Although the trial court's summary judgment order states that Dr. Elliott's affidavit was among the items reviewed, it appears from the transcript that the trial court did not properly consider the affidavit's content according to the requirements of N.C.G.S. § 90-21.12 and our Rules of Evidence, as interpreted by this Court. In the transcript of the summary judgment hearing, the judge refers only to Dr. Elliott's deposition and never acknowledges the affidavit's substantive content. Specifically, he referred to parts of Dr. Elliott's deposition that led him to conclude that Dr. Elliott would be "testifying in affect [sic] to a national standard of care." In the affidavit, Dr. Elliott states that he has reviewed information about Goldsboro and the level of hospital care there. Dr. Elliott's affidavit further states that he is "familiar with the prevailing standard of care for handling shoulder dystocia in the same or similar community to Goldsboro, North Carolina in 2001 by a physician with the same or similar training, education and experience as Dr. Roethling." Dr. Elliott's affidavit and deposition comply with the requirements of N.C.G.S. § 90-21.12 and demonstrate "sufficient familiarity" with the community at issue, rendering Dr. Elliott competent to testify on the relevant standard of care pursuant to Rule 702.

In his affidavit, Dr. Elliott stated: "Based on my review of the labor and delivery records . . . for Reagan Crocker, it is my opinion within a reasonable degree of medical certainty that Dr. Roethling breached the standard of care which caused Reagan to suffer hypoxic injury that ultimately led to her death." This statement, when considered in the light most favorable to plaintiffs, creates a genuine issue of material fact for the trier of fact under N.C.G.S. § 90-21.12 and Rule 56 regarding whether defendants breached the applicable standard of care, resulting in the injury to and death of Reagan Crocker. Summary judgment is not proper when a medical expert gives evidence tending to show that the defendant failed to meet the standard of care in the relevant community. *Mozingo*, 331 N.C. at 191, 415 S.E.2d at 346. Any question as to the credibility of Dr. Elliott's testimony on the standard of care is a matter for the jury. *See* N.C.G.S. § 90-21.12 ("[T]he defend-

ant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities . . . .") The trial court thus erred in granting summary judgment for defendants.

In sum, we hold that in a medical malpractice case: 1) gaps in the testimony of the plaintiff's expert during the defendant's discovery deposition may not properly form the basis of summary judgment for the defendant; 2) the trial court should consider affidavits submitted by the plaintiff or his witnesses in opposition to the defendant's motion for summary judgment in accordance with Rule 56; 3) to determine whether the plaintiff has presented evidence admissible to meet his burden under N.C.G.S. § 90-21.12 and Rule 702, the trial court should apply the test set forth in *State v. Goode*; 4) to determine whether an expert's testimony satisfies the third prong under *Goode* of familiarity with the "same or similar community" standard of care, the trial court should apply well-established principles of determining relevancy under Evidence Rules 401 and 701; and, 5) once the plaintiff raises a genuine issue as to whether the defendant's conduct breached the relevant standard of care, the resolution of that issue is for the trier of fact, usually the jury, per N.C.G.S. § 90-21.12. We reverse and remand to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice MARTIN, concurring, with separate mandate.

In *Howerton v. Arai Helmet, Ltd.*, this Court examined and explained the standard for "ruling on the admissibility of expert testimony" in North Carolina. 358 N.C. 440, 455, 597 S.E.2d 674, 684 (2004). We acknowledged, on the one hand, that "trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony," and we reaffirmed that such decisions will generally be reviewed on appeal for abuse of discretion. *Id.* at 458, 597 S.E.2d at 686. We emphasized, on the other hand, that the trial court's preliminary assessment should not "go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence." *Id.*

at 460, 597 S.E.2d at 687. Evidence may be " 'shaky but admissible,' " and it is the role of the jury to make any final determination regarding the weight to be afforded to the evidence. *Id.* at 460-61, 597 S.E.2d at 687-88 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993)).

This Court took great care in *Howerton* to distinguish our approach to expert qualification and admissibility of expert testimony from the federal court procedures described in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Howerton*, 358 N.C. at 469, 597 S.E.2d at 692-93. We stated that "application of the North Carolina approach is decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach." *Id.* at 464, 597 S.E.2d at 690 (quoting *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000)). Our concern was that "trial courts asserting sweeping pre-trial 'gatekeeping' authority under *Daubert* may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence." *Id.* at 468, 597 S.E.2d at 692.

In the context of medical malpractice cases, our General Assembly has expressed a similar sentiment regarding the jury's function in weighing expert testimony. *See* N.C.G.S. § 90-21.12 (2007). Assuming expert testimony is properly qualified and placed before the trier of fact, section 90-21.12 reserves a role for the jury in determining whether an expert is sufficiently familiar with the prevailing standard of medical care in the community. *See id.* Under the statute, "the trier of the facts" must be "satisfied by the greater weight of the evidence that the care of [the] health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities." *Id.*

In the instant case, the record before this Court appears to present a close question as to whether plaintiffs' proffered expert, Dr. Elliott, was sufficiently familiar with the standard of care in Goldsboro. Dr. Elliott's deposition testimony tended not to support the admission of his testimony at trial. For instance, he did not know the designation of Wayne Memorial Hospital (in which plaintiffs' daughter was born) or the number of labor and delivery suites it had. He demonstrated little familiarity with Goldsboro or Wayne County beyond a basic estimate of population and general location within the state. He testified that most of his obstetrics career was spent in Phoenix, a metro area he believed had more than twenty times the

number of obstetricians than Goldsboro and a population exceeding that of Goldsboro by over four million people. Dr. Elliott himself had never performed the Zavanelli maneuver, nor had he ever observed it performed during his twenty-four years of practice in Phoenix. Moreover, at several points during his deposition, he appeared to be applying a national standard of care rather than the "same or similar community" standard required by our General Assembly in section 90-21.12. *See* § 90-21.12.

Dr. Elliott's affidavit, on the other hand, indicated that he had researched and was knowledgeable about the standard of care in Goldsboro. For example, Dr. Elliott stated that after reviewing various materials, he was familiar with "the training, education and experience of Dr. Peter Roethling," "the size of the population [of Goldsboro], the level of care available at the hospital, the facilities and the number of health care providers for obstetrics," and "the prevailing standard of care for handling shoulder dystocia in the same or similar community to Goldsboro."

Our statutes and case law do not require an expert to have actually practiced in the community in which the alleged malpractice occurred, or even to have practiced in a similar community. *See* § 90-21.12; *see also* N.C.G.S. § 8C-1, Rule 702(b) (2007) (indicating that an expert in a medical malpractice case need not be licensed in North Carolina so long as the expert is licensed in some other state). In this regard, I agree with Justice Hudson's opinion that our law does not "prescribe any particular method by which a medical doctor must become 'familiar' with a given community." Book or Internet research may be a perfectly acceptable method of educating oneself regarding the standard of medical care applicable in a particular community. *See*, *e.g.*, *Coffman v. Roberson*, 153 N.C. App. 618, 624, 571 S.E.2d 255, 259 (2002) (holding medical expert demonstrated sufficient familiarity with applicable standard of care when that familiarity was gained in part from "Internet research about the size of the hospital, the training program, and the AHEC (Area Health Education Center) program"), *disc. rev. denied*, 356 N.C. 668, 577 S.E.2d 111 (2003).

Although the trial court appropriately considered both Dr. Elliott's deposition testimony and his affidavit in determining whether to admit his expert opinion at trial, these discovery materials did not adequately convey a complete picture of Dr. Elliott's qualifications or the reliability of his proposed testimony. Defend-

ants' deposition of plaintiffs' proposed expert suggested a lack of relevant knowledge about Goldsboro, while the expert's affidavit asserted his familiarity without explaining what materials he reviewed or the way in which those materials influenced his determination of the applicable standard of medical care. Moreover, the trial court based its decision to exclude Dr. Elliott primarily on a paper record, considering the video deposition transcript, the affidavit, and brief oral argument by counsel. Thus, the trial court was in no better position than this Court to review the record and to assess Dr. Elliott's qualifications and the reliability of his proposed testimony. *See In re Greene*, 306 N.C. 376, 380, 297 S.E.2d 379, 382 (1982) (explaining that "[t]his Court, unlike a trial court, is ill-equipped to resolve disputed questions of fact" because we "do not hear live testimony of sworn witnesses and are required to rely exclusively upon written records").

When the proffered expert's familiarity with the relevant standard of care is unclear from the paper record, our trial courts should consider requiring the production of the expert for purposes of voir dire examination. In such situations, particularly when the admissibility decision may be outcome-determinative, the expense of voir dire examination and its possible inconvenience to the parties and the expert are justified in order to ensure a fair and just adjudication. Voir dire examination provides the trial court with the opportunity to explore the foundation of the expert's familiarity with the community, the method by which the expert arrived at his conclusion regarding the applicable standard of care, and the link between this method and the expert's ultimate opinion. Moreover, unlike the nonadversarial discovery process, counsel for both parties may participate equally in a voir dire hearing and help elicit all information relevant to the expert's qualifications and the admissibility of the proposed testimony.

Perhaps most importantly, voir dire examination provides the trial court with an informed basis to guide the exercise of its discretion. It is precisely because the trial court " 'has the advantage of seeing and hearing the witnesses' " that the trial court's discretionary decision is entitled to deference on appeal. *State v. Lasiter*, 361 N.C. 299, 305, 643 S.E.2d 909, 912 (2007) (quoting *State v. Little*, 270 N.C. 234, 240, 154 S.E.2d 61, 66 (1967)) (explaining further that the trial court's firsthand observations of jury voir dire enable it to " 'gain a "feel" of the case which a cold record denies to a reviewing court' " (quoting *Little*, 270 N.C. at 240, 154 S.E.2d at 66)).

I do not suggest that voir dire examination is necessary in every case in which opposing counsel challenges a proffered expert's qualifications or proposed testimony. In light of the emphasis *Howerton* places on the jury's role in evaluating expert testimony, however, voir dire examination may be prudent in close cases. In *Howerton*, this Court expressed concern with "the case-dispositive nature of *Daubert* proceedings, whereby parties in civil actions may use pretrial motions to exclude expert testimony under *Daubert* to bootstrap motions for summary judgment that otherwise would not likely succeed." *Howerton*, 358 N.C. at 467, 597 S.E.2d at 691 (stating further: "[A] party may use a [pre-trial] hearing to exclude an opponent's expert testimony on an essential element of the cause of action. With no other means of proving that element of the claim, the non-moving party would inevitably perish in the ensuing motion for summary judgment." *Id.* at 468, 597 S.E.2d at 692.).

The same concern is implicated in the instant case, in which defendants sought and received summary judgment immediately after the trial court's exclusion of plaintiffs' tendered expert. At the end of counsels' arguments, following discussion about Dr. Elliott's deposition testimony and affidavit, plaintiffs' counsel noted to the trial court that "[t]his is not the cross-examination of Dr. Elliott at a voir dire [examination]." As counsel's remark implies, here, and in similar cases, the voir dire procedure provides a more reliable assessment mechanism than discovery depositions or conclusory affidavits, protecting the jury from unreliable expert testimony yet preserving the jury's role in weighing the credibility of expert testimony when appropriate.

For the foregoing reasons, this case is reversed and remanded to the Court of Appeals for further remand to the trial court with instructions to conduct a voir dire examination of plaintiffs' proffered expert and, based on this evidentiary foundation, to determine the admissibility of the proposed expert testimony. *See Marks v. United States*, 430 U.S. 188 (1977).

Justice EDMUNDS concurs in this opinion.

Justice NEWBY dissenting.

In my view, this case presents the issue of whether a tendered expert's unsubstantiated statements of familiarity with the applicable standard of care in a medical malpractice action mandate a voir dire examination to determine whether the expert is competent to testify

at trial.[1] While I agree that the trial court in its discretion could have conducted a voir dire of the proffered expert, under the facts of this case and the long-established deferential standard of review, I do not believe the trial court's decision not to do so was an abuse of discretion requiring this Court to intervene and direct the proceedings of the trial court. I therefore respectfully dissent.

Plaintiffs brought this action alleging that defendants committed medical malpractice during the delivery of plaintiffs' daughter Reagan at Wayne Memorial Hospital in Goldsboro. Plaintiffs sought to contend at trial that defendant H. Peter Roethling, M.D. breached the applicable standard of care while delivering Reagan by failing to perform what is known as the Zavanelli maneuver. The Zavanelli maneuver is a medical procedure by which a baby suffering shoulder dystocia is pushed back into the mother's uterus, relieving compression on the umbilical cord and enabling the baby to receive sufficient oxygen. Delivery is thus delayed until an emergency cesarean section can be performed.

Plaintiffs tendered John P. Elliott, M.D. as their only expert witness. He intended to testify that the Zavanelli maneuver was part of the standard of care applicable to a board-certified obstetrician in Goldsboro at the time of Reagan's birth and, therefore, that defendant Roethling breached the standard of care in failing to perform the maneuver. As will be detailed more fully below, Dr. Elliott had no experience practicing in Goldsboro or any similar community and, when he formed his opinion, had very little knowledge of defendant Roethling's training, of the Goldsboro community in general, or of the medical facilities at Wayne Memorial Hospital.

Defendants sought to exclude Dr. Elliott's testimony and, based upon the possible exclusion, moved for summary judgment on 1 Feb-

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1. The separate opinions of Justice Martin and Justice Hudson, when taken together, constitute a majority of the Court in favor of reversing and remanding. Justice Martin's opinion, having the narrower directive, is the controlling opinion, *cf. Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260, 266 (1977) ("When a fragmented [Supreme Court of the United States] decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' " (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S. Ct. 2909, 2923, 49 L. Ed. 2d 859, 872 (1976) (opinion of Stewart, Powell, and Stevens, JJ.))), and requires the trial court to conduct a voir dire examination of the proffered expert witness. References in this dissenting opinion to "the majority" denote matters as to which the opinions of Justices Martin and Hudson seem to agree. When responding to one of those opinions separately, this dissenting opinion will refer to the authoring Justice by name.

ruary 2006. After a hearing on the motion, the trial court found that Dr. Elliott had impermissibly based his opinion on a national standard of care, and on 1 March 2006, the court entered an order excluding Dr. Elliott's testimony and granting summary judgment in favor of defendants. Plaintiffs appealed, and the Court of Appeals affirmed the trial court. This Court allowed discretionary review to determine whether it was proper for the trial court to exclude Dr. Elliott's testimony and grant defendants' motion for summary judgment.

Section 90-21.12 of the General Statutes, entitled "Standard of health care," provides:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

N.C.G.S. § 90-21.12 (2007). Under this statute, the plaintiff in a medical malpractice suit bears the burden of proving the defendant failed to comply with the applicable standard of care. To do so, the plaintiff must first establish the content of that standard by providing evidence of "the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." *Id.* Due to the specialized nature of the standard of care in medical malpractice cases, the content and meaning of the standard must be demonstrated by expert testimony. *See id.* § 1A-1, Rule 9(j) (2007); *id.* § 8C-1, Rule 702(a) (2007); *Ballance v. Wentz*, 286 N.C. 294, 302, 210 S.E.2d 390, 395 (1974).

Regardless of context, the decision whether to admit expert testimony lies within the province of the trial court. N.C.G.S. § 8C-1, Rule 104(a) (2007).

> "[A] trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686

> (2004). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

N.C. Dep't of Transp. v. Haywood Cty., 360 N.C. 349, 351, 626 S.E.2d 645, 646 (2006) (alteration in original). The abuse of discretion standard is firmly entrenched in our caselaw for appellate review of trial courts' discretionary decisions, and the implication by a majority of this Court that abuse of discretion does not apply here thus represents a sharp departure from precedent. In stating that "the pertinent inquiry is whether the trial court properly applied the statutory requirements of N.C.G.S. § 90-21.12 and the Rules of Evidence," moreover, Justice Hudson's opinion fails to set forth any real standard of review to fill the void. Justice Martin likewise neglects to state the standard under which he deems a voir dire examination necessary. The statutory provisions to which Justice Hudson refers do indeed contain standards that the trial court must apply, but those standards simply define inquiries and determinations that are left *to the discretion of the trial court*. Abuse of discretion therefore remains the proper standard for our review of the trial court's decision to exclude Dr. Elliott's testimony.

Although the jury is entrusted with weighing the credibility of expert testimony that has been deemed admissible, the abuse of discretion standard affords the trial court wide latitude in performing the preliminary function of evaluating whether the expert in question is competent to testify. *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940) ("The competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury. This principle is so well settled we do not think it necessary to cite authorities."). In this case, prior to stating his opinions before a jury, Dr. Elliott was required to demonstrate to the trial court his competency to testify regarding the applicable standard of care.

As the General Statutes reflect, the trial court's traditional duty to determine the admissibility of expert testimony is particularly important in the medical malpractice context. In medical malpractice suits in which the plaintiff does not rely on the doctrine of *res ipsa loquitur*, our Rules of Civil Procedure require the trial court to determine whether the plaintiff's pleading asserts that an expert witness will "testify that the medical care did not comply with the applicable

standard of care" and, if the pleading fails to do so, to dismiss the complaint. N.C.G.S. § 1A-1, Rule 9(j); *id.* § 90-21.12. Similarly, a witness can testify to the "scientific, technical or other specialized knowledge" that is crucial in medical malpractice cases only after the trial court is satisfied that the witness is "qualified as an expert by knowledge, skill, experience, training, or education." *Id.* § 8C-1, Rule 702(a). This consistent interposition of the trial court between potential expert witnesses and the jury represents sound legislative policy, as lay jurors will naturally accord great weight to expert testimony. *Billips v. Commonwealth*, 274 Va. 805, 809, 652 S.E.2d 99, 101-02 (2007) ("Advancements in the sciences continually outpace the education of laymen, a category that includes judges, jurors and lawyers . . . . Consequently, there is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be 'scientific,' . . . .").

In determining whether an expert's testimony is sufficiently reliable for admission, the trial court must make "a preliminary, foundational inquiry into the basic methodological adequacy of [the] expert testimony." *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (citing *Queen City Coach Co.*, 218 N.C. at 323, 11 S.E.2d at 343). Notwithstanding Justice Hudson's intimation to the contrary, an expert's methodology need not be especially "controversial or novel" for its reliability to come under scrutiny. Just as it must do in cases involving expert testimony derived from complex scientific methods, the trial court in a medical malpractice action must examine the process by which the expert arrived at the proffered opinion on the content of the applicable standard of care. The court must be able to determine which information the expert used in forming the opinion as well as how the expert used that information.

I agree with Justice Martin's view that when opposing counsel challenges an expert's competency to testify to the applicable standard of care, and it is a close case as to whether the expert is sufficiently familiar with that standard, the best practice is for the trial court to conduct a voir dire examination of the proffered expert witness. In fact, had the trial court elected to hold a voir dire hearing to determine Dr. Elliott's competency to testify, I would find no abuse of discretion in that decision. However, when the record alone demonstrates that the expert lacks the required familiarity, a voir dire hearing is not required as a matter of law. In the instant case, the record reveals that while Dr. Elliott asserted his familiarity with the applicable standard, he had minimal knowledge of Goldsboro or any similar

communities and was simply applying a national standard of care when he formed his opinion. Moreover, despite his years of practice in a large metropolitan area, Dr. Elliott had no personal experience with the procedure about which he sought to testify and knew of no specific instances of its use. In such cases the trial court may properly deem the proffered expert witness incompetent to testify without the expense and inconvenience of a voir dire examination.

In challenging Dr. Elliott's familiarity with the applicable standard of care, defendants questioned not only the relevance of his opinions but also the reliability of the methods he used to formulate those opinions. In so doing, defendants disputed the accuracy, not the truthfulness, of Dr. Elliott's conclusion that he was familiar with the standard applicable to Goldsboro or a similar community. In other words, defendants challenged Dr. Elliott's competency, not his credibility. As noted by Justice Hudson, both the relevance of an expert's testimony and the reliability of the expert's methodology are questions of law to be determined by the court in its admissibility inquiry. *Id.* at 458, 597 S.E.2d at 686 (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995)). Questions of the relevance of Dr. Elliott's testimony and the reliability of his methods cannot simply be decided by Dr. Elliott. The court must look beyond his bare assertions and decide these issues for itself.

I do not dispute the majority's statement that there is no "particular method by which a medical doctor must become 'familiar' with a given community." I do believe, however, that in order for the trial court to properly decide Dr. Elliott was competent to testify to the standard of care applicable in Goldsboro or similar communities, Dr. Elliott was required to demonstrate to the court *some* acceptable method by which he arrived at his conclusion on the content of Goldsboro's standard of care. The evidence before the court failed to establish such a method. Dr. Elliott was a member of the same health care profession as defendant Roethling, both being board-certified obstetricians. He knew that defendant Roethling had completed a residency in obstetrics and gynecology, but he demonstrated no further knowledge of defendant Roethling's training and experience. Dr. Elliott knew the approximate population of the Goldsboro area and the number of obstetricians practicing there, but he had no personal experience practicing in Goldsboro or any similar community. He recited basic facts about defendant Roethling and about Goldsboro, but ultimately failed to clarify how those facts served to familiarize him with the applicable standard of care. As defense counsel stated

at the motion hearing, Dr. Elliott simply failed to "connect the dots between Goldsboro or a similar community" and the personal knowledge and experience that resulted in the formulation of his opinion.

This Court has affirmed two Court of Appeals opinions that upheld the trial court's function of determining admissibility by requiring expert witnesses to elucidate both the facts underlying their proffered testimony and the logical link between those facts and the experts' opinions. In *Henry v. Southeastern OB-GYN Associates*, 145 N.C. App. 208, 550 S.E.2d 245, *aff'd per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001), the Court of Appeals held an expert was properly excluded because his assertion of familiarity with a national standard of care failed to demonstrate sufficient knowledge of the standard of care in Wilmington or a similar community. *Id.* at 212-13, 550 S.E.2d at 248. The court noted the lack of a meaningful connection between the facts the expert used and his conclusion on the applicable standard of care, stating there was no evidence that a national standard applied to Wilmington or that the community in which the expert practiced was similar to Wilmington. *Id.* at 210, 550 S.E.2d at 246-47. The Court of Appeals also upheld the trial court's refusal to allow the expert to testify at trial that he was familiar with the standard of care applicable to Wilmington or similar communities, because such testimony would have contradicted the expert's deposition testimony. *Id.* at 217-20, 550 S.E.2d at 251-52 (Hudson, J., dissenting).

In *Pitts v. Nash Day Hospital, Inc.*, 167 N.C. App. 194, 605 S.E.2d 154 (2004), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005), the Court of Appeals performed a similar analysis in holding that an expert was improperly excluded. The court found that a number of strong similarities between the personal experience of the expert and that of the defendant medical doctor represented a reliable method for the expert to use in drawing conclusions regarding the applicable standard of care. Specifically, the court noted the expert and the defendant doctor had comparable "skill, training, and experience," both having practiced extensively in North Carolina; the expert had practiced in communities throughout North Carolina and testified to their similarity to the community in question "in terms of population served, rural nature, depressed economy, and limitations on resources"; and the expert "was familiar with the equipment [used by the defendant doctor] because he used similar . . . equipment in other communities in his medical practice." *Id.* at 198, 605 S.E.2d at 156-57. The numerous similarities in the two doctors' backgrounds gave the court sufficient grounds upon which to conclude the expert's method

of forming an opinion on the applicable standard of care was reliable. *Id.* at 199, 605 S.E.2d at 157.

These cases demonstrate that neither an expert's bald assertion of familiarity with the applicable standard of care nor mere superficial statements of fact about the community in question can give the trial court a sufficient basis to deem the expert's methods reliable or the resulting testimony relevant. When challenged, the expert must not only state with specificity the facts that contributed to the proffered opinion, but also make clear to the court how those facts enabled the expert to arrive at a conclusion. This latter step must be performed most explicitly when, as in the instant case, the expert has no personal experience in the community at issue or any similar community.

The record reflects that at the time of his testimony, Dr. Elliott was licensed to practice medicine in Arizona, California, and Colorado, but not in North Carolina. He gave his deposition testimony from Phoenix, Arizona via videoconference. His practice at the time was at Good Samaritan Regional Medical Center ("Good Samaritan") in Phoenix, and he had spent his career practicing in Phoenix and in various Army hospitals, none of which were located in North Carolina. According to Dr. Elliott, Good Samaritan services the Phoenix metropolitan area, the population of which he estimated at "about four and a half million," and also draws patients from across Arizona and throughout the country. In contrast, Dr. Elliott estimated the population of the Goldsboro area at "a little over 100,000 people." He further approximated that there were "in excess of 200" obstetricians practicing in the Phoenix metropolitan area, compared to a total of 8 obstetricians in the Goldsboro area. Dr. Elliott had never practiced in Goldsboro and admitted in his deposition that he had never even practiced in a community similar to Goldsboro.

Dr. Elliott's deposition is devoid of specific facts pertaining to defendant Roethling's training and experience, aside from the basic knowledge that defendant Roethling had completed a residency in obstetrics and gynecology. He also did not know how long defendant Roethling had been in practice. As discussed above, Dr. Elliott's deposition testimony does reveal some secondhand knowledge of the Goldsboro community. He had familiarized himself with the total population of the Goldsboro area and Wayne County's relative location in North Carolina. He also knew the number of obstetricians practicing in Goldsboro at the time of Reagan Crocker's birth.

Nonetheless, his knowledge of the facilities available at Wayne Memorial Hospital was vague at best: he "believe[d] they [did] not have a neonatal intensive care unit," and he did not know how many labor and delivery suites they had. At no point in his deposition or his affidavit did Dr. Elliott explain how the basic facts he knew about defendant Roethling and the Goldsboro community enabled him to conclude that the standard of care applicable to an obstetrician in Goldsboro or any similar community required use of the Zavanelli maneuver in Reagan Crocker's case.

Dr. Elliott failed to articulate a proper basis for his conclusions even though defense counsel fully explored his familiarity with the community at issue, other similar communities, and the applicable standard of care. Defense counsel repeatedly asked Dr. Elliott about specific facts regarding Goldsboro that may have contributed to his testimony, for instance by inquiring into his familiarity with the exact medical facilities available at Wayne Memorial Hospital. Counsel also asked about Dr. Elliott's experience in similar communities and found he had none. Perhaps most importantly, counsel specifically requested that Dr. Elliott explain how he arrived at his conclusion on the content of Goldsboro's standard of care, asking, "Why is it that you think that the Zavanelli maneuver is something that a physician like Dr. Roethling should have considered doing as opposed to perhaps something that you would expect one of your colleagues in Phoenix to do?" Dr. Elliott responded:

> Well, I expect Dr. Roethling reads the same literature that I would or my colleagues in Phoenix would. The textbooks are the same. They are not written for, you know, Goldsboro, North Carolina versus Cleveland, Ohio or Phoenix, Arizona. The information is really very general information. The articles that are published are very general information. And the expected behaviors are very similar. So I would expect a physician in Phoenix to have the same knowledge as Dr. Roethling irrespective of their location.

Like the tendered expert in *Henry v. Southeastern OB-GYN Associates*, Dr. Elliott essentially testified to a belief in a national standard of care for obstetricians, yet failed to demonstrate how his minimal knowledge of Goldsboro led to his conclusion that such a standard applies to Goldsboro or any similar community.

Furthermore, it is not even clear that Dr. Elliott used reliable methods in concluding the Zavanelli maneuver is part of the standard

of care applicable to Phoenix. Regarding his own experience in dealing with shoulder dystocia, Dr. Elliott testified that he had never himself performed or witnessed the Zavanelli maneuver and was unaware of any member of his own medical group, consisting of fifteen physicians who deliver babies, ever using the maneuver while practicing in Phoenix. Although Good Samaritan services a much larger population and has considerably more extensive facilities than Wayne Memorial Hospital, Dr. Elliott could not recall any specific case during his twenty-four years at Good Samaritan in which any obstetrician attempted the maneuver. The record also reflects that Dr. Elliott's opinion was based in part on a worldwide study that found only about one hundred reported cases in which the Zavanelli maneuver was used between 1985, when the maneuver was first mentioned in medical literature, and 1997, four years before Reagan's birth. If the reported usage of the Zavanelli maneuver is, on average, fewer than ten times per year throughout the world, it is unclear how Dr. Elliott could reliably conclude the maneuver is part of the standard of care in Phoenix, let alone Goldsboro.

The majority de-emphasizes the insufficiency of Dr. Elliott's deposition testimony by pointing to his affidavit. In so doing, I believe the majority places too much importance on the affidavit. Unlike a deposition, an affidavit gives the opposing party no opportunity to cross-examine the affiant. Thus, crediting the affidavit over the deposition fails to give due respect to the adversarial means by which our justice system seeks to ascertain truth. *See In re Miller*, 357 N.C. 316, 334, 584 S.E.2d 772, 785-86 (2003) (citations omitted). In my view, in deciding questions of reliability and relevance, courts should endeavor to determine which facts the expert actually used when forming the proffered opinion, rather than focusing on facts the expert subsequently learned. *Cf. Henry*, 145 N.C. App. at 217-20, 550 S.E.2d at 251-52 (Hudson, J., dissenting) (noting the court in that case refused to allow an expert to testify at trial in a manner that would have contradicted the expert's deposition testimony). To do otherwise is to admit testimony that lacks the foundation our General Assembly envisioned in enacting N.C.G.S. § 90-21.12.

Even if it were proper to ascribe greater worth to the affidavit than the deposition, Dr. Elliott's affidavit does not sufficiently demonstrate that he is familiar with the applicable standard of care. The relevant portions of that affidavit, quoted in full by Justice Hudson, baldly *assert* Dr. Elliott's familiarity with "the size of the population, the level of care available at the hospital, the facilities and the num-

ber of health care providers for obstetrics," and with the standard of care applicable to this case. The affidavit contains no specific information about the Goldsboro community or its medical facilities that would support these assertions. Our Rules of Evidence seek to prevent, as unhelpful to the trier of fact, testimony that simply speaks in the language of the applicable legal standard and thus "merely tell[s] the jury what result to reach." N.C.G.S. § 8C-1, Rule 704 official cmt. (2007). Similarly, Dr. Elliott should not be deemed competent to testify based solely on his ability to essentially parrot the standard of care language of section 90-21.12.

Neither Dr. Elliott's deposition nor his affidavit succeeded in demonstrating any nexus between, on the one hand, his experience and his minimal knowledge of Goldsboro and, on the other, the conclusion that a national standard of care including the Zavanelli maneuver was applicable in Goldsboro or any similar community. In short, any proper basis he may have had to offer an opinion that the Zavanelli maneuver was part of the standard of care applicable to Goldsboro was not clear to the court. As observed by the Court of Appeals, "neither Dr. Elliott's affidavit nor the record before this Court includes sufficient *facts*, as opposed to conclusions, to support Dr. Elliott's statements that he is familiar with the standard of care applicable in communities similar to Goldsboro, North Carolina." *Crocker v. Roethling*, 184 N.C. App. 377, 646 S.E.2d 442, 2007 WL 1928681, at *3 (2007) (unpublished). Because Dr. Elliott failed to sufficiently establish his familiarity with "the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities" as defendant Roethling at the time of Reagan's birth, *see* N.C.G.S. § 90-21.12, the trial court's ruling that he was incompetent to testify to those standards was not an abuse of discretion " 'so arbitrary that it could not have been the result of a reasoned decision,' " *N.C. Dep't of Transp. v. Haywood Cty.*, 360 N.C. at 351, 626 S.E.2d at 646 (quoting *White*, 312 N.C. at 777, 324 S.E.2d at 833).

After reviewing the trial court's exclusion of Dr. Elliott's testimony for abuse of discretion, this Court must inquire separately into the trial court's grant of summary judgment in favor of defendants. Bearing in mind that Dr. Elliott's testimony was properly deemed inadmissible and thus cannot be considered for summary judgment purposes, any competent facts asserted by the nonmoving party must be "taken as true, and their inferences must be viewed in the light most favorable to that party." *E.g.*, *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted).

Dr. Elliott's proffered testimony represented plaintiffs' only evidence of the applicable standard of care. Because Dr. Elliott was incompetent to testify on that matter, plaintiffs were unable to satisfy N.C.G.S. § 90-21.12 by offering competent proof that defendants failed to comply with the standard of care. Plaintiffs contend that even if Dr. Elliott was incompetent to testify, defendant Roethling himself admitted in his deposition that the Zavanelli maneuver was part of the standard of care applicable to this case. My review of the deposition testimony reveals that while defendant Roethling acknowledged the existence of the Zavanelli maneuver, he never stated it was part of the applicable standard of care. When the plaintiff in a medical malpractice action lacks any competent means of proving the defendant breached the applicable standard of care, the governing statute dictates that "the defendant shall not be liable." N.C.G.S. § 90-21.12. Thus, even when viewed in the light most favorable to plaintiffs, the case presented "no genuine issue as to any material fact" and defendants were "entitled to a judgment as a matter of law." *Id.* § 1A-1, Rule 56(c) (2007). The trial court properly granted summary judgment in defendants' favor.

I believe the result reached by the majority of the Court fails to give proper deference to the trial court's reasonable decision not to conduct a voir dire examination of the tendered expert witness. While I do not contend that the trial court would have been in error had it decided to hold a voir dire hearing, the facts of this case are not such as to mandate voir dire as a matter of law. The trial court committed no abuse of discretion, and its ruling should remain intact. I would affirm the judgment of the Court of Appeals and therefore respectfully dissent.

Chief Justice PARKER and Justice BRADY join in this dissenting opinion.

WAKE CARES, INC. v. WAKE CTY. BD. OF EDUC.

[363 N.C. 165 (2009)]

WAKE CARES, INC.; PATRICE LEE, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF HER MINOR CHILDREN, IAN LEE, DELANEY LEE, MARGARET LEE, AND BAILEY LEE; KATHLEEN BRENNAN, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF HER MINOR CHILD, ELIZABETH BRENNAN; SCOTT P. HAVILAND AND GIHAN I. EL-HABBAL, INDIVIDUALLY AND AS GUARDIANS AD LITEM OF THEIR CHILDREN, AHMED HAVILAND, AYAH HAVILAND, AND IMAN HAVILAND; MICHAEL JOHN STANTON AND ANGELA MARIE STANTON, INDIVIDUALLY AND AS GUARDIANS AD LITEM OF THEIR CHILDREN, JACOB STANTON, ALEXIS STANTON, DANIELLE STANTON, DALLAS STANTON, AND JORDAN STANTON; AND KIMBERLY SINNOTT AND JOHN NADASKY, INDIVIDUALLY AND AS GUARDIANS AD LITEM OF THEIR CHILDREN, REID NADASKY, SEAN NADASKY, AND JAMES NADASKY, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED v. WAKE COUNTY BOARD OF EDUCATION AND LORI MILBERG, HORACE J. TART, CAROL PARKER, ROSA GILL, SUSAN PARRY, PATTIE HEAD, ELEANOR GOETTEE, RON MARGIOTTA, AND BEVERLEY CLARK, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WAKE COUNTY BOARD OF EDUCATION

No. 230PA08

(Filed 1 May 2009)

Schools and Education— mandatory year-round schools—statutory authority

The Wake County Board of Education is statutorily authorized to compel attendance at year-round calendar schools. The General Assembly has conferred broad, specific, and sole authority upon local school boards to determine school calendars, and year-round schools are explicitly recognized as acceptable school calendars by N.C.G.S. § 115C-84.2. Parental consent is no more a factor in assignment to year-round schools than it is to traditional schools.

Justice EDMUNDS concurring.

Justice MARTIN dissenting.

Justices BRADY and NEWBY join in this dissenting opinion.

Justice BRADY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 190 N.C. App. ——, 660 S.E.2d 217 (2008), reversing and remanding an order granting summary judgment for plaintiffs entered on 3 May 2007 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Supreme Court 16 December 2008.

Hunter, Higgins, Miles, Elam & Benjamin, PLLC, by Robert N. Hunter, Jr.; and William Peaslee for plaintiff-appellants.

Tharrington Smith, L.L.P., by Ann L. Majestic and Curtis H. Allen III, for defendant-appellee Wake County Board of Education.

Roberts & Stevens, P.A., by Christopher Z. Campbell and K. Dean Shatley, II, for North Carolina Council of School Attorneys, amicus curiae.

North Carolina School Boards Association, by Allison Schafer, Legal Counsel; and Poyner Spruill LLP, by Edwin M. Speas, Jr., for North Carolina School Boards Association, amicus curiae.

TIMMONS-GOODSON, Justice.

The question presented by this appeal is whether the North Carolina General Statutes require the Wake County Board of Education to obtain parental consent before assigning students to year-round calendar schools. Because the plain language of the statutes authorizes the creation and assignment to year-round calendar schools, we conclude the Board may assign students to year-round schools without parental consent, and we therefore affirm the decision of the Court of Appeals.

I. Background

The underlying facts of this appeal, as found by the trial court and recited by the Court of Appeals, are undisputed. The Wake County public school system (WCPSS) is the second-largest school system in the state and one of the fastest-growing school systems in the country, having grown more than thirty percent since 2000. Over 128,000 students were enrolled during the 2006-2007 school year, and the school population is expected to gain an additional 65,000 students by 2015. The most dramatic growth and overcrowding are in schools along the N.C. 55 corridor, which includes Cary, Apex, and Holly Springs.

To accommodate the tremendous student population growth, the Wake County Board of Education (the Board) has opened thirty-three additional schools since July 2000, renovated many other schools, and plans to build thirty-one new schools by 2012. Despite the extensive construction, many Wake County schools remain extremely overcrowded and are forced to use cafeterias, libraries, auditoriums,

offices, common areas, teacher lounges, and even converted storage rooms as classrooms. School campuses are also increasingly resorting to using mobile classrooms, a situation that overtaxes facilities such as restrooms, media centers, and cafeterias.

In addition to building new schools and using more mobile classrooms, the Board has attempted to alleviate overcrowding by operating a limited number of elementary and middle schools on a multi-track year-round calendar. The WCPSS operates on three different calendars: a traditional calendar, in which school begins in late August and continues until early June; a modified calendar (a single-track year-round calendar), in which the school year begins in late July and ends in late May; and a multi-track year-round calendar. In the multi-track year-round schools, students are divided into four "tracks," each with its own schedule. Track schedules are staggered so that three tracks are in school and one track is on break at all times. Because the multi-track system allows year-round schools to use their buildings twelve months a year, rather than nine, a year-round school can accommodate up to one-third more students than a traditional calendar school. Regardless of which calendar students follow, all students attend school for 180 days. Year-round students receive the same amount of vacation time as those at traditional calendar schools; the vacation time is simply spread throughout the year, rather than limited to the summer months. Year-round students also have the same holidays as students on the traditional calendar.

In September 2006 the Board voted to convert nineteen elementary and three middle schools to a year-round calendar starting in the 2007-2008 school year. On 6 February 2007, after holding three public hearings, the Board approved its final student assignment plan for the 2007-2008 school year. Under that plan, 20,717 students were assigned to newly-converted or newly-built year-round schools. Previously 17,855 of those students had been assigned to traditional calendar schools.[1]

On 13 March 2007, plaintiffs filed a complaint for declaratory judgment and injunctive relief from the Board's assignment plan, asserting that the Board lacked the authority to convert traditional

1. Contrary to Justice Martin's assertion that this case arises from the Board's decision to "change its year-round school program from voluntary to mandatory," each year-round school has had a portion of students involuntarily assigned to it since 2003. Thus, the Board has not "changed" its program, merely expanded it to encompass more students, including plaintiffs' children. It is this expansion of mandatory year-round school assignment that has prompted the instant case.

calendar schools to year-round schools and then assign WCPSS students to those schools on a mandatory basis. Upon hearing the matter, the trial court concluded the Board was authorized to operate and assign students to year-round calendar schools, but only with "informed parental consent." Accordingly, the trial court entered an order prohibiting the Board from requiring "the attendance of students at year round calendar schools without informed parental consent."

The Board appealed to the Court of Appeals, which unanimously reversed the trial court, holding that "the Board is authorized by the General Assembly to establish year-round schools and to assign students to attend those schools without obtaining their parents' prior consent." *Wake Cares, Inc. v. Wake Cty. Bd. of Educ.*, ––– N.C. App. –––, –––, 660 S.E.2d 217, 220 (2008). We dismissed plaintiffs' appeal based on a substantial constitutional question, but allowed their petition for discretionary review. We now affirm the decision of the Court of Appeals.

II. Analysis

The trial court and plaintiffs agree that the Board has the authority to create and to assign students to year-round calendar schools. Plaintiffs argue, however, that the Board must obtain parental consent before assigning students to year-round schools. We must therefore determine whether parental consent is a prerequisite condition to year-round school assignment by the Board under the North Carolina General Statutes.

We begin by recognizing that local boards of education have broad general statutory power to control and supervise public schools:

> All powers and duties conferred and imposed by law respecting public schools, which are not expressly conferred and imposed upon some other official, are conferred and imposed upon local boards of education. Said boards of education shall have general control and supervision of all matters pertaining to the public schools in their respective administrative units and they shall enforce the school law in their respective units.

N.C.G.S. § 115C-36 (2007); *see also id.* § 115C-40 (2007) ("Local boards of education, subject to any paramount powers vested by law in the State Board of Education or any other authorized agency shall have general control and supervision of all matters pertaining

to the public schools in their respective local school administrative units . . . ."). Thus, unless such power is expressly delegated elsewhere, local school boards possess the inherent authority to control and supervise "all matters pertaining to the public schools." *Id.*

In addition to the broad grant of authority reserved under N.C.G.S. § 115C-36, section 115C-47 sets forth a list of fifty-four specific powers and duties vested in local boards of education. N.C.G.S. § 115C-47 (2007). Such powers and duties include the duty to provide "adequate school systems," *id.* § 115C-47(1), to "assure appropriate class size," *id.* § 115C-47(10), and, notably, to "determine the school calendar," *id.* § 115C-47(11). Indeed, N.C.G.S. § 115C-47(11) instructs that "[l]ocal boards of education shall determine the school calendar under G.S. 115C-84.2." Clearly, local boards of education are not only authorized, but statutorily required to set school calendars, subject to N.C.G.S. § 115C-84.2. With these broad powers and duties in mind, we therefore turn to the specific school calendar guidelines of N.C.G.S. § 115C-84.2.

Subsection 115C-84.2(a) states that "[e]ach local board of education shall adopt a school calendar consisting of 215 days all of which shall fall within the fiscal year." *Id.* § 115C-84.2(a) (2007). School calendars must include a "minimum of 180 days and 1,000 hours of instruction covering at least nine calendar months." *Id.* § 115C-84.2(a)(1). The statutory requirement of school calendars covering at least nine calendar months comports with Article IX of the North Carolina Constitution, which states that a "general and uniform system of free public schools . . . shall be maintained at least nine months in every year." N.C. Const. art. IX, § 2, cl. 1. These nine months represent only the minimum amount of time required for instruction; the legislature may provide for a longer term if desired. *Harris v. Bd. of Comm'rs*, 274 N.C. 343, 353, 163 S.E.2d 387, 394 (1968); *Frazier v. Bd. of Comm'rs*, 194 N.C. 49, 63, 138 S.E. 433, 440 (1927). The local board "shall designate when the 180 instructional days shall occur." N.C.G.S. § 115C-84.2(a)(1); *see also id.* § 115C-84.2(d) (2007) ("Local boards of education shall determine the dates of opening and closing the public schools . . . .").

Section 115C-84.2 does not classify school calendars as "traditional," "modified," or "year-round," nor does it express any preference as to the school calendars local boards should adopt. N.C.G.S. § 115C-84.2 indicates, however, that local school boards may devise different types of school calendars to achieve educational goals:

"Local boards and individual schools are encouraged to use the calendar flexibility in order to meet the annual performance standards set by the State Board." *Id.* § 115C-84.2(a). Notably, N.C.G.S. § 115C-84.2 specifically recognizes year-round schools as a legitimate calendar option. While N.C.G.S. § 115C-84.2 places some limitations on school calendars, *see id.* § 115C-84.2(b) (2007), year-round schools are expressly exempted from several of these limitations. For example, a school calendar "shall include at least 42 consecutive days when teacher attendance is not required unless . . . the school is a year-round school." *Id.* § 115C-84.2(b)(2) (emphasis added). Further, "*[e]xcept for year-round schools*, the opening date for students shall not be before August 25, and the closing date for students shall not be after June 10." *Id.* § 115C-84.2(d) (emphasis added). Thus, N.C.G.S. § 115C-84.2 explicitly acknowledges year-round calendars as a valid school calendar option. We find no statutory restrictions or legislative disapproval of the use of year-round school calendars in N.C.G.S. § 115C-84.2. To the contrary, subsection 115C-84.2(a) encourages local school boards to utilize calendar flexibility.

Having determined that utilization of a year-round calendar is authorized and, indeed, even to some extent encouraged, there remains only the question of whether parental consent plays any role in the year-round school assignment process. The plain language of our General Statutes expressly rejects any such implication. School assignment is solely within the power of the local school board, and "[e]xcept as otherwise provided by law, the authority of each board of education in the matter of assignment of children to the public schools shall be full and complete, and its decision as to the assignment of any child to any school shall be final." *Id.* § 115C-366(b) (2007).

Although N.C.G.S. § 115C-84.2(a) states that "[l]ocal boards of education shall consult with parents and the employed public school personnel in the development of the school calendar," *id.* § 84.2(a) (emphasis added), it does not require parental consent in developing school calendars, nor does it implicate school *assignment* in any manner. Parents who are dissatisfied with their child's school assignment may apply to the local school board for reassignment and receive a hearing on the matter. *See id.* § 115C-369 (2007). At such hearing, the local board must consider "the best interest of the child, the orderly and efficient administration of the public schools, the proper administration of the school to which reassignment is requested and the instruction, health, and safety of the pupils there

enrolled, and shall assign said child in accordance with such factors." *Id.* § 115C-369(c). Any final determination by the local board as to reassignment is then subject to judicial review. *Id.* § 115C-370 (2007).

In sum, the General Assembly has conferred broad, specific, and sole authority upon local school boards to determine school calendars. Moreover, N.C.G.S. § 115C-84.2 explicitly recognizes year-round calendars as acceptable school calendars. As such, parental consent is no more a factor in assignment to year-round schools than it is to traditional schools. When assignment to a particular school places too great a burden on individual children, as is alleged by plaintiffs in the instant case, parents may seek reassignment and judicial review of any assignment decision.

Plaintiffs argue, however, that N.C.G.S. § 115C-1 requires the Board to operate and provide equal access for all students to traditional calendar schools. N.C.G.S. § 115C-1 states:

> A general and uniform system of free public schools shall be provided throughout the State, wherein equal opportunities shall be provided for all students, in accordance with the provisions of Article IX of the Constitution of North Carolina. . . . There shall be operated in every local school administrative unit a uniform school term of nine months, without the levy of a State ad valorem tax therefor.

Id. § 115C-1 (2007). Plaintiffs contend there are fundamental differences in the educational experiences and opportunities available to children attending year-round schools and those attending traditional calendar schools. According to plaintiffs, year-round schools are therefore not part of a "uniform system" of public schools under N.C.G.S § 115C-1. Thus, plaintiffs reason, while the Board may offer year-round schools as an alternative to traditional schools, it must give all students the option of attending a traditional calendar school, and the Board cannot compel students to attend a non-traditional calendar school. Further, contend plaintiffs, N.C.G.S. § 115C-1 requires "a uniform school term of nine months," and that the word "term" indicates that such nine months must be consecutive, rather than spread throughout the calendar year. We are not persuaded.

Section 115C-1 merely codifies our state's constitutional requirement of "a general and uniform system of free public schools, which shall be maintained at least nine months in every year." N.C. Const. art. IX, § 2, cl. 1. This constitutional requirement that the public

school system be "uniform" in no way implicates the school calendar. *See Bd. of Educ. v. Bd. of Cty. Comm'rs*, 174 N.C. 469, 473, 93 S.E. 1001, 1002 (1917) (noting that the term "uniform" qualifies the word "system" and requires only that provision be made "for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support" (citations omitted)). The "general and uniform" system of public schools indicates "a fundamental right to a sound basic education." *Leandro v. State*, 346 N.C. 336, 348, 488 S.E.2d 249, 255 (1997). The constitutional guarantee of the opportunity for a sound basic education does not require, however, "that equal educational opportunities be afforded students in all of the school districts of the state." *Id.* at 351, 488 S.E.2d at 257. Plaintiffs do not argue that year-round schools fail to provide a sound basic education. In fact, the trial court found that "there is no contention that the educational opportunity offered by a year round school is better or worse than the educational opportunity offered by a traditional elementary or middle school." Thus, while the educational opportunities available to children attending year-round schools may differ from those available to pupils at traditional schools, these differences do not remove year-round calendar schools from the "uniform system" of public schools.

Further, on its face, N.C.G.S. § 115C-1 does not require that the school term consist of nine consecutive months or otherwise dictate the manner in which the school term should be calendared. Plaintiffs' reading of the word "term" to mandate nine consecutive months places the very general language of section 115C-1 in conflict with the specific guidelines of section 115C-84.2, a position repugnant to our canons of statutory interpretation. *See Bd. of Educ. v. Bd. of Cty. Comm'rs*, 240 N.C. 118, 126, 81 S.E.2d 256, 262 (1954) (stating that " '[a]n unnecessary implication arising from one [statutory] section, inconsistent with the express terms of another on the same subject, yields to the expressed intent' " (citations omitted)). We agree with the Court of Appeals that N.C.G.S. § 115C-1, "consistent with the purpose of the constitutional provision it was designed to implement, does not mandate equal access to a school term of nine consecutive months, but rather refers to the minimum quantum of educational instruction required." *Wake Cares*, —— N.C. App. at ——, 660 S.E.2d at 231. Plaintiffs offer no other statutory support for their position, and we have found none. We conclude N.C.G.S. § 115C-1 does not limit the Board's authority to assign students to year-round schools.

III. Conclusion

We hold that the Board is statutorily authorized to compel attendance at year-round calendar schools. The Board's action in converting traditional calendar schools to year-round calendar schools comports with its statutory duty to provide a school system adequate to the needs of increasing student enrollment while assuring appropriate class sizes in its schools. See N.C.G.S. § 115C-47(1), (10). Moreover, the more efficient use by year-round calendar schools of existing school facilities complies with the public policy of the state to create a public school system "in the most cost-effective manner" while ensuring a sound basic education for all North Carolina children. *Id.* § 115C-408(a) (2007).

We recognize the emotional nature of this case, but we must emphasize that our duty goes no further than to determine the legal authority for implementing mandatory year-round schools, not the wisdom of such a decision. This Court cannot substitute its own judgment for that of the Board. *See Leandro*, 346 N.C. at 357, 488 S.E.2d at 261 ("[T]he administration of the public schools of the state is best left to the legislative and executive branches of government."); *see also Coggins ex rel. Coggins v. Bd. of Educ.*, 223 N.C. 763, 769, 28 S.E.2d 527, 531 (1944). As noted by the Court of Appeals, "if plaintiffs disagree with mandatory assignment to year-round schools, their remedy lies with the electoral process or through communications with the legislative and executive branches of government." *Wake Cares*, ––– N.C. App. at –––, 660 S.E.2d at 233. We agree, and we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EDMUNDS concurring.

I concur with the majority holding affirming the Court of Appeals reversal of the trial court's order. However, while I acknowledge the grave difficulties faced by defendant Wake County Board of Education and detailed in the majority opinion, I write separately to emphasize that this Court's decision is compelled by the applicable constitutional provisions and statutes.

Nevertheless, plaintiffs are not without recourse. The record includes affidavits from individual plaintiffs establishing that mandatory year-round schools will be inordinately disruptive in their family lives. Under section 115C-369, parents or guardians of any student

assigned to a year-round school may seek reassignment and apply for a mandatory hearing if the request is denied. N.C.G.S. § 115C-369(a) (2007). At such a hearing, one of the factors that "shall" be considered is "the best interest of the child." *Id.* § 115C-369(c) (2007). I cannot believe that "best interest" does not include at least some of the factors raised by plaintiffs, such as sibling placement, family schedules, and the like.

Moreover, plaintiffs have the ultimate remedy of the ballot box. *Id.* § 115C-37 (2007) (mandating election of county boards of education). While boards of education must make difficult choices as to how to allocate scarce resources, those boards are responsible to the voters, who have the power both to elect candidates of their choice and to unseat incumbents.

For the reasons given above, I concur in the majority opinion.

Justice MARTIN dissenting.

This case arises from the decision of the Wake County Public School System (WCPSS) to change its year-round school program from voluntary to mandatory. Despite a tradition of using year-round schools as a voluntary supplemental program, and in the absence of specific legislative authorization, WCPSS mandatorily placed approximately 20,000 students at schools operating on year-round calendars.[2] These students were not offered placements at schools operating on the traditional school schedule, as had previously been the expectation of students and families within WCPSS. The actions of WCPSS violate the North Carolina school calendar law. They are also inconsistent with long-standing education practice in this State. Because WCPSS exceeded its authority when it materially and substantially changed the school calendar for some of its students, I respectfully dissent.

As Judge Manning observed, mandatory placement on a year-round calendar "is a systemic, material change for the students and families" so affected. Since the advent of public education in North Carolina over 160 years ago, the overwhelming majority of our schools have operated on a traditional calendar. Although breaks from educational tradition may prove valuable and effective, the

2. This new policy was initiated in 2003 with a small number of students but has now been expanded to approximately 20,000 students. The instant case is the first legal challenge to the new policy.

process used to implement such fundamental policy changes must necessarily comply with the law.

The legislature has not authorized any local school board to mandate year-round schooling for public school students. It is unreasonable to suggest that the legislature's 2004 amendment to the school calendar statute, which was enacted to preserve summer vacation, was actually intended to grant local school boards the authority to impose on public school students a schedule that requires them to attend school throughout the summer months. A careful reading of the applicable statutes reveals that they prohibit a local school board from mandating that students attend a year-round calendar.

The trial court properly preserved our students' legal right to attend a traditional calendar school. This Court should require the local board to direct its policy arguments to the General Assembly. The consequences of the majority's decision are starkly different from those of the trial court's order. Instead of maintaining the status quo and allowing the General Assembly to consider and clearly resolve this important policy question, the majority's holding opens the door for any local school board in North Carolina to impose mandatory year-round schools.

Despite the long history of public education in North Carolina, year-round schooling is a relatively recent innovation. The practice began in our State as an experimental program in which student and family participation was purely voluntary. WCPSS opened North Carolina's first year-round school in 1989, and interested parents sought admission for their children via an application process. In 1991 the State Board of Education (State Board) issued a policy statement supporting local boards' study and exploration of year-round "models." *See* N.C. State Bd. of Educ., Policy Manual, Policy No. EEO-G-000 (titled "Policy supporting local efforts to implement year-round education models") (Dec. 5, 1991), *available* at http://sbepolicy.dpi.state.nc.us. The local board implemented the State Board's policy throughout the 1990s, opening a handful of voluntary year-round schools each year.

According to the local board's own account, for most of their short history, year-round schools in WCPSS have operated only with the support of local communities and the consent of individual attendees. For example, in 1992 the local board discarded its original proposal for the first year-round middle school due to "negative community response," whereas the first conversion of a traditional

elementary school to a year-round calendar was spawned by "[a] high level of staff and parent support." During the 1995-1996 school year, the local board approved a plan for "expanding the voluntary year-round calendar" in the upcoming years. In 1999 a citizens' advisory committee recommended that WCPSS "provide more optional year-round schools, especially in areas where the year-round option does not currently exist." In sum, WCPSS and children and families functioned under the premise that students necessarily retained the right to attend traditional calendar schools.

In 2003 the local board removed the traditional calendar option for a small number of students by mandatorily placing them at year-round schools that were otherwise populated by willing applicants. In 2006 the local board substantially expanded the new policy by developing a comprehensive plan to impose year-round schooling on a significant percentage of students. During the 2006-2007 school year, the board opened five new multi-track year-round schools populated almost entirely by mandatory placements. That year, nearly 7,000 students were involuntarily placed at year-round schools. Furthermore, the local board voted to convert nineteen additional elementary schools and three additional middle schools to a multi-track year-round schedule beginning in the 2007-2008 term. The board's plan for the 2007-2008 term more than doubled both the number of schools designated as year-round and the number of students mandatorily slotted for year-round schools. Nearly 18,000 students who attended traditional calendar schools during the 2006-2007 school year faced involuntary placement at year-round schools in 2007-2008, bringing the total number of mandatory year-round placements to over 20,000. The local board stated that a mandatory year-round schedule for these students was necessary to address existing and anticipated overcrowding.

The year-round school schedule is fundamentally different from the traditional schedule. Specifically, the multi-track year-round schedule replaces the traditional nine and a half month instructional period followed by a two and a half month summer vacation with four rotating intervals of nine instructional weeks followed by three vacation or "track out" weeks.

Although families who elected to participate in year-round schooling presumably felt there were benefits to that schedule, the resistance of other families to a mandatory year-round program is not surprising. At least some children and families have benefitted from, and indeed have come to rely upon, summer vacation. The

long summer break gives children the opportunity to learn about subjects school does not teach through methods school cannot use. During the summer students may pursue a passion for an instrument or sport, gain and hone skills like computer programming for future employment, spend time with family near and far, expand their perspectives by making friends from outside their neighborhoods while at camp, or simply learn self-direction as they plot their own course each day. The year-round schedule seriously hinders these opportunities, enjoyed by virtually every generation of North Carolina's children, and upsets families' reliance on the traditional summer vacation.

In this case, plaintiffs allege the following hardships arising from mandatory placement of public school students at year-round schools:

(1) Children within the same family unit are placed at both traditional and year-round calendar schools. Different vacation periods for children within the same family unit deprive siblings of bonding time and significantly reduce the periods available for family travel.

(2) Lack of a traditional summer vacation prevents extended trips to visit out-of-state relatives and potentially interferes with shared custody arrangements in which one divorced parent lives outside of North Carolina.

(3) Children enrolled in year-round schools cannot participate in some valuable summer programs that are scheduled to accommodate the much larger number of children who attend traditional calendar schools. Such activities include day camp; music, art, and dance programs; sports leagues; educational and university enrichment programs; and religious education and activities. For example, year-round students are precluded from participating in, among other things, the Duke University Talent Identification Program for academically gifted students and the North Carolina State University Summer Reading Skills Program (http://continuingeducation.ncsu.edu/reading/).(http://continuingeducation.ncsu.edu/reading/)

(4) Some parents, including many teachers, have chosen jobs with schedules matching the traditional school calendar, enabling them to stay at home with their children during the summer. When children of these parents are placed at year-round schools, the parents must choose between finding and paying for child care during the periodic three-week breaks, or quitting their jobs.

(5) Year-round schooling imposes financial hardships on many families. Particularly, year-round families often face increased difficulty and expense in securing child care arrangements because the frequent three-week track out periods preclude utilization of more traditional and less expensive child care options such as older students, summer nannies, or day care. For instance, the YMCA's track out program, recommended to parents by WCPSS, costs $1,885 per year per child.

In sum, plaintiffs contend that the periodic rotation in and out of school and the loss of summer vacation alter the personal development of students and interfere with many important facets of family life. Weighing the detrimental impact on individual families against the challenges facing WCPSS requires thorough examination and resolution of the mandatory year-round question by the appropriate policy-setting bodies for public education. The local board is not one of those bodies.

The General Assembly, State Board, and local school boards have different institutional roles with respect to education administration. Consideration of these roles indicates that absent legislative authorization, local boards may not fundamentally alter the customary public school calendar.

Under the North Carolina Constitution and Chapter 115C of our General Statutes, the General Assembly and State Board are responsible for setting major educational policy. Our State Constitution states that "[t]he General Assembly shall provide . . . for a general and uniform system of free public schools," and "[t]he State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto." N.C. Const. art. IX, §§ 2(1), 5. No such constitutional authority is vested in local boards of education.

Section 115C-12 of the General Statutes builds upon the constitutional provisions and specifically charges the State Board with establishing educational policy: "The general supervision and administration of the free public school system shall be vested in the State Board of Education. The State Board of Education shall establish policy for the system of free public schools, subject to laws enacted by the General Assembly." N.C.G.S. § 115C-12 (2007). Local boards, on the other hand, are charged with "enforc[ing] the school law in their respective units." N.C.G.S. § 115C-36 (2007).

Local boards are not well suited to consider implementation of mandatory year-round schooling without guidance from the General Assembly. There are statewide ramifications to such a substantial policy shift. Although the local board asserts cost-savings from its use of year-round schools, the long-term implications—financial, educational, or otherwise—of imposing year-round schedules on children and families are simply not clear from the present record. The General Assembly is far better situated than any one local school board to balance the benefits of maintaining the traditional calendar for students, families, industries such as tourism, or other parties against any benefits of year-round schooling to facility use, academic achievement, or other interests.

Moreover, the majority's proposed recourse for affected families, assignment appeals procedures and local school board elections, ignores the factual record. The trial court's findings specifically refute any assertion that application by year-round students for reassignment to traditional calendar schools constitutes a practical solution. *See* N.C.G.S. § 115C-369 (2007) (permitting application to the local board for reassignment to a different school). Indeed, the trial court found that "the assignment appeals process under G.S. 115C-366, et seq. is futile and inadequate." In this regard, the trial court observed that the traditional calendar seats available for reassignment "are materially fewer in number than [the] . . . seats mandatorily assigned to four (4) track year round schools under the [board's] conversion plan." Additionally, the board's policy requires at least some of the families who are granted reassignment to provide their own transportation to the traditional calendar schools, which the trial court found "imposes an undue burden and expense on the parents."

With respect to the political process: The vast majority of Wake County students are not affected by the compulsory year-round policy, and the students who are affected all reside in a particular area within the county. Together, these factors mean that year-round students and their families are unlikely to muster the political strength necessary to avoid selective imposition of mandatory year-round schooling. In sum, the inevitable difficulties associated with unilateral imposition of mandatory year-round placements at the local level emphasize the importance of the General Assembly's statewide consideration of this issue.

Although the role local boards play in the operation of our public schools is important and multi-faceted, *see*, *e.g.*, N.C.G.S. § 115C-47

(2007) (listing approximately fifty of the powers and duties vested in local boards by the legislature), this Court has previously stated that it is the General Assembly that "has the power to provide for a longer term for the public schools of the State." *Frazier v. Bd. of Comm'rs*, 194 N.C. 49, 63, 138 S.E. 433, 440 (1927). We have also observed, "Whether the term shall exceed the minimum fixed by the Constitution must be determined from time to time by the General Assembly, in accordance with its judgment, and in response to the wishes of the people of the State." *Id.* Only after our General Assembly decides that mandatory year-round calendars are appropriate in this State may a local school board impose such calendars within its district.

A careful and reasoned analysis of the calendar statute reveals that the General Assembly has not granted local boards the power to impose mandatory year-round schooling. *See* N.C.G.S. § 115C-84.2 (2007). First, the statute prohibits a local board from adopting a school calendar that violates the opening and closing dates set by section 115C-84.2(d). Second, as explained below, the statute precludes local boards from mandating that different children attend different school calendars. For these reasons, the local board lacked authority to place students at year-round schools on an involuntary basis.

The local board's placement of students on a year-round calendar violates the calendar statute's limitations on opening and closing dates. Section 115C-84.2(d) states that school shall not begin before August 25 nor end after June 10. § 115C-84.2(d). A year-round calendar, which includes instructional days outside the allowed period, does not comply with this provision. The majority holds that statutory exemptions of year-round schools from the opening and closing date requirements permit local boards to adopt mandatory year-round calendars. *See id.* ("Except for year-round schools, the opening date for students shall not be before August 25, and the closing date for students shall not be after June 10."); *see also* § 115C-84.2(b)(2) (exempting year-round schools from the mandatory teacher vacation requirement).

The majority's holding does not comport with our canons of statutory interpretation. In reading a statute, this Court routinely seeks the intent of the legislature. *See Lithium Corp. of Am. v. Town of Bessemer City*, 261 N.C. 532, 536, 135 S.E.2d 574, 577 (1964) (stating that, when the meaning of a statute is unclear, "[t]he spirit and intent of an act controls its interpretation"). Further, provisions

"should be construed in a manner which tends to prevent them from being circumvented." *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 666, 509 S.E.2d 165, 172 (1998).

The legislature added the opening and closing date requirements and accompanying exception for year-round schools in a 2004 amendment. *See* Act of July 18, 2004, ch. 180, sec. 1, 2004 N.C. Sess. Laws 701, 704 (codified at N.C.G.S. § 115C-84.2(d)). It is illogical to reason that, in an amendment expressly bounding the school year and thereby preserving the traditional summer break, the legislature meant to allow all local boards to eliminate that break by imposing mandatory year-round calendars. That interpretation, adopted by the majority, permits the exception to swallow the overarching intent of the amendment: to curtail calendar expansion and protect summer vacation. The more reasonable interpretation of the statute is that the legislature, aware of year-round schools operating on a small-scale, voluntary basis throughout the State, included the statutory exception to allow for their continued existence. Had the legislature intended to allow mandatory year-round schooling for every North Carolina student—a startling break from over 160 years of educational practice—it could have, and would have, done so in a straightforward fashion.

Furthermore, other provisions of the calendar statute prohibit a local board from placing some children on a customary school schedule but placing other children on a year-round schedule. These provisions require that, for purposes of the mandatory calendar, all students in a single administrative unit attend school on the same days. Section 115C-84.2(a) states that "[e]ach local board of education shall adopt a school calendar" and "shall designate when the 180 instructional days shall occur." § 115C-84.2(a). "A school calendar" means one school calendar, which the local board must adopt for all students in its administrative unit. *Id.* The statute then instructs the board to choose "the 180 instructional days." *Id.* The plain language indicates that the board must adopt a single set of 180 instructional days in setting its mandatory calendar.

The calendar statute does not permit variation within the local unit with respect to the 180 instructional days of the mandatory calendar. When the General Assembly did intend to grant flexibility within the unit, it did so explicitly. For example, the legislature expressly allowed for variation among schools with respect to instructional hours. *See* § 115C-84.2(a)(1) ("The number of instructional hours in an instructional day may vary . . . and does not have to be

uniform among the schools in the administrative unit."). Additionally, the legislature permitted local boards to schedule certain calendar days beyond the 180 instructional days "in consultation with each school's principal for use as teacher workdays, additional instructional days, or other lawful purposes." § 115C-84.2(a)(5). The language used in these provisions is markedly different from that discussing the basic 180 days, see § 115C-84.2(a)(1) ("The local board shall designate when the 180 instructional days shall occur."), which leaves no room for flexibility within the local unit. Moreover, in a recent amendment, the legislature deleted a sentence found in prior versions of the statute providing that "[d]ifferent opening and closing dates may be fixed for schools in the same administrative unit." *See* ch. 180, sec. 1, 2004 N.C. Sess. Laws at 704. Because the legislature capably expressed its intent to allow for flexibility within the local unit in certain instances, but declined to allow for variation regarding the 180 instructional days, those days must be the same for every school in the unit.

Local boards may not mandate multiple, wholly different sets of 180 instructional days for different schools or students in the same administrative unit. *See* § 115C-84.2. Students on a year-round calendar attend school on different days than do students on a traditional calendar. Therefore, the local board's imposition of mandatory year-round schooling on certain students in its unit, while other students remain at traditional schools, violates the calendar statute.[3]

The local board may, however, continue to offer year-round schooling as a voluntary program. This authority is found in section 115C-84.2(d)'s exemption of year-round schools from the opening and closing date requirements and in section 115C-84.2(e), which provides: "Nothing in this section prohibits a local board of education from offering supplemental or additional educational programs or activities outside the calendar adopted under this section." § 115C-84.2(d), (e). The reference in section 115C-84.2(e) to "additional programs" encompasses year-round schooling.[4]

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3. A multi-track schedule on its own violates the calendar statute, because the different tracks operate to assign students in the same administrative unit to different sets of 180 instructional days.

4. Year-round schooling is described elsewhere in the education statutes as an optional program. *See* N.C.G.S. § 115C-238.31(a) (2007) (listing "[c]alendar alternatives," including year-round school, in Article 16, titled "Optional Programs"). Like year-round schooling, the other optional programs discussed in Article 16, including adult education programs, summer schools, and charter schools, are far more extensive than mere after school activities. *See* N.C.G.S. §§ 115C-230 to -238.55 (2007). For

These additional programs, however, must be voluntary. This conclusion derives from the plain language of section 115C-84.2(e): "Nothing . . . prohibits a local board of education from *offering*" the additional programs. § 115C-84.2(e) (emphasis added). The definition of an offer is to "present[] something for acceptance." *Black's Law Dictionary* 1113 (8th ed. 2004). Therefore, the board is authorized to offer programs with alternative calendars, including year-round, but it is not authorized to compel their acceptance. Rather, the local board must make available, to all students who wish, a spot in a school operating on the traditional calendar. *See* § 115C-84.2(d) (setting allowable school starting and ending dates). Though students may opt for a year-round school, they retain the right to attend a school operating on the traditional calendar.

The majority points to section 115C-36 in concluding that a local school board may place students at year-round schools. *See* § 115C-36 (conferring on local boards of education "[a]ll powers and duties conferred and imposed by law respecting public schools[] which are not expressly conferred and imposed upon some other official" and providing that local boards "shall have general control and supervision of all matters pertaining to the public schools in their respective administrative units"). The majority further points to section 115C-47(11), which provides that local boards "shall determine the school calendar under G.S. 115C-84.2." § 115C-47(11).

Both the residual power to supervise the public schools and the general authority to determine the local school calendar, however, must yield to the more specific limitations imposed by the legislature in section 115C-84.2. "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized . . . ; but, to the extent of any necessary repugnancy between them, the special statute . . . will prevail over the general statute. . . ." *Krauss v. Wayne Cty. Dep't of Soc. Servs.*, 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997) (internal quotation marks omitted) (quoting *McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (alterations in original)). Section 115C-36 is a general statute, in that it grants to local boards "general control and supervision of all matters pertaining to the public schools," but addresses no specific area of control. § 115C-36. Section

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instance, a large portion of the Article is devoted to charter schools, which constitute a full replacement for the customary public education program. *See* §§ 115C-238.29A to -238.29K.

115C-47(11) is more specific, in that it directs local boards to determine the school calendar, but it expressly states that such a determination must be in accord with section 115C-84.2. § 115C-47(11). Section 115C-84.2 sets out "minute and definite" requirements and the limited circumstances under which those requirements may be waived. *Krauss*, 347 N.C. at 378, 493 S.E.2d at 433 (quoting *McIntyre*, 341 N.C. at 631, 461 S.E.2d at 747). As discussed, mandatory year-round schools violate the provisions of section 115C-84.2. Accordingly, the argument that Chapter 115C's general grant of residual authority permits this violation is inconsistent with well established canons this Court uses to discern legislative intent.

Additionally, the majority's reliance on section 115C-366(b), which gives local boards authority to assign students to the public schools, is misplaced. As stated by the trial court, this is not a case about the assignment of students to a particular school. Rather, this case is about the local board's decision to "materially and decisively change the schedule and manner in which students and their families are required to attend school during the calendar year." Section 115C-366 itself states that the local board's assignment authority is complete and final "[e]xcept as otherwise provided by law." N.C.G.S. § 115C-366(b) (2007). Because section 115C-84.2 requires operation of a calendar beginning no sooner than August 25 and ending no later than June 10, and because it requires that local boards make that calendar available to all students, the local board is prohibited from mandatorily placing students at year-round schools.

Perhaps because year-round schooling is a fairly recent development in North Carolina and has thus far been implemented on an experimental, overwhelmingly voluntary basis, our General Assembly has not yet taken the opportunity to address the propriety of mandatory year-round calendars. In this situation, when the current statutes do not permit mandatory year-round calendars, the local board must argue the benefits of its new education policy to the legislature rather than to this Court.

The legislature is best equipped to craft a solution that balances the legitimate needs of local school systems with the interests of students and their families. *See Leandro v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997) ("[T]he administration of the public schools of the state is best left to the legislative and executive branches of government.").

> The members of the General Assembly are popularly elected to represent the public for the purpose of making just such decisions. The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The legislature can properly conduct public hearings and committee meetings at which it can hear and consider the views of the general public as well as educational experts and permit the full expression of all points of view . . . .

Id. at 355, 488 S.E.2d at 259; *see also Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 645, 599 S.E.2d 365, 395 (2004) (observing that the legislative and executive branches "have developed a shared history and expertise in the field that dwarfs that of this and any other Court"). There is no doubt that the legislative and executive branches enjoy a myriad of institutional advantages over this Court in setting education policy.

Although this Court has not hesitated to defend our citizens' right to a sound basic education, *see Leandro*, 346 N.C. at 347, 488 S.E.2d at 255; *Hoke County*, 358 N.C. at 609, 599 S.E.2d at 373, we have repeatedly emphasized the primacy of the General Assembly in enacting new policy. We have consistently refused to allow courts to intrude "into an area so clearly the province, initially at least, of the legislative and executive branches." *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261. For example, we reversed a trial court when it mandated that the State begin educating four-year-olds to rectify a failure to provide a sound basic education. *See Hoke County*, 358 N.C. at 645, 599 S.E.2d at 395. We overturned the trial court's choice of a specific policy both in recognition of courts' institutional limitations and because failing to give our coordinate branches the initial chance to craft a solution would have "effectively undermine[d] the authority and autonomy of the government's other branches." *Id.* at 643, 645, 599 S.E.2d at 393, 395.

The circumstances here cry out for the legislature to speak first, before this Court or any local board of education, on the question of mandatory year-round schooling. This case concerns a policy question of great importance to our State's educational institutions and its public school students and their families. In support of its position, the local board advocates for a statutory interpretation counter to the vast weight of traditional education practice. Nothing in the current education statutes indicates, however, that the General Assembly intended to permit local school boards to mandatorily place students at year-round schools. Accordingly, this Court should uphold the trial

court's order and preserve students' legal right to attend a traditional calendar school.

I respectfully dissent.

Justices BRADY and NEWBY join in this dissenting opinion.

Justice BRADY dissenting.

The majority opinion evinces a dramatic shift from the traditional maxim that "mother knows best" to the "progressive" idea that "bureaucrat and elected official knows best." I cannot sit silently and watch as this Court removes the ultimate responsibility of education from the hands of parents to the hands of the education establishment. While I concur fully in Justice MARTIN's well-reasoned dissenting opinion, I write separately to emphasize both the importance that family plays in the education of our young citizenry and how the majority opinion fails to consider the harmful effect of its decision on the family.

Initially, I note that the majority has failed to properly construe the statutes at issue. "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). The majority's construction of N.C.G.S. § 115C-1, which mandates "[t]here shall be operated in every local school administrative unit a uniform school term of nine months," is strained. To interpret that statute to mean anything other than a consecutive nine month calendar is farcical. Yet, the majority allows local school boards the authority to stretch these nine months of instruction over twelve months and then strips parents of the right to choose whether their child should be subjected to this schedule in contravention of our Constitution and the intent of the General Assembly.

The absence of reason presented by this construction is easily demonstrated through hypothetical situations involving interpretations of the word "term." Members of this Court serve an eight year term. N.C. Const. art. IV, § 16. Certainly no one would interpret that provision to mean that a member of the Court may sporadically spread his or her eight year term over the course of his or her lifetime as long as the sum total of service is only eight years. Were this a mat-

ter of an employment contract in which an employee was contractually obligated to work a nine month term, this Court certainly would not interpret that contract to allow the employee to work for three months and then take a one month vacation before resuming work without being in breach of contract. However, when the question involves placing more control of traditional family matters in the hands of government officials, such a construction suddenly becomes plausible. In effect, the majority has assumed the role of the General Assembly and rewritten the statute to say whatever it wants. I refuse to join in this blatant violation of the separation of powers.

After having contorted principles of statutory construction, the majority has now taken yet another decision relating to the education of our children out of the hands of parents, placing it into the hands of the education establishment. For years, families have been able to rely upon the traditional school calendar to plan family vacations and other family-oriented activities, which are important not only to individual families, but to the health of our culture, economy, and society in general. Now, however, the distinct probability exists that multi-children families will be presented with mandatory year-round schedules that place each of their children in a different calendar track, leaving little to no time when all the children in the family unit are free from school responsibilities. Parents may have also wished to opt for a traditional school calendar in order to give their teenagers opportunities to gain valuable employment experience during the extended summer vacations found in a nine month calendar, thereby increasing their career skills and learning the personal responsibility required of adults at an early age. For some unfortunate families in Wake County, that choice is no longer an option.[5] The majority additionally fails to recognize the severe economic impact defendants' action would have on seasonal employment, especially in the service industry, where many students experience the transition from teenagers to young adults during the summer months.

Furthermore, the uneven geographical distribution of Wake County schools subject to a mandatory year-round calendar is problematic. The mandatory year-round schedule has been implemented by the board for schools located outside of the Interstate 440 Beltline.

5. The school calendar act passed in 2004 and now codified in N.C.G.S. § 115C-84.2(d) was intended to preserve the traditional lengthy summer vacation enjoyed by families across North Carolina. Incredibly, this act, sought by an organization called "Save our Summers North Carolina," provided the death knell for the traditional summer for many Wake County students because of a passing mention of year-round schools relied upon by the majority in fashioning its argument.

Many families choose to live in the suburban areas outside the Beltline for reasons including school choice, economic feasibility, and familial concerns. Yet, between forced year-round schedules and the ever-raging reassignment debate, which has been chronicled in the local media, families no longer receive what they bargained for in their choice of the neighborhood in which they raise our most valuable assets.

While constitutional issues of liberty are not before the Court, the language used by this Court and the Supreme Court of the United States in dealing with such issues demonstrates the long-standing deference our judiciary and society has given to traditional family decisions on education. The liberty "interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court of the United States. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality). No other right has been so glowingly discussed and vigorously protected by our nation's highest court. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course . . . ."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." (citations omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

This Court has likewise held the right of parents to direct the upbringing of their children in high regard. *See, e.g.*, *Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 266 (2003) ("The protected liberty interest complements the responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." (citations omitted)); *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994) (holding that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of

parents to custody, care, and control of their children must prevail"); *Delconte v. State*, 313 N.C. 384 passim, 329 S.E.2d 636 passim (1985) (discussing home schools in relation to compulsory school attendance statutes). Yet, today the majority decision gives no deference to the traditional notion of family control of educational decisions. While it could be argued that parents have the right to remove their children from public schools and provide alternative forms of education, such an opportunity is simply not practical for many families. Considering today's decision, one cannot help but wonder about the majority's dedication to this Court's prior pronouncements on the importance of the family in educational decisions.

In the end, the majority decision is simply another chapter in the ongoing saga in which more and more traditional decisions made by the family are handed over to the government. While I certainly sympathize with the plight of the Wake County School System and the explosive population growth in the county, ease of administration should never take precedence over the preservation of the oldest institution—the family. I respectfully dissent.

NORTH CAROLINA DEPARTMENT OF CORRECTION; THEODIS BECK, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION, IN HIS OFFICIAL CAPACITY; AND GERALD J. BRANKER, WARDEN OF CENTRAL PRISON, IN HIS OFFICIAL CAPACITY v. NORTH CAROLINA MEDICAL BOARD

No. 51PA08

(Filed 1 May 2009)

1. Declaratory Judgments— standing—justiciable controversy

Plaintiffs had standing in a declaratory judgment action involving defendant's position statement on physicians and executions. The actions of two governmental entities, both seeking to fulfill their statutory duties, were in irreconcilable conflict so that a justiciable controversy exists.

2. Declaratory Judgments— physician participation in executions—ripeness

A declaratory judgment action involving defendant N.C. Medical Board's position statement on physicians and executions was ripe for decision. The existence of pending litigation about an ancillary matter does not render the issue presented here non-

justiciable, nor does the fact that defendant has not yet disciplined a medical doctor for participating in an execution. The determinative point is that plaintiffs are hindered in their ability to perform their statutory duties because they are unable to find a physician willing to subject himself or herself to discipline for participating in an execution.

3. Declaratory Judgments— court's statement—not an erroneous statement of fact

The trial court did not erroneously decide a question of fact in a declaratory judgment action concerning physician participation in executions by a statement regarding the historical practice. The court's order does not demonstrate that its decision was based on this statement, the statement was not designated as a finding or conclusion and can be considered surplusage, and the decision rested solely upon conclusions of law and stated no findings.

4. Sentencing— capital—physician participation

N.C.G.S. § 15-190, by its plain language, envisions physician participation in executions in some professional capacity, and defendant N.C. Medical Board's position statement exceeds its authority because it directly contravenes the specific requirement of physician presence found in that statute.

Justice HUDSON dissenting.

Chief Justice PARKER and Justice TIMMONS-GOODSON join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an amended order granting plaintiffs' request for declaratory relief and denying defendant's motion to dismiss entered on 5 October 2007 by Judge Donald W. Stephens in Superior Court, Wake County. On 29 April 2008, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court 18 November 2008.

Roy Cooper, Attorney General, by Thomas J. Pitman, Special Deputy Attorney General, and Joseph Finarelli, Assistant Attorney General, for plaintiff-appellees.

D. Todd Brosius and Thomas W. Mansfield for defendant-appellant.

Nelson Mullins Riley & Scarborough LLP, by Wallace C. Hollowell, III, for American Medical Association, amicus curiae.

Timothy C. Miller for Federation of State Medical Boards of the U.S., Inc., amicus curiae.

Womble Carlyle Sandridge & Rice, PLLC, by Sarah L. Buthe, for Physicians for Human Rights, amicus curiae.

BRADY, Justice.

In January 2007 the North Carolina Medical Board (Medical Board) issued a Position Statement on physician participation in executions. This statement prohibits physicians licensed to practice medicine in North Carolina, under the threat of disciplinary action, from any participation other than certifying the fact of the execution and simply being present at the time of the execution. Because of this Position Statement, physicians have declined to participate in executions in any manner, which has resulted in a de facto moratorium on executions in North Carolina. To rectify this situation, plaintiffs North Carolina Department of Correction, Theodis Beck, and Marvin Polk[1] brought suit seeking injunctive relief prohibiting the Medical Board from taking any disciplinary action against physicians for participating in an execution and a declaratory judgment delineating the rights and obligations of plaintiffs and the Medical Board with regards to executions.

This case presents four issues: First, whether a justiciable case or controversy exists between plaintiffs and the Medical Board; second, whether any such case or controversy is ripe for decision; third, whether the trial court impermissibly made a finding of fact without accepting evidence from defendant; and fourth, whether the Position Statement is inconsistent with the manifest intent of the General Assembly in enacting N.C.G.S. § 15-190, which requires a physician to be present at all executions. We hold that plaintiffs have standing, that this case is ripe for decision, that the trial court did not make an improper finding of fact, and that the Position Statement is inconsistent with N.C.G.S. § 15-190. Accordingly, we affirm the order of the trial court.

1. At the time this action was commenced, Theodis Beck was the Secretary of the North Carolina Department of Correction and brought suit in his official capacity. Alvin W. Keller, Jr. is the current Secretary of the North Carolina Department of Correction. Additionally, Marvin Polk was Warden of Central Prison at the time of suit. The current Warden of Central Prison is plaintiff Gerald J. Branker, who was substituted as a party for former Warden Polk on 24 July 2007.

FACTUAL AND PROCEDURAL BACKGROUND

Brown v. Beck

The genesis of the present controversy was a case in the United States District Court for the Eastern District of North Carolina challenging the constitutionality of North Carolina's lethal injection protocol. In *Brown v. Beck*, a condemned prisoner filed a 42 U.S.C. § 1983 action seeking injunctive relief to allow time to review the protocol and procedures the State intended to employ in his upcoming execution. 2006 WL 3914717 (E.D.N.C. Apr. 7, 2006) (No. 5:06CT3018 H). The plaintiff contended that the protocol and procedures the defendant agents of the Department of Correction intended to use were constitutionally deficient because of (1) their failure to "ensure that the personnel responsible for anesthesia are appropriately trained and qualified," and (2) their lack of "adequate standards for administering injections and monitoring consciousness." *Id.* at *1. The plaintiff also objected to the defendants' failure "to make adequate efforts to identify and address contingencies that may arise during execution." *Id.* Judge Malcolm J. Howard conditionally denied the plaintiff's motion for a preliminary injunction, but found that the plaintiff "has raised substantial questions as to whether North Carolina's execution protocol creates an undue risk of excessive pain." *Id.* at *8. The court found "that the questions raised could be resolved by the presence of medical personnel who are qualified to ensure that Plaintiff is unconscious at the time of his execution," and it ordered defendants to promptly "file with this Court and serve upon Plaintiff a notice setting forth the plans and qualifications of such personnel." *Id.* On 12 April 2006, the defendants submitted a revised execution protocol requiring the use of additional equipment to monitor the prisoner's level of consciousness and specifying that the equipment would be "observed and its values read by" both a licensed registered nurse and a licensed physician. On 17 April 2006, the court found the plaintiff's objections to the revised protocol to be without merit and denied the injunctive relief sought, stating, *inter alia*, that the court "is satisfied by the State's plan to use a licensed registered nurse and a licensed physician to monitor the level of plaintiff's consciousness." *Brown* (Apr. 17, 2006) (Final Order).

The Issuance of the Medical Board's Position Statement

In April 2006 the Medical Board received a complaint alleging that a physician was scheduled to participate in an execution. The Medical Board investigated this complaint and determined it was

unfounded. Following other inquiries about the Medical Board's position on executions, the Medical Board issued the following Position Statement[2] in January 2007:

CAPITAL PUNISHMENT

> The North Carolina Medical Board takes the position that physician participation in capital punishment is a departure from the ethics of the medical profession within the meaning of N.C. Gen. Stat. § 90-14(a)(6). The North Carolina Medical Board adopts and endorses the provisions of AMA Code of Medical Ethics Opinion 2.06 printed below except to the extent that it is inconsistent with North Carolina state law.
>
> The Board recognizes that N.C. Gen. Stat. § 15-190 requires the presence of "the surgeon or physician of the penitentiary" during the execution of condemned inmates. Therefore, the Board will not discipline licensees for merely being "present" during an execution in conformity with N.C. Gen. Stat. § 15-190. However, any physician who engages in any verbal or physical activity, beyond the requirements of N.C. Gen. Stat. § 15-190, that facilitates the execution may be subject to disciplinary action by this Board.
>
> *Relevant Provisions of AMA Code of Medical Ethics Opinion 2.06*
>
> An individual's opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution. Physician participation in execution is defined generally as actions which would fall into one or more of the following categories: (1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; (3) an action which could automatically cause an execution to be carried out on a condemned prisoner.
>
> Physician participation in an execution includes, but is not limited to, the following actions: prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or

2. The Position Statement, according to defendant, is a "non-binding interpretive statement that merely warns that a physician actively participating in [a] judicial execution 'may be subject to disciplinary action' by the Medical Board."

remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; and rendering of technical advice regarding execution.

In the case where the method of execution is lethal injection, the following actions by the physician would also constitute physician participation in execution: selecting injection sites; starting intravenous lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing, or maintaining lethal injection devices; and consulting with or supervising lethal injection personnel.

The following actions do not constitute physician participation in execution: (1) testifying as to medical history and diagnoses or mental state as they relate to competence to stand trial, testifying as to relevant medical evidence during trial, testifying as to medical aspects of aggravating or mitigating circumstances during the penalty phase of a capital case, or testifying as to medical diagnoses as they relate to the legal assessment of competence for execution; (2) certifying death, provided that the condemned has been declared dead by another person; (3) witnessing an execution in a totally nonprofessional capacity; (4) witnessing an execution at the specific voluntary request of the condemned person, provided that the physician observes the execution in a nonprofessional capacity; and (5) relieving the acute suffering of a condemned person while awaiting execution, including providing tranquilizers at the specific voluntary request of the condemned person to help relieve pain or anxiety in anticipation of the execution.

Official Change in Protocol

On 25 January 2007, a preliminary injunction staying all executions was entered by the Superior Court, Wake County, in a case separate from the case at bar. The Superior Court concluded in its order that the earlier change in protocol made by the Department of Correction and Warden Polk must be submitted to and approved by the Governor and Council of State. Thus, on 6 February 2007, the Department of Correction and Warden Polk presented an updated Execution Protocol to the Governor and Council of State pursuant to N.C.G.S. § 15-188. The submitted Protocol contained the following section on personnel:

> The Warden shall ensure that the lethal injection procedure is administered by personnel who are qualified to set up and prepare the injections described above, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of Article 19 [of Chapter 15 of the General Statutes] and this Execution Protocol. Medical doctors, physician assistants, advanced degree nurses, registered nurses, and emergency medical technician-paramedics, who are licensed or certified by their respective licensing boards and organizations, shall be deemed qualified to participate in the execution procedure. As required by Article 19, a licensed medical doctor shall be present at each execution. The doctor shall monitor the essential body functions of the condemned inmate and shall notify the Warden immediately upon his or her determination that the inmate shows signs of undue pain or suffering. The Warden will then stop the execution. The doctor shall also be responsible for certifying the death of the inmate at such time as he or she determines the procedure has been completed as required by N.C.G.S. § 15-192.

That same day, the Governor and Council of State approved the proposed Protocol.

In Warden Polk's second affidavit, filed in conjunction with plaintiff's amended complaint, Warden Polk affirmed:

> 14. On behalf of Plaintiffs, I have solicited physicians licensed by the State of North Carolina and employed by or contracting with the North Carolina Department of Correction in an effort to locate a licensed physician who would be willing to participate or otherwise be involved in executions of condemned inmates in North Carolina despite the impending threat of disciplinary action by the [Medical] Board for violation of the Position Statement and the ethics of the medical profession.
>
> 15. My solicitation efforts have been unsuccessful as all licensed physicians I have contacted, including current employees of the North Carolina Department of Correction, have advised that they refuse to subject themselves to disciplinary action by the [Medical] Board for participating or otherwise being involved in a judicial execution.
>
> 16. The potential for disciplinary action against licensed physicians has prevented plaintiffs from locating a licensed physi-

> cian willing to be present for the execution of any condemned inmate as required by N.C. Gen. Stat. § 15-190. Further, the absence of a licensed physician from an execution by lethal injection would violate N.C. Gen. Stat. § 15-190.

Because plaintiffs believed they could not carry out their statutory responsibility to execute condemned inmates because of the Medical Board's Position Statement, plaintiffs filed suit against the Medical Board, seeking injunctive relief and a declaratory judgment. The Medical Board filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and also argued that plaintiffs lacked standing and that there was no justiciable case or controversy.

Following arguments by the parties, Judge Donald Stephens of the Superior Court, Wake County, made the following declarations of law on 1 October 2007:

> 7. Logic and common sense would suggest that the requirements in N.C. Gen. Stat. §§ 15-190 and -192,—imposing a specific duty and task upon the surgeon or physician of Central Prison to be "present" for executions and to "certify the fact of the execution"—are indicative of a statutory intent by the General Assembly to require the attendance and professional participation of a physician by reason of that individual's occupation, training and expertise in medicine. The legislature intended that a physician be present to perform medical tasks attendant to an execution for which the physician is uniquely qualified, including: (1) ensuring, to the extent possible, that the condemned inmate is not subjected to unnecessary and excessive pain which could constitute cruel and unusual punishment prohibited by the Eight[h] Amendment to the United States Constitution and Section 27 of the North Carolina Constitution; and (2) examining the inmate at the conclusion of the procedure for the purpose of determining and pronouncing death.
>
> 8. The plain language of the Medical Board's Position Statement prohibits any professional conduct by the surgeon or physician to assess and prevent unnecessary or excessive pain experienced by the inmate, including such activities as: (1) monitoring the essential body functions of the inmate; (2) observing the monitoring equipment assessing those body functions; (3) providing professional expertise and medical advice to correctional staff participating in the execution; (4) notifying the

> Warden or other correctional staff members of any perceived problems with the establishment or maintenance of the intravenous sites or with the preparation and administration of the required chemicals or with the adequacy of the dosage units of those chemicals to be administered to a particular inmate to insured [sic] that the inmate would be rendered unconscious and unlikely to experience pain during the execution process. The physician is prohibited from treating any medical problem or issue that might arise during an execution and from actually examining the inmate for any medical purpose, including determining and pronouncing that death has occurred.
>
> 9. By the Medical Board's Position Statement, the Board has declared that the medical activities outlined in paragraph 8 above, whether or not those activities are required by the law and Constitutions of the United States and North Carolina, violated the ethics of the medical profession. The Board's Position Statement prohibits such activities and gives notice that any physician participating in that conduct will be subject to discipline even where the activities are performed in accordance with State law.

The trial court further declared that there was "a ripe and justiciable case and controversy" between plaintiffs and defendant and concluded as a matter of law that:

> The Medical Practices Act of 1858, which forms the origin of N.C. Gen. Stat. § 90-2, was not intended to give to the North Carolina Medical Board the authority to prohibit doctors from performing specific statutory tasks enacted by the legislature in other statutes including tasks which are currently embodied in N.C. Gen. Stat. §§ 15-190 and -192. In creating those tasks in 1909, the legislature clearly intended that a physician attend and provide professional medical assessment, assistance and oversight in every judicial execution compelled by law upon inmates convicted and sentenced to death by jury verdict in the superior courts of this State.
>
> Although the current effort by the Medical Board to prohibit physician participation in execut[ions] may well be viewed as humane and noble, such a decision rests entirely with representatives elected by the citizens of this State, the North Carolina General Assembly. As of this date, the legislature has taken no such action.

Therefore, the trial court allowed plaintiffs' requests for preliminary and injunctive relief and declared that executions are not medical procedures and thus are outside the scope of Chapters 90 and 131E of the North Carolina General Statutes.

The Medical Board gave notice of appeal from the trial court's order, but on 6 February 2008, plaintiffs sought review by this Court prior to the determination of the matter by the Court of Appeals. The Medical Board filed a petition for discretionary review as to additional issues on 18 February 2008. We allowed plaintiffs' petition on 10 April 2008 and the Medical Board's petition on 29 April 2008. We now affirm the trial court's decision.

ANALYSIS

Existence of a Case or Controversy

[1] We first address defendant's arguments that the trial court erred in determining that a justiciable case or controversy exists.

> The Superior Court has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise.

Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 287, 134 S.E.2d 654, 656-57 (1964) (citations omitted). Thus, we must determine whether there exists a genuine controversy between plaintiffs and defendant "arising out of conflicting contentions as to their respective legal rights and liabilities under a . . . statute." *Id.*

> Section 15-188 provides in pertinent part:
>
> The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of [Article 19 of Chapter 15 of the General Statutes].

N.C.G.S. § 15-188 (2007). Moreover, our General Statutes provide that:

> The execution shall be under the general supervision and control of the warden of the penitentiary, who shall from time to time, in writing, name and designate the guard or guards or other reliable person or persons who shall cause the person, convict or felon against whom the death sentence has been pronounced to be executed as provided by this Article and all amendments thereto. At such execution there shall be present the warden or deputy warden . . . and the surgeon or physician of the penitentiary.

Id. § 15-190 (2007). Thus, the General Assembly has mandated that the Warden of Central Prison ensure the execution of inmates condemned to death by requiring the Warden to "cause to be provided . . . qualified personnel . . . to perform other tasks required for this procedure." *Id.* § 15-188. The General Assembly has also required that the "surgeon or physician of the penitentiary" be "present" when the death sentence is executed. *Id.* § 15-190.

Chapter 90 of our General Statutes places responsibility on defendant "to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina," *id.* § 90-2(a) (2007), which includes the authority to discipline physicians for failure to adhere to "the ethics of the medical profession," *id.* § 90-14(a)(6) (2007).

Plaintiffs, in attempting to fulfill their statutory duty while also complying with the constraints of the North Carolina and United States Constitutions, produced a protocol envisioning physician participation in administering the death penalty, which was presented to and approved by the Governor and the Council of State. The Medical Board, seeking to fulfill its statutory duty to promote the ethical practice of medicine, developed a Position Statement which prohibits physician participation in an execution. Thus, the actions of two governmental entities, both seeking to fulfill their statutory duties, are in irreconcilable conflict. Plaintiffs cannot carry out their statutory duty to execute condemned inmates under the Execution Protocol without subjecting a physician to discipline by the Medical Board. As such, there is a genuine controversy between plaintiffs and defendant "arising out of conflicting contentions as to their respective legal rights and liabilities under a . . . statute." *Roberts*, 261 N.C. at 287, 134 S.E.2d at 656-57. We agree with the trial court's declaration of law that plaintiffs have standing to litigate this issue. Accordingly, defendant's assignments of error are overruled.

Ripeness

[2] Next, defendant argues that any case and controversy between the parties is not yet ripe for decision because (1) there is pending litigation challenging the procedures used by the Council of State in approving the current protocol and (2) defendant "has not yet had before it a matter involving active participation by a physician in a judicial execution." We disagree. The existence of pending litigation involving a matter ancillary to the case at bar does not render the issue presented here unripe. There is no standing court order that would otherwise prohibit plaintiffs from performing their statutory duty to conduct executions. Instead, the only issue currently preventing plaintiffs from fulfilling their statutory duties is their inability to find a physician willing to participate in an execution in contravention of defendant's Position Statement. Simply put, the existence of litigation at a lower level that may later affect plaintiff's ability to fulfill their statutory duties does not render the instant issue of statutory interpretation nonjusticiable. Moreover, this issue is not unripe simply because defendant has not yet disciplined a medical doctor for participating in an execution. The determinative point is that plaintiffs are hindered in their ability to perform their statutory duties because they are unable to find a physician willing to subject himself or herself to discipline for participating in an execution. Accordingly, it is irrelevant that a specific case addressing such conduct has not yet come before the Medical Board. We conclude that this matter is ripe for judicial review, and defendant's assignments of error are thus overruled.

The Trial Court's Statement on Physician Participation

[3] Defendant argues that the trial court erroneously decided a question of fact or a mixed question of law and fact when the trial judge stated during the hearing: "I believe that historically whether required by statute or not, physicians have taken an active role in this procedure. I can't believe in 1907 that the physician required (inaudible) to observe and be present at an execution did not examine the deceased and pronounce the deceased dead." Defendant asserts that the trial court lacked any evidence to support its statement and that the court erred in refusing defendant's request to offer evidence on the role physicians have historically played in executions. Defendant's argument is without merit. First, the trial court's order evinces nothing that demonstrates or even intimates that the trial court based its decision, in whole or in part, upon whether physicians

took an active role in executions before passage of the 1909 statute. Moreover, the trial court's statement was not designated as a finding of fact, nor was it included in the trial court's declarations of law or conclusions of law in its order. Therefore, the statement is not essential to the trial court's decision and can be considered surplusage. Finally, our conclusion is consistent with the mandate to the trial court that it "find the facts specially and state separately its conclusion of law thereon" when the action is "tried upon the facts without a jury." N.C.G.S. § 1A-1, Rule 52(a) (2007). Here, the trial court's order stated no findings of fact, and its decision did not determine or rest upon any disputed facts, but solely upon declarations and conclusions of law. Defendant's assignments of error are overruled.

The Validity of the Position Statement

[4] Having concluded that a genuine case or controversy exists and that this matter is ripe for decision, we turn to the overriding issue in the instant case—the meaning of the word "present" in N.C.G.S. § 15-190.

> 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 a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

Diaz v. Div. of Soc. Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) and *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.")). Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004) (stating that "this Court does not read segments of a statute in isolation").

Applying these long-standing rules of statutory construction, we determine that the statutes at issue are clear and unambiguous. Therefore, there is no need for us to resort to other rules of statutory construction, but simply to apply the statutes as written to the case at bar. *Diaz*, 360 N.C. at 387, 628 S.E.2d at 3.

In support of its argument that the General Assembly never intended a physician to actively participate in an execution, defendant asserts that we should consider the legislative history of Sections 15-190 and 15-192 and the two-decade-long interpretation of the statute by plaintiffs. This we decline to do. Initially, we note that defendant's recitation of the legislative history of Sections 15-190 and 15-192 relies heavily upon the modification of the mode of execution in North Carolina from asphyxiation to lethal injection in 1983. Specifically, defendant relies on the decision of the 1983 Senate Judiciary Committee to not include a provision requiring that a physician administer the ultrashort-acting barbiturate and chemical paralytic agent that cause the condemned inmate's death. However, this decision of a legislative committee consisting of a small percentage of a single house of our bicameral legislature seventy-three years after the enactment of the statutory language at issue carries no weight in our determination of the intent of the enacting legislature.

First, this Court has previously recognized the rule "that ordinarily the intent of the legislature is indicated by its actions, and not by its failure to act." *Styers v. Phillips*, 277 N.C. 460, 472-73, 178 S.E.2d 583, 589-91 (1971) (" 'Courts can find the intent of the legislature only in the acts which are in fact passed, and not in those which are never voted upon in Congress, but which are simply proposed in committee.' " (quoting *United States v. Allen*, 179 F. 13, 19 (8th Cir. 1910), *aff'd as modified on other grounds by Goat v. United States*, 224 U.S. 458 (1912), *and by Deming Inv. Co. v. United States*, 224 U.S. 471 (1912))). That a legislature declined to enact a statute with specific language does not indicate the legislature intended the exact opposite. *Id.* at 472, 178 S.E.2d at 589 (declining " 'to attribute any such attitude to the Legislature' " and noting that a party's argument as to why a bill failed to pass " 'can be nothing more than conjecture' " and " '[m]any other reasons for legislative inaction readily suggest themselves' " (quoting *Moore v. Bd. of Chosen Freeholders*, 76 N.J. Super. 396, 404, 184 A.2d 748, 752, *modified on other grounds*, 39 N.J. 26, 186 A.2d 676 (1962))). Finally, "[i]n determining legislative intent, this Court does not look to the record of the internal deliberations of committees of the legislature considering proposed legislation." *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991). For all of these reasons, the committee's decision to not present the bill with language requiring that a physician administer the lethal agents bears no weight on whether the General Assembly foreclosed any physician participation. Moreover, plaintiffs' prior interpretation of the statute at issue is ir-

relevant in our determination of the intent of the legislation as derived from the plain language of the statute.

Additionally, defendant asserts that the history surrounding the 1909 enactment of N.C.G.S. § 15-190 supports its position that the legislature did not envision physician participation in any way during the condemned inmate's execution. Specifically, defendant argues that in 1909 the method of execution was changed from hanging by the sheriff in the county of conviction to electrocution at Central Prison, and thus, the physician was only required to be present to certify the death of the condemned inmate. *See* N.C.G.S. § 15-192 (2007) (which has remained unchanged since it was enacted in 1909 and reads in pertinent part: "The Warden, together with the surgeon or physician of the penitentiary, shall certify the fact of the execution of the condemned prisoner . . . ."). Defendant argues that it would have been impossible for a physician to participate in an execution by using monitoring equipment in 1909 to measure the progress of, and any possible undue pain and suffering caused by, the electrocution. We observe that to the contrary, it would not be necessary for a physician to be present at the execution itself to certify the death of the condemned inmate. The deaths of our citizenry are certified all across this State on a daily basis, and rarely, if ever, is the professional certifying death present at the time the death occurs. Moreover, the absence of monitoring equipment in 1909 did not diminish a physician's special skill and knowledge of the human body and his or her ability to recognize when a human being is suffering an inordinate amount of pain. To accept defendant's interpretation of the 1909 statute would require us to determine that the 1909 legislature merely intended that a licensed medical doctor be present only as an uninvolved onlooker[3] during an inmate's execution. Common sense dictates otherwise.

Section 15-190 requires a physician to be present at the execution of a condemned inmate. The General Assembly did not include such a requirement simply to have a "professional" present at the time of the execution without that individual supplying some sort of professional assistance. The warden or his designee is required to be present to perform his duty to carry out the execution. The condemned inmate's legal counsel may be present, certainly in his or her professional capacity. A clergy member may be present, certainly in his or her professional capacity. Two of the three learned professions (attorneys and clergy) are allowed to attend an execution and are

3. Or, as stated during oral arguments, "a potted plant."

presumably permitted to act in a manner commensurate with the duties of their profession, but, according to defendant, the third (physician) is required simply to be present and not act in any professional capacity. *See* N.C.G.S. § 15-190; *Patronelli v. Patronelli*, 360 N.C. 628, 630, 636 S.E.2d 559, 561 (detailing the three learned professions). To assert that the physician is to merely occupy space in a non-professional capacity is simply illogical and renders unintelligible the requirement that "the surgeon or physician of the penitentiary" be present. N.C.G.S. § 15-190.

Thus, the General Assembly has specifically envisioned some sort of medical participation in the execution process, and defendant's Position Statement runs afoul of N.C.G.S. § 15-190 by completely prohibiting physician participation in executions. While defendant would retain disciplinary power over a licensed medical doctor who participates in an execution, *see* N.C.G.S. § 90-14, defendant may not discipline or threaten discipline against its licensees solely for participating in the execution alone. To allow defendant to discipline its licensees for mere participation would elevate the created Medical Board over the creator General Assembly.

Moreover, the language of the Protocol itself, as submitted by the Warden and approved by the Governor and Council of State does not overstep the statutory authority of those officials to determine and approve the exact means of execution. Exceptional care was taken when drafting the Protocol to ensure that it would not cause a physician to violate the Hippocratic Oath. Under the Protocol, the physician is not required to administer the lethal agents, nor is the physician required to do anything other than "monitor the essential body functions of the condemned inmate and [ ] notify the Warden immediately upon his or her determination that the inmate shows signs of undue pain or suffering." The physician is given authority in the Protocol to ensure that no undue harm is inflicted on the condemned inmate: if the physician determines there is undue pain or suffering, "[t]he Warden will then stop the execution." Certainly, the Protocol's requirement that a physician help prevent "undue pain or suffering" is consistent with the physician's oath to "do no harm." The Warden is well within his authority to require such monitoring, and defendant is without power to prevent the Warden from doing so. Defendant's assignments of error are overruled.

CONCLUSION

Accordingly, we hold that N.C.G.S. § 15-190, by its plain language, envisions physician participation in executions in some professional

capacity. Defendant's Position Statement exceeds its authority under Chapter 90 of the North Carolina General Statutes because the Statement directly contravenes the specific requirement of physician presence found in N.C.G.S. § 15-190. Because plaintiffs have standing, a genuine controversy exists, the issue is ripe for decision, and the trial court did not impermissibly decide questions of fact or fail to allow additional presentation of evidence; and because the Position Statement is an invalid exercise of defendant's statutory powers, we affirm the decision of the trial court.

AFFIRMED.

Justice HUDSON dissenting.

Because I believe that changes in statutory language and definitions are fundamentally tasks for the legislature, not the courts, I respectfully dissent. Here, the General Assembly has given defendant, the North Carolina Medical Board, broad authority to discipline physicians, and in my view, the nonbinding Position Statement at issue comports with that authority. The Statement is also entirely consistent with the requirements of N.C.G.S. §§ 15-190 and -192, in that it indicates that a physician will not be disciplined for "merely being 'present' during an execution," as required by the plain language of those statutes. Nevertheless, the majority's holding here oversteps our role by fashioning a definition of "present" that would create a conflict between two governmental entities where there currently is none. I would instead find that no genuine case or controversy appropriate for the courts exists between these parties.

The General Assembly granted the following authority to defendant:

> (a) The Board shall have the power to place on probation with or without conditions, impose limitations and conditions on, publicly reprimand, assess monetary redress, issue public letters of concern, mandate free medical services, require satisfactory completion of treatment programs or remedial or educational training, fine, deny, annul, suspend, or revoke a license, or other authority to practice medicine in this State, issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:
>
> . . . .

> (6) Unprofessional conduct, including, but not limited to, departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice, or good morals, *whether the same is committed in the course of the physician's practice or otherwise*, and *whether committed within or without North Carolina*.

N.C.G.S. § 90-14(a)(6) (2007) (emphases added). This sweeping authority, by its plain language, permits defendant to discipline licensees even for actions not committed during the course of medical practice and for matters occurring outside of our state. This statute, which has been a part of North Carolina law in one form or another since the Medical Practices Act of 1858, reflects our legislature's intention to confer on defendant broad powers to regulate its own profession. Nevertheless, in a holding that finds the Position Statement in question to be "an invalid exercise of defendant's statutory powers," the majority fails to recognize or even discuss the comprehensive nature of the "statutory powers" granted to defendant by the General Assembly.

In their amended complaint, plaintiffs allege that because of defendant's Position Statement, physicians are "compelled . . . to choose between jeopardizing their employment . . . or subjecting themselves to potential disciplinary action by Defendant." Plaintiffs contend that, as a direct result of this fear of discipline, plaintiffs have been unable to locate a physician "willing to participate or otherwise be involved in a judicial execution," leading to their being "unable to carry out those duties the laws of North Carolina empower and require [them] to complete." Plaintiffs then asked the trial court (1) to enjoin defendant from disciplining any licensed physicians for involvement in executions carried out by plaintiffs; (2) to "declare the rights and obligations" of the parties; and (3) to declare that "a judicial execution is not a medical procedure" and thus "outside the authority of Defendant [under N.C.G.S. § 14-90] . . . to oversee or regulate, despite the involvement of a licensed physician." The trial court entered an order granting all three of these requests.

As recounted by the majority and by defendant in its brief to this Court, "[t]he genesis of the present controversy" was the order entered in *Brown v. Beck*, 2006 WL 3914717 (E.D.N.C. Apr. 7, 2006) (No. 5:06CT3018 H), in which a federal district court judge compelled

these plaintiffs to file "a notice setting forth the plans and qualifications of such [medical] personnel" "who are qualified to ensure that [a condemned prisoner] is unconscious at the time of his execution." *Id.*, at *8. The revised protocol submitted by these plaintiffs included a provision that a condemned prisoner's level of consciousness would be monitored by a "licensed medical doctor."

Following entry of the final order in *Brown*, and in direct response to "several inquiries from physicians . . . seeking guidance," defendant "[r]ealiz[ed] that the proper role of physicians in executions would likely be a recurrent issue" and "determined that it would be appropriate to consider issuing a Position Statement regarding the ethical implications and potential disciplinary consequences" of such a role. Beginning in the latter half of 2006, defendant undertook to draft and issue this Position Statement and ultimately adopted it in January 2007, pursuant to its statutory authority.

According to defendant, its Position Statement "attempted to harmonize the Medical Board's obligation to enforce the ethics of the medical profession with the statutory requirements of sections 15-190 and -192 . . . that a physician be 'present' at a judicial execution and certify the execution." Although the majority erroneously characterizes the Position Statement as "prohibit[ing] physicians licensed to practice medicine in North Carolina, under the threat of disciplinary action, from any participation" in an execution, it does not. In fact, the nonbinding, interpretive Statement provides only that "any physician who engages in any verbal or physical activity, beyond the requirements of N.C. Gen. Stat. § 15-190, that facilitates the execution *may be subject to disciplinary action* by this Board." (Emphasis added.) The statement prohibits no conduct, but merely acknowledges the possibility that defendant could discipline a physician who acts beyond the statutory requirement of being "present," and provides defendant's guidance as to what might constitute participation beyond that statutory requirement.

Moreover, the Statement explicitly provides that the Board "will not discipline licensees for merely being 'present' during an execution in conformity with N.C. Gen. Stat. § 15-190." The portion of the Statement defining "physician participation" in executions was adopted from an American Medical Association's (AMA) Code of Medical Ethics opinion "except to the extent that it is inconsistent with North Carolina state law," thereby ensuring that a licensed physician will not run afoul of the Position Statement if her "participation" falls within statutory guidelines set forth by our legisla-

ture. Indeed, I believe defendant succeeded in walking the fine line between its statutory mandate to "regulate the practice of medicine," N.C.G.S. § 90-2(a) (2007), including disciplining licensed physicians for failing to adhere to "the ethics of the medical profession," *id.* § 90-14(a)(6), and the statutory requirement that a physician be "present" at all executions, *id.* § 15-190 (2007).

Contrary to plaintiffs' contentions and the majority's analysis, the plain language of defendant's Position Statement is consistent with both the broad grant of authority outlined in N.C.G.S. § 90-14(a)(6) and the specific requirement of being "present" in N.C.G.S. § 15-190. In fact, it is the majority's attempts to discern the legislature's intent and meaning by the word "present," and defendant's use of the word "participation," that create a conflict between the statute and the Position Statement. I note as well that plaintiffs, when arguing before the trial court in this case, likewise averred that defendant's Position Statement "changes nothing. The doctor can still be present. He can still sign the death certificate."

It was only when plaintiffs sought to allay the Eighth Amendment concerns of the federal judge in the Eastern District of North Carolina, by assuring him that the condemned prisoner would be unconscious during the administration of lethal drugs, that plaintiffs promised the more active participation ("monitoring") by physicians in executions. That representation—again, by plaintiffs, not defendant—gave rise to North Carolina physicians' uncertainty as to their proper role in executions and defendant's corresponding need to issue a nonbinding, interpretive Position Statement that reiterated the statutory requirement of being "present" but cautioned that further actions should be limited by physicians' ethical responsibilities as medical professionals.

This case was brought under the Uniform Declaratory Judgment Act, which gives courts the power to "determine[] any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise" in which a party is "interested" or "affected." N.C.G.S. § 1-254 (2007). We have previously held that before our courts acquire jurisdiction under the Act a "genuine controversy between the parties" must exist. *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 656 (1964) (citations omitted). As noted by Justice Ervin:

> There is much misunderstanding as to the object and scope of [the Uniform Declaratory Judgment Act]. Despite some

> notions to the contrary, it does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. This observation may be stated in the vernacular in this wise: The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice.

Lide v. Mears, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949) (internal citations omitted).

In the context of a challenge to the constitutionality of a city ordinance, this Court noted:

> "The validity or invalidity of a statute in whole or in part, is to be determined in respect of its adverse impact upon personal or property rights *in a specific factual situation*. . . ."
>
> Our Uniform Declaratory Judgment Act does not authorize the adjudication of mere abstract or theoretical questions. Neither was this act intended to require the Court to give advisory opinions when no genuine controversy presently exists between the parties.

Angell v. City of Raleigh, 267 N.C. 387, 391-92, 148 S.E.2d 233, 236 (1966) (emphasis added) (citations omitted). In *Angell*, we found no such "genuine justiciable controversy" between the parties because the City of Raleigh had "issued no license pursuant to the provisions of the ordinance alleged to be unconstitutional" at the time of the lawsuit. *Id.* at 392, 148 S.E.2d at 236. This Court has also held:

> Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. *Mere apprehension or the mere threat of an action or a suit is not enough.*

Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 234, 316 S.E.2d 59, 61-62 (1984) (emphasis added) (citations omitted).

Plaintiffs essentially ask the courts to redefine "present," as used in N.C.G.S. § 15-190, to include "participation" as used in defendant's Position Statement, in order to create a controversy entitling them to a declaratory judgment. Such "bootstrapping" may not generally provide the basis for declaratory judgment. *See Griffin v. Fraser*, 39 N.C.

App. 582, 587, 251 S.E.2d 650, 654 (1979) (holding that a complaint seeking a ruling creating a new interpretation of the Internal Revenue Code that would then create a genuine controversy between the parties "[did] not suffice for the jurisdictional prerequisites of a declaratory judgment action"). Instead, the genuine controversy must appear from the complaint and the record. *See*, *e.g.*, *Hubbard v. Josey*, 267 N.C. 651, 652, 148 S.E.2d 638, 639 (1966) (per curiam) ("The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff is entitled to the declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all, so that even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory judgment." (quotation and citation omitted)). To the extent there is a controversy here, it was created by plaintiffs when they included in the 2007 Execution Protocol the requirement that a licensed physician monitor the consciousness of the condemned inmate.

Further, it is far from clear how enjoining defendant from disciplining physicians will achieve the result sought by plaintiffs, namely, the resumption of executions. The court order below neither requires that physicians be involved at executions nor that executions proceed. While the majority is certainly correct in its assertion that the parties have "conflicting contentions as to their respective legal rights and liabilities under a . . . statute," *Roberts*, 261 N.C. at 287, 134 S.E.2d at 656-57, the controversy concerns primarily whether defendant's authority to discipline physicians for their conduct includes their participation in executions. Until evidence shows that a physician is actually facing discipline, or refuses to be present at an execution solely because of fears of discipline, preventing defendant from disciplining physicians will not necessarily result in a physician serving at an execution, in light of the AMA Code of Medical Ethics. Thus, plaintiffs fail to show that the declaratory judgment they seek can redress their alleged injury. *See*, *e.g.*, *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 569 (1984) (holding that, to establish standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." (citation omitted)).

In addition, unless and until litigation related to the 2007 Execution Protocol has ended, we are unable to determine with any accuracy what precise role is required of a physician in an exe-

cution in North Carolina. More significantly, we cannot know if there is a conflict between that role and the provisions of defendant's Position Statement. The majority's holding here, or any attempt by this Court to interpret N.C.G.S. § 15-190 and the word "present," has the effect of redefining—and essentially dictating—that role, a task that is better left to the legislature. The General Assembly granted defendant broad authority to regulate the medical profession, and may limit that authority, should it so desire, to exclude participation in executions. Indeed, our legislature has recognized its responsibility in this regard, as bills are currently pending in both the House and Senate that would remove executions from defendant's authority and prohibit defendant from taking any disciplinary action against a licensed physician who provides professional assistance at such an execution. *See* S. 161, 149th Gen. Assem., 2009 Sess. (N.C. 2009) ("Execution/Physician Assistance Authorized"); H. 784, 149th Gen. Assem., 2009 Sess. (N.C. 2009) ("Execution/Physician Assistance Authorized"). It is not for this Court to do so, nor is it a proper application of the Uniform Declaratory Judgment Act and the courts' power to enjoin.

For this Court to issue a ruling now in this matter would run afoul of the prohibition against advisory opinions and would lead instead to recklessly "entangling [our]selves in abstract disagreements over administrative policies." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807, 155 L. Ed. 2d 1017, 1024 (2003) (citations omitted). Rather, we should seek to "protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 807-08, 155 L. Ed. 2d at 1024 (citations omitted). As "ripeness is peculiarly a question of timing," *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 140, 42 L. Ed. 2d 320, 351 (1974), perhaps we will be presented with these issues again at a future date. For example, a proper court challenge to defendant's Position Statement might be brought by a North Carolina licensed physician who is present at an upcoming execution and receives notice of disciplinary action for his "participation," whatever that entails. Such a scenario would provide us with the concrete facts necessary to determine whether the application of defendant's Position Statement, pursuant to its statutory authority under section 90-14(a)(6), runs afoul of the General Assembly's specific provision in section 15-190 for the presence of a physician at executions. Unlike the majority's holding here, we would not be fashioning our own definitions in the absence of any evidence as to what "participation" has been, essentially allowing plaintiffs to

" 'put [a purely advisory opinion] on ice to be used if and when occasion might arise.' "[4] *Harrison*, 311 N.C. at 234, 316 S.E.2d at 62 (citation omitted).

The majority's analysis of the statutes in question illustrates the hazards we risk by engaging in such speculation. While I agree with the majority's statement, "[t]hat a legislature declined to enact a statute with specific language does not indicate the legislature intended the exact opposite," surely it must also be the case that the failure to enact a provision must be taken as an indication that the legislature did, in fact, intend *not* to have the effect of the specific language it rejected. We know that our General Assembly refused to require a physician to administer the drugs involved in executions, yet the majority's holding here today would ignore that explicit rejection as immaterial to the question of "medical participation." Instead, it would graft upon the word "present" some professional responsibilities, despite the legislature's failure to refer to "physicians" at all in the detailed language of N.C.G.S. § 15-188 concerning how lethal injections should be administered. As these matters of wording are the result of legislative action, they are best left to the General Assembly to clarify.

Again, however, I emphasize that defendant's nonbinding, interpretive Position Statement, and its provision that physicians "may be subject to disciplinary action" for activities beyond the requirements of N.C.G.S. § 15-190, are not inconsistent with either the plain language of N.C.G.S. § 15-190 or the broad authority granted by N.C.G.S. § 90-14(a)(6). That issue—not the meaning of the word "present," nor that of "participation"—is the primary question before this Court, contrary to the majority's interpretation of N.C.G.S. § 15-190.

Plaintiffs' complaint specifically sought a declaration "as to whether a judicial execution is not a medical procedure and thus outside both the scope of Chapters 90 and 131E of the North Carolina General Statutes and the authority of Defendant . . . to oversee or

4. The lack of evidence in the record before us on several critical questions also shows why this matter is not yet ripe for judicial review. No evidence was allowed to show what "participation" has entailed for the last one hundred years. Nor do we have any showing, beyond plaintiffs' hearsay assertions, that the non-binding, interpretive Position Statement is the sole reason that licensed physicians in North Carolina have declined to be present at executions, rather than because of their own individual opposition to the death penalty, scheduling conflicts, discomfort with the way their role has been defined in the revised 2007 Execution Protocol, or some other reason. "It is not our practice to decide causes where essential facts wander elusively in the realm of surmise." *Boswell v. Boswell*, 241 N.C. 515, 519, 85 S.E.2d 899, 902 (1955).

regulate, despite the involvement of a licensed physician." Defendant's brief here asserts error in the trial court's finding, denominated as a conclusion and made without benefit of any evidence, that an execution is not a medical event or procedure. While the trial court appears to have viewed this conclusion as fundamental to its holding that the Statement "is an invalid exercise of defendant's statutory powers," I disagree. The plain language of Section 90-14(a)(6) does not limit defendant's disciplinary authority to "medical procedures"; in fact, it specifically provides the opposite, that defendant may discipline licensees for unprofessional conduct whether "committed in the course of the physician's practice *or otherwise*." N.C.G.S. § 90-14(a)(6) (emphasis added). I would hold that the Position Statement is a valid exercise of defendant's statutory authority. Any change in that authority—which is the practical effect of the majority opinion—is a matter for the General Assembly which granted it, not for the courts.

I believe defendant has carefully attempted to carry out its duties under N.C.G.S. § 90-14(a)(6) and has done so in a manner consistent with N.C.G.S. §§ 15-190 and -192. By issuing its Position Statement, defendant has neither prevented plaintiffs from conducting an execution nor prohibited a physician from being present at—or even participating in—such an execution. Reconciling these statutes and the Position Statement, an execution could proceed if the Protocol allows and plaintiffs locate a physician willing to be "present," or to "participate" and risk discipline. If plaintiffs desire the General Assembly to limit the authority it granted to defendant under N.C.G.S. § 90-14(a)(6), they must ask the legislature, not the courts, to do so. Indeed, the central "fact" to the injury alleged by plaintiffs is that defendant, in adopting the Position Statement, "unilaterally acted to alter public policy to the exclusion of the General Assembly, and bypassed the courts." Thus, plaintiffs in their own pleading acknowledge the legislative nature of their concern.

Because I conclude that this matter is properly for the General Assembly and does not present a justiciable controversy for declaratory judgment, I would reverse the trial court's order and remand for dismissal of this lawsuit. Thus, I respectfully dissent.

Chief Justice PARKER and Justice TIMMONS-GOODSON join in this dissenting opinion.

STATE OF NORTH CAROLINA v. BILLY RAY BYRD

No. 499A07

(Filed 5 May 2009)

1. Domestic Violence— protective order—ex parte temporary restraining order entered under Rule 65(b) not valid protective order under Chapter 50(b)

The trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury case by enhancing defendant's sentence under N.C.G.S. § 50B-4.1(d) based on his alleged knowing violation of a valid domestic violence protective order because: (1) the trial court's 11 March 2004 order stated that it was entered under N.C.G.S. § 1A-1, Rule 65(b), and thus, it was an *ex parte* temporary restraining order (TRO) entered under Rule 65(b) instead of a valid domestic violence protective order entered under Chapter 50B; (2) the fact that the motion was made in the victim's existing action for divorce from bed and board under Chapter 50 and that the TRO contains language similar to that in N.C.G.S. § 50B-3(a) does not bring the TRO within the definition of a valid protective order as defined in N.C.G.S. § 50B-1; (3) although the intended purpose of the TRO was to accomplish the same objective as a valid protective order under N.C.G.S. § 50B-3(a), the Legislature did not provide in N.C.G.S. § 50B-4.1(a) that knowing violation of a TRO or preliminary injunction entered under Rule 65 would constitute a Class A1 misdemeanor, nor did the Legislature provide that such a violation would raise the felony one class higher than the principal felony charged; (4) even if the TRO had been entered under Chapter 50B, it failed to meet the second prong of the definition of a valid domestic violence protective order since it was not entered upon a hearing by the court or consent of the parties, and merely putting defendant on notice that a TRO had been entered against him does not satisfy the hearing requirement necessary to permit a sentence enhancement under N.C.G.S. § 50B-4.1(d); and (5) by limiting applicability of the enhancement provision to violation of protective orders issued after a hearing, our General Assembly recognized and gave deference to protection of a defendant's liberty interest through due process of law.

2. Appeal and Error— appealability—discretionary review improvidently allowed

Discretionary review of the instructional issue regarding sentencing enhancement in an assault with a deadly weapon with intent to kill inflicting serious injury case based on the alleged knowing violation of a valid domestic violence protective order was improvidently allowed.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 185 N.C. App. 597, 649 S.E.2d 444 (2007), finding no prejudicial error in a trial resulting in judgments entered 26 August 2005 by Judge James U. Downs in Superior Court, Buncombe County. On 8 November 2007, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court 17 March 2008.

Roy Cooper, *Attorney General*, *by Elizabeth F. Parsons*, *Assistant Attorney General*, *for the State.*

Glover & Petersen, *P.A.*, *by James R. Glover and Ann B. Petersen*, *for defendant-appellant.*

PARKER, Chief Justice.

Billy Ray Byrd ("defendant") appeals the enhanced sentence imposed upon his conviction for assault with a deadly weapon with intent to kill inflicting serious injury based on his knowing violation of a valid domestic violence protective order. For the reasons stated herein, we hold that the temporary restraining order ("TRO") entered in this case pursuant to Rule 65(b) of the North Carolina Rules of Civil Procedure was not a valid domestic violence protective order as defined by Chapter 50B of the General Statutes. The trial court, therefore, erred in enhancing defendant's sentence under N.C.G.S. § 50B-4.1(d).

Defendant's wife Carrie Byrd ("Carrie") filed a *pro se* complaint and motion for a domestic violence protective order on 13 March 2003 in District Court, Transylvania County. The district court entered an *ex parte* domestic violence order on 13 March 2003 and, following a hearing, issued a domestic violence protective order on 20 March 2003 valid for a term of one year. The couple reconciled within the order's one-year term, and Carrie's motion to set aside the protective order was allowed on 10 July 2003.

Approximately one year later on 11 March 2004, Carrie filed a complaint through counsel seeking, *inter alia*, divorce from bed and board. With the complaint, Carrie filed a motion for a preliminary injunction pursuant to North Carolina Rule of Civil Procedure 65(a) and also sought a TRO pursuant to Rule 65(b). Carrie's complaint and affidavit generally alleged that defendant had assaulted and battered her on numerous occasions up to and including the date of the complaint but did not allege specific acts of domestic violence except for an incident that occurred on 11 March 2003.

The district court issued an *ex parte* order granting Carrie's request for a TRO on 11 March 2004 and set a hearing date of 15 March 2004. The TRO was properly served on defendant on 12 March 2004. Defendant's counsel moved for a continuance on 15 March 2004, and the hearing and TRO were both continued until 24 March 2004. In entering the TRO, the trial court found, *inter alia*:

> 3. That the said verified Complaint, verified Motion, and Affidavit filed herein by applicant adequately avers grounds for the issuance of a temporary restraining order and that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.
>
> 4. The injury, loss or damage otherwise occurring to applicant is that Defendant may assault and batter Plaintiff as he has done in the recent past . . . .

The trial court concluded:

> 7. That the applicant's request for a temporary restraining order without notice to the Defendant should be allowed.

The trial court then ordered:

> 3. That pending the hearing provided for above, the Court orders and directs as follows:
>
> . . . .
>
> (b) That the Defendant is ordered and directed not to go about, assault, threaten, molest, harass, interfere with, or bother the Plaintiff and the minor children in any way whatsoever.

At trial on the charges in this criminal case, the State presented evidence tending to show that on 23 March 2004, defendant went to

Carrie's office with a .22-caliber semiautomatic rifle. Gerald Cotton ("Cotton"), a witness and alleged victim of defendant's actions, testified that defendant pointed the rifle at Cotton's chest and pulled the trigger, but the gun did not fire. Cotton ran toward the back door and heard two more shots as he was fleeing.

Beth Vockley ("Vockley"), the branch supervisor at Carrie's workplace, came out of her office when she saw Cotton running down the hall. Vockley saw defendant pointing the gun at Carrie and told him not to shoot her. Carrie pushed the gun away and ran toward Vockley's office. Vockley heard two gunshots. Carrie fell to the floor after the second. Defendant dropped the rifle on the floor and walked out of the office.

Carrie was taken to Mission Memorial Hospital, where she underwent surgery for a bullet wound in the left frontal area of her head. She recovered after the surgery but continues to have difficulty forming words and multitasking.

Defendant was indicted for the following offenses: (i) attempted murder of Carrie Byrd and knowing violation of a valid protective order under N.C.G.S. § 50B-4.1(a) (04CRS54011); (ii) assault with a deadly weapon with intent to kill inflicting serious injury on Carrie Byrd and knowing violation of a valid protective order under N.C.G.S. § 50B-4.1(a) (04CRS53565); (iii) knowingly violating a valid domestic violence protective order by going to Carrie's workplace (04CRS53567); (iv) attempted murder of Gerald Cotton and knowing violation of a valid protective order under N.C.G.S. § 50B-4.1(a) (04CRS54012); and (v) assault with a deadly weapon with intent to kill Gerald Cotton and knowing violation of a valid protective order under N.C.G.S. § 50B-4.1(a) (04CRS53571).

On 25 August 2005 the trial court declared a mistrial as to the attempted murder of Carrie, the jurors having reached an impasse on that charge. The jury found defendant guilty of the Class C felony of assault with a deadly weapon with intent to kill inflicting serious injury on Carrie, the misdemeanor charge of knowingly violating a valid domestic violence protective order, and misdemeanor assault with a deadly weapon on Cotton. Defendant was found not guilty of attempted murder of Cotton.

During the sentencing phase, the jury returned a verdict that defendant knowingly violated a domestic violence protective order in the same course of conduct which constituted the assault with a

deadly weapon with intent to kill inflicting serious injury on Carrie. The jury also found as an aggravating factor that defendant inflicted permanent and debilitating injury on Carrie Byrd.

The trial court found Prior Record Level I as to the Class C felonious assault on Carrie. Based on the jury's finding of a violation of a valid domestic violence protective order, the offense was elevated to Class B2 pursuant to N.C.G.S. § 50B-4.1(d). The trial court found that mitigating factors were outweighed by the jury's finding of permanent and debilitating injury. The trial court imposed a sentence in the aggravated range of 196 to 245 months imprisonment. Finding Prior Record Level II as to the misdemeanor assault on Cotton, the trial court imposed a consecutive sentence of seventy-five days imprisonment. The trial court arrested judgment on defendant's conviction for violation of a valid domestic violence protective order.

A divided panel of the Court of Appeals upheld defendant's conviction and enhanced sentence imposed under N.C.G.S. § 50B-4.1(d) for his knowing violation of a valid protective order. The dissenting judge disagreed with the majority's determination that defendant's sentence was properly enhanced for violation of a valid protective order.

On 9 October 2007 defendant gave notice of appeal to this Court based on the dissent in the Court of Appeals. On 8 November 2007, this Court allowed defendant's petition for discretionary review as to whether the trial court erred in its instructions to the jury on the enhancement provisions of N.C.G.S. § 50B-4.1.

[1] Defendant first contends that the trial court erred in denying, and the Court of Appeals erred in affirming the denial of, his motion to dismiss the enhancement of the penalty for his felonious assault conviction on account of his knowing violation of a valid domestic violence protective order. When a person commits a felony while knowingly violating a domestic violence protective order, N.C.G.S. § 50B-4.1(d) enhances the penalty one class higher. The maximum penalty in the aggravated range that could, therefore, be imposed was increased from a Class C felony to that of a Class B2 felony. N.C.G.S. § 15A-1340.17(c), (e) (2003). As a result, defendant's maximum term of imprisonment was set at 245 months instead of 120 months. *Id.*

In deciding whether defendant's contention has merit, we must first determine whether the TRO entered pursuant to Rule 65 of the Rules of Civil Procedure was, as a matter of law, a valid domestic vio-

lence protective order under Chapter 50B. To make this determination, we look to the language of the statutes. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citing *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). When a statute is clear and unambiguous, the Court will give effect to the plain meaning of the words without resorting to judicial construction. *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Id.* (citing *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980)).

Section 50B-4.1 provides in pertinent part:

> (a) Except as otherwise provided by law, a person who knowingly violates a valid protective order entered pursuant to this Chapter or who knowingly violates a valid protective order entered by the courts of another state or the courts of an Indian tribe shall be guilty of a Class A1 misdemeanor.
>
> . . . .
>
> (d) Unless covered under some other provision of law providing greater punishment, a person who commits a felony at a time when the person knows the behavior is prohibited by a valid protective order as provided in subsection (a) of this section shall be guilty of a felony one class higher than the principal felony described in the charging document. This subsection shall not apply to a person who is charged with or convicted of a Class A or B1 felony or to a person charged under subsection (f) of this section.

N.C.G.S. § 50B-4.1 (2003).[1] For the penalty to be enhanced, the jury must make "a finding . . . that the person knowingly violated the protective order in the course of conduct constituting the underlying felony," N.C.G.S. § 50B-4.1(e), as was found by the jury in this case.

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1. The relevant portions of Chapter 50B have been amended since March 2004, the date the TRO was issued. Accordingly, for purposes of this appeal the provisions of Chapter 50B in effect in March 2004 are applicable.

Section 50B-1 defines the term "protective order" as "includ[ing] any order entered pursuant to this Chapter upon hearing by the court or consent of the parties." N.C.G.S. § 50B-1(c) (2003). The TRO entered pursuant to Rule 65 in this case fails to meet either element of this definition as it was not entered pursuant to Chapter 50B and was not entered after a hearing by the court or with consent of the parties.

The order entered by the trial court on 11 March 2004 states that it was entered under Rule 65(b) of the North Carolina Rules of Civil Procedure. The trial court made a conclusion of law stating that "the applicant's request for a temporary restraining order without notice to the Defendant should be allowed." The order entered by the trial court was, therefore, an *ex parte* TRO entered under Rule 65(b), not a valid domestic violence protective order, entered pursuant to Chapter 50B.

The State, relying on N.C.G.S. § 50B-2, argues that the TRO entered in this case is the "functional legal equivalent" of a valid domestic violence protective order. Section 50B-2(a) provides that "[a]ny person residing in this State may seek relief under this Chapter . . . by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself." N.C.G.S. § 50B-2(a) (2003). The State contends that the TRO was entered pursuant to Chapter 50B in that it was obtained by Carrie's filing a motion, alleging acts of domestic violence, in her action for divorce from bed and board, filed under Chapter 50 of the General Statutes. We disagree.

For whatever reason, Carrie did not seek relief under Chapter 50B. Rather she sought relief under Rule 65(a) and (b) of the Rules of Civil Procedure. While Carrie might well have filed a Chapter 50B motion in her existing action for divorce from bed and board, she did not file such a motion. The fact that the motion was made in the victim's existing action for divorce from bed and board under Chapter 50 and that the TRO contains language similar to that in N.C.G.S. § 50B-3(a) does not bring the TRO within the definition of a valid protective order as defined in N.C.G.S. § 50B-1. At the time the TRO was entered, N.C.G.S. § 50B-3(a) permitted the court to grant "any protective order to bring about a cessation of acts of domestic violence." Carrie's complaint did not allege any recent specific acts of domestic violence, asserting only that defendant had "physically assaulted and battered the plaintiff on numerous occasions." The

TRO entered pursuant to Rule 65(b) did not make a finding that the order was necessary to bring about the cessation of acts of domestic violence. Unquestionably, the intended purpose of the TRO was to accomplish the same objective as a valid protective order under N.C.G.S. § 50B-3(a). Nevertheless, the Legislature did not provide in N.C.G.S. § 50B-4.1(a) that knowing violation of a TRO or preliminary injunction entered under Rule 65 of the Rules of Civil Procedure would constitute a Class A1 misdemeanor. Nor did the Legislature provide that such a violation would raise the felony one class higher than the principal felony charged in the charging document. N.C.G.S. § 50B-4.1(d) (2003).

Defendant also asserts that Carrie could not have met the requirements of a Chapter 50B protective order and urges this argument in support of his position that the TRO was not a valid protective order for purposes of N.C.G.S. § 50B-4.1(d). However, this issue is not properly before this Court, and we will not engage in speculation and conjecture as to how the trial court might have ruled had Carrie's motion been made pursuant to Chapter 50B rather than Rule 65 of the Rules of Civil Procedure.

Moreover, even if the TRO had been entered under Chapter 50B, which we have held it was not, it fails to meet the second prong of the definition of a valid domestic violence protective order in that it was not entered "upon hearing by the court or consent of the parties." N.C.G.S. § 50B-1(c). The State contends, and the Court of Appeals' majority agreed, that because an *ex parte* proceeding was held before the TRO was issued, the hearing requirement under N.C.G.S. § 50B-1(c) was satisfied. Again we disagree.

The provisions of Chapter 50B demonstrate that in the domestic violence context, the Legislature contemplated two separate proceedings whereby two types of orders could be entered, a valid protective order and an *ex parte* order. N.C.G.S. §§ 50B-1(c), -2(c), -3(b) (2003). If exigent circumstances require immediate issuance, without notice to the other party, of an order to protect a party, the General Assembly has provided for an *ex parte* order. Under Chapter 50B when "[p]rior to the hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party . . . the court may enter such orders as it deems necessary to protect the aggrieved party . . . from such acts." N.C.G.S. § 50B-2(c). A trial court entering an *ex parte* order under this subsection is also required to hold a "hearing . . . within 10

days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later." *Id.* By definition a valid protective order must be upon hearing or by consent of the parties. N.C.G.S. § 50B-1(c). That the definition of a "protective order" permits entry of the order by consent also suggests that the enjoined party must have had notice with the opportunity to be heard. The record before this Court reveals that no such hearing was held by the trial court before it entered the TRO on 11 March 2004. A hearing was scheduled for 15 March 2004, but was continued, along with the TRO, until 24 March 2004. The order granting the TRO states that the "applicant's request for temporary restraining order comes on without notice to the Defendant." The circumstances surrounding its entry, as well as the language of the order itself, make clear that no hearing of the type contemplated by N.C.G.S. § 50B-1(c) was held in this case. Only a valid protective order entered under Chapter 50B can be used to enhance a defendant's sentence under N.C.G.S. § 50B-4.1(d).

The majority in the Court of Appeals concluded that the *ex parte* hearing before entry of the TRO satisfied the hearing required for a valid protective order. In discussing this issue the Court of Appeals' majority opined that "what the act seeks to accomplish is to protect individuals from domestic violence through, *inter alia*, the imposition of an enhanced sentencing to serve as a deterrent against those who perpetrate the violence." *State v. Byrd*, 185 N.C. App. 597, 603, 649 S.E.2d 444, 449 (2007). The majority then concluded that "the 'hearing' requirement found in N.C. Gen. Stat. § 50B-1(c) was satisfied when defendant received notice that a TRO had been entered against him." *Id.* at 604, 649 S.E.2d at 449 (footnote omitted). We acknowledge that the term "hearing" is often used generically to refer to any proceeding before a court. *See Black's Law Dictionary* 737 (8th ed. 2004) (defining a hearing as "[a] judicial session . . . held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying"). We cannot, however, agree that this generic definition comports with the statutory scheme in Chapter 50B, which, in our view, requires that a defendant be given notice and the opportunity to be heard before entry of a protective order.

The dissenting opinion in the Court of Appeals, after discussing the hearing requirement under Chapter 50B and the distinction between an *ex parte* proceeding and the hearing required for a valid protective order, notes that the TRO was employed to deprive defendant of a liberty interest by enhancing his sentence for this felony con-

viction. The dissenting opinion then concludes, "To increase Defendant's prison term on the basis of a TRO, without affording him the opportunity to be heard as to the allegations of domestic violence against him, would violate his right to due process." *Byrd*, 185 N.C. App. at 610, 649 S.E.2d at 452 (Wynn, J., dissenting). We agree with the dissenting opinion that merely putting defendant on notice that a TRO had been entered against him does not satisfy the hearing requirement necessary to permit a sentence enhancement under N.C.G.S. § 50B-4.1(d).

The State contends that no constitutional argument was made before the trial court or the Court of Appeals and that the dissenting judge raised an issue not properly before that court. Defense counsel's argument before the trial court of defendant's motion to dismiss was not recorded; hence, no transcript is available from which this Court can ascertain what defendant argued to the trial court. In his brief to this Court, defendant makes in essence the same argument asserted in his brief to the Court of Appeals. In his brief to the Court of Appeals, defendant first noted that all orders issued under Chapter 50B may be enforceable by contempt proceedings under N.C.G.S. § 50B-4(a). Then, although not using the words, "due process of law," defendant stated that:

> Ex parte orders are granted on one sided affidavits filed by one party. Such orders may be sufficiently reliable to be enforceable by contempt proceedings. Only an order issued after the opposing party has an opportunity to be heard on the merits of a claim is sufficiently reliable to justify enforcement by criminal penalties.

We agree. Indeed, the opportunity to be heard and to challenge the truth of the adversary's assertions is part and parcel of due process. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (citations omitted)). By limiting applicability of the enhancement provision to violation of protective orders issued after a hearing, our General Assembly recognized and gave deference to protection of a defendant's liberty interest through due process of law. We hold, therefore, that a TRO entered under Rule 65(b) of the Rules of Civil Procedure is not the "functional legal

equivalent" of a "protective order" entered pursuant to the procedure set forth in Chapter 50B.

[2] Having determined that the TRO was not a valid protective order under Chapter 50B, we conclude that the trial court erred in submitting the sentencing enhancement issue to the jury. We, therefore, do not address whether the instruction was proper.

For the foregoing reasons the decision of the Court of Appeals is reversed as to whether the TRO entered under Rule 65(b) satisfied the valid protective order requirement of N.C.G.S. § 50B-4.1(d). As to the instructional issue, discretionary review was improvidently allowed.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice NEWBY dissenting.

Defendant shot his wife in knowing violation of a court order directing him not to commit acts of violence against her. Chapter 50B of the General Statutes evinces a clear legislative intent to punish recurrent domestic violence by imposing enhanced sentences on criminals such as defendant who violate protective orders. Yet today, our Court subverts the General Assembly's intent and raises formalistic concerns, thereby removing from the trial court the authority under N.C.G.S. § 50B-4.1 to punish defendant's wanton disregard of a strict court order. Because I would read the General Statutes liberally in the interest of deterring domestic violence through enhanced sentences, I respectfully dissent.

The majority's holding that enhanced sentencing under section 50B-4.1 is not available in this case is based initially on the fact that the temporary restraining order ("TRO") aimed at preventing acts of violence by defendant against his wife and children was technically entered pursuant to Rule of Civil Procedure 65(b) and was not specifically designated as a Chapter 50B domestic violence protective order. I cannot agree with the majority that the intent underlying section 50B-4.1 would preclude enhanced sentencing based merely on the statutory section number with which the violated order was labeled.

I believe the *ex parte* TRO granted to the victim Carrie Byrd ("Carrie") on 11 March 2004 was a protective order entered pursuant to Chapter 50B. Section 50B-2(a) provides in pertinent part: "Any person residing in this State may seek *relief under this Chapter* . . . by filing *a motion* in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against [the movant] . . . ." N.C.G.S. § 50B-2(a) (2003)[2] (emphasis added). Therefore, one may obtain relief under Chapter 50B by making a motion to that end in a pending Chapter 50 action. Further, section 50B-2(a) imposes no limitation as to the statutory section under which such a motion must be filed. Carrie filed her Rule 65(b) motion in conjunction with a complaint under Chapter 50 of the General Statutes. Her Chapter 50 complaint alleged defendant had committed acts of violence against Carrie, stating defendant "physically assaulted and battered the Plaintiff on numerous occasions," causing her "humiliation and serious bodily injury" and leaving her "in fear for her own physical and mental wellbeing [sic] and that of her children." Carrie's affidavit in support of her motion for the TRO likewise asserted that defendant "repeatedly assaulted and battered the Plaintiff on many occasions" and referred specifically to defendant's assault and battery of Carrie on 11 March 2003, which in fact had previously been the basis of a Chapter 50B protective order. Carrie's Rule 65(b) motion thus satisfied the requirements of section 50B-2(a) for seeking relief pursuant to Chapter 50B.

Not all orders under Rule 65(b) are Chapter 50B protective orders. For example, a TRO sought and granted for the purpose of protecting personal property is appreciably different from a Chapter 50B protective order, which is designed "to bring about a cessation of acts of domestic violence" against spouses and children. *Id.* § 50B-3(a) (2003). When an applicant seeks protection from domestic violence as Carrie did, however, our courts should not afford less protection than the laws envision simply because the application explicitly invokes Rule 65(b) rather than Chapter 50B.

In addition to being entered upon a motion that satisfied section 50B-2(a), the TRO at issue here contains findings and directives that squarely implicate the purposes of a Chapter 50B protective order. In the 11 March 2004 TRO, the trial court found that "[t]he injury, loss or damage otherwise occurring to applicant is that Defendant may

2. Like the majority, I base my analysis of this appeal on the provisions of Chapter 50B that were in effect in March 2004. I note, however, that this analysis would apply equally to Chapter 50B as currently amended.

assault and batter Plaintiff as he has done in the recent past." The court went on to order defendant "not to go about, assault, threaten, molest, harass, interfere with, or bother the Plaintiff and the minor children in any way whatsoever." The TRO was entered upon a motion in a Chapter 50 action and was plainly intended "to bring about a cessation of acts of domestic violence." *Id.* It therefore qualifies as a Chapter 50B protective order.

It also bears noting that, because Carrie sought a TRO aimed at preventing defendant's acts of violence against her, the showings she had to make to obtain the Rule 65(b) TRO were indistinguishable from the showings required to obtain an *ex parte* protective order under section 50B-2(c). Rule 65(b) authorizes a TRO only if "it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." N.C.G.S. § 1A-1, Rule 65(b) (2007). Indeed, in granting the TRO, the trial court specifically found that Carrie's complaint, motion, and affidavit "adequately aver[red] grounds for the issuance of a temporary restraining order and that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." In terms almost identical to those of Rule 65(b), section 50B-2(c) authorizes the court to "enter such [*ex parte*] orders as it deems necessary to protect the aggrieved party or minor children" from domestic violence "if it clearly appears to the court from specific facts shown[] that there is a danger of acts of domestic violence against the aggrieved party or a minor child." *Id.* § 50B-2(c) (2003). Because the "immediate and irreparable injury, loss, or damage" from which Carrie sought protection under Rule 65(b) was the same domestic violence with which Chapter 50B is concerned, Carrie could have obtained an *ex parte* protective order under section 50B-2(c) based on the very same affidavit that resulted in the TRO.[3] At any rate, the TRO Carrie obtained was a domestic violence protective order entered upon a motion filed in accordance with section 50B-2(a), and

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3. A section 50B-2(c) *ex parte* protective order is simply a specialized form of TRO. This is further demonstrated by the fact that the effective duration of a TRO is roughly the same as that of an *ex parte* order under section 50B-2(c). A TRO "shall expire by its terms within such time after entry, not to exceed 10 days, as the judge fixes." N.C.G.S. § 1A-1, Rule 65(b). Similarly, "[u]pon the issuance of an ex parte order under [section 50B-2(c)], a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later." *Id.* § 50B-2(c).

it thus qualifies as a protective order entered pursuant to Chapter 50B. I believe this treatment of the TRO does more to vindicate the legislative intent of deterring domestic violence than does a rigid reading of Chapter 50B that focuses on the minutiae of the TRO's form rather than its function.

Because the TRO was a protective order entered pursuant to Chapter 50B, defendant's knowing and felonious violation of the TRO should result in an enhanced sentence under section 50B-4.1, which provides in pertinent part:

> (a) Except as otherwise provided by law, a person who knowingly violates a valid protective order entered pursuant to this Chapter . . . shall be guilty of a Class A1 misdemeanor.
>
> . . . .
>
> (d) Unless covered under some other provision of law providing greater punishment, a person who commits a felony at a time when the person knows the behavior is prohibited by a valid protective order as provided in subsection (a) of this section shall be guilty of a felony one class higher than the principal felony described in the charging document.

Id. § 50B-4.1 (2003).[4]

Besides unduly focusing on the fact that the TRO was labeled with Rule 65(b) and not Chapter 50B, the majority also concludes that the TRO did not meet another element of the statutory definition of "protective order." "As used in [Chapter 50B], the term 'protective order' includes any order entered pursuant to [Chapter 50B] *upon hearing by the court* or consent of the parties." *Id.* § 50B-1(c) (2003) (emphasis added). As explained above, I believe the TRO was entered pursuant to Chapter 50B. The majority also asserts that the TRO fails to satisfy the definition's requirement of being entered "upon hearing by the court or consent of the parties." It is undisputed that defendant did not consent to the TRO. I disagree, however, with the majority's conclusion that the TRO was not entered after a hearing.

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4. The General Assembly's preference in subsection 50B-4.1(d) for the greatest possible punishment under the law for felons who violate protective orders demonstrates the strength of the legislative intent to deter domestic violence. I believe the majority's approach is inconsistent with that intent.

The TRO begins with the following language: "This cause coming on to be *heard* before the undersigned District Court Judge . . . ." (emphasis added). In addition, the trial court granted the TRO only after "having considered the verified Complaint, Motion, and Affidavit herein filed by applicant." Although the hearing was *ex parte* in nature, the TRO was nonetheless granted after a hearing. The majority's assertion to the contrary is due to the fact that the hearing was not fully adversarial: there was no notice to defendant and no opportunity for defendant to be heard prior to entry of the TRO. Nowhere does the statutory definition of "protective order" require a full adversarial hearing, however. The order must simply be entered "upon hearing by the court or consent of the parties." *Id.* Thus, this element of the definition excludes neither *ex parte* protective orders under section 50B-2(c) nor Rule 65(b) orders entered upon a section 50B-2(a) motion.

The inclusion of *ex parte* hearings within the meaning of "upon hearing by the court" is especially plausible in light of the fact that section 50B-2 itself explicitly recognizes the existence of *ex parte* hearings. When a party seeks emergency relief *ex parte* as Carrie did here, an *ex parte* hearing before the trial court is available. *See* N.C.G.S. § 50B-2(c) ("If an aggrieved party acting pro se requests ex parte relief, the clerk of superior court shall schedule an ex parte hearing with the district court division of the General Court of Justice within 72 hours of the filing for said relief, or by the end of the next day on which the district court is in session in the county in which the action was filed, whichever shall first occur."). The statutory definition of "protective order" contained in the very same chapter does not exclude orders entered after such *ex parte* hearings, nor does it otherwise qualify the hearing requirement. *Id.* § 50B-1(c). I would therefore conclude that a section 50B-2(c) *ex parte* hearing satisfies the definition's hearing element, as does an *ex parte* hearing conducted under Rule 65(b) when the resulting TRO is a Chapter 50B protective order. As the Court of Appeals aptly stated, "To hold otherwise would allow one who had notice that an *ex parte* Chapter 50B order had been entered against him a ten-day window in which to continue acts of domestic violence against the party who sought the order, while avoiding the corresponding sentencing enhancement provided in Chapter 50B." *State v. Byrd*, 185 N.C. App. 597, 603, 649 S.E.2d 444, 449 (2007) (footnotes omitted). Like the Court of Appeals, I doubt the legislature intended this result.

After concluding that the TRO in this case does not satisfy the statutory definition of "protective order," the majority goes on to

address the constitutional issue of whether defendant's right to due process of law would be violated by the imposition of an enhanced sentence on the basis of an *ex parte* order. This approach is in conflict with the "longstanding principle" that "appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " *James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam)). Because the majority purports to decide this case on statutory grounds, it is unnecessary to consider the more momentous constitutional question.

I also have strong misgivings as to whether the constitutional issue is properly before this Court. The record does not reflect that defendant made any constitutional argument to the trial court, and defendant did not specifically raise his due process rights in his briefs to the Court of Appeals or to this Court. The majority reaches the due process issue based on defendant's contention that an *ex parte* order is not "sufficiently reliable to justify enforcement by criminal penalties." This assertion is found in the context of defendant's statutory argument that the TRO does not constitute a Chapter 50B protective order, and while this isolated statement may vaguely implicate due process, defendant cites no authority for the unstated proposition that imposing an enhanced sentence on the basis of an *ex parte* order would deprive defendant of a liberty interest without due process of law. "It is not the role of the appellate courts . . . to create an appeal for an appellant," *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam), so I hesitate to wade into constitutional waters when the issue has not been fully briefed and argued by the parties.

Because the majority reaches the due process issue, however, I am compelled to respond. In general, to deprive defendant of a liberty interest on the basis of court proceedings of which he had no prior notice, and in which he had no opportunity to appear in his own defense, could raise questions regarding defendant's right to due process of law. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865, 873 (1950) (citations omitted). This case is an exception to the general rule, how-ever. In its 11 March 2004 order granting Carrie's motion for a TRO, the trial court set 15 March 2004 as the date for a full adversarial hearing on the matter. Defendant was properly served with the TRO on 12 March 2004. On 15 March 2004, defendant's counsel moved for and was granted a continuance until 24 March 2004. Defendant was thus partly respon-

sible for, and fully aware of, the fact that the TRO remained in effect when, on 23 March 2004, he went to Carrie's place of work and flagrantly violated the court's order by shooting Carrie in the head.

By moving for a continuance, defendant postponed both his own opportunity to be heard and the trial court's opportunity to enter an order that would have removed any constitutional concerns over the enhancement of defendant's sentence. Further, had defendant not engaged just one day before the rescheduled hearing in the very conduct he had been ordered to avoid, he would have had the opportunity for a hearing to satisfy the trial court that he had not been committing acts of domestic violence. "Even a constitutional right may be waived 'by conduct inconsistent with a purpose to insist upon it.' " *State v. Langford*, 319 N.C. 332, 338, 354 S.E.2d 518, 522 (1987) (quoting *State v. Hutchins*, 303 N.C. 321, 342, 279 S.E.2d 788, 801 (1981)). Defendant should not now be heard to complain of his lack of opportunity to contest the allegations of domestic violence when he himself delayed the hearing by seeking a continuance and then conducted himself in a manner egregiously inconsistent with any claim that he was not violent toward Carrie. I would hold that defendant waived his right to contest the allegations of domestic violence and thus was not prejudiced by the enhancement of his sentence based on his violation of the *ex parte* TRO.

By requiring enhanced sentences under section 50B-4.1 of the General Statutes, the General Assembly demonstrated a clear intent to deter violations of court orders aimed at the prevention of domestic violence. Although the TRO in this case had just such an objective and resembled a section 50B-2(c) *ex parte* protective order in everything but name, the majority refuses to give effect to the intent of section 50B-4.1 because the applicant for domestic violence relief failed to explicitly invoke Chapter 50B in her motion. I do not believe the General Assembly intended Chapter 50B to be interpreted so inflexibly. Neither do I believe the legislature intended to allow a defendant who is subject to an *ex parte* protective order to use the time before the full adversarial hearing to knowingly violate the *ex parte* order without facing enhanced sentencing. In my view, Chapter 50B should be read broadly in favor of protecting endangered spouses and children, rather than narrowly in favor of defendants who commit crimes in knowing violation of court orders. I find no error in defendant's sentencing and therefore respectfully dissent.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
BILLY RAY BYRD	)	

No. 499A07

The opinion filed 1 May 2009 in this case is withdrawn and the revised opinion filed with this order substituted therefor. The sole change in the opinion is the deletion of the sentence at the end of the first paragraph read, "However, we hold that the error was not prejudicial."

By order of the Court in Conference this the 5th day of May 2009.

s/Parker, CJ
For the Court

STATE OF NORTH CAROLINA v. MICKEY VONRICE ROLLINS

No. 138PA08

(Filed 1 May 2009)

Evidence— marital privilege—spouse visiting prisoner

An inmate had no reasonable expectation of privacy in conversations with his wife in the public visiting areas of Department of Correction facilities, and the conversations were not protected by the marital communications privilege set forth in N.C.G.S. § 8-57(c).

Justice TIMMONS-GOODSON dissenting.

Chief Justice PARKER and Justice HUDSON join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 189 N.C. App. 248, 658 S.E.2d 43 (2008), reversing both an order entered 19 August 2005 by Judge William C. Griffin, Jr. and a judgment entered 6 October 2006 by Judge Jack W. Jenkins, in Superior Court, Martin County, and remanding the case for a new trial. Heard in the Supreme Court 25 February 2009.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for defendant-appellee.*

BRADY, Justice.

In this case we consider whether the marital communications privilege preserved in N.C.G.S. § 8-57(c) protects conversations between a husband and wife that occur in the public visiting areas of state correctional facilities. After extensive review of the history of the marital communications privilege in North Carolina and the rights granted to prisoners in correctional institutions, we conclude that the privilege does not extend to communications occurring in the public visiting areas of North Carolina Department of Correction (DOC) facilities because a reasonable expectation of privacy does not exist in such areas.

FACTUAL AND PROCEDURAL BACKGROUND

On 11 June 2002, eighty-eight-year-old Harriett "Brownie" Highsmith was found murdered in her Robersonville, North Carolina residence. Mickey Vonrice Rollins (defendant) was seen in the vicinity of Highsmith's residence on the afternoon of the murder[1] and was identified by law enforcement as a person of interest. In September 2002 defendant's wife, Tolvi Rollins, was interviewed by Special Agent Walter Brown of the State Bureau of Investigation (S.B.I.) about the murder. Mrs. Rollins indicated that she had no pertinent information concerning the crime.

Highsmith's murder remained unsolved and law enforcement received no new leads in the investigation until fall of 2003. At some time following the Highsmith murder defendant was incarcerated for an unrelated crime. In September 2003, Mrs. Rollins was arrested for felony witness intimidation for threats allegedly made to a witness involved with defendant's trial in the unrelated matter. S.B.I. Agent Brown was present at Mrs. Rollins's arrest and again asked if she had any information about the Highsmith murder. Mrs. Rollins gave Agent Brown no information at that time, but the next month she voluntarily contacted Robersonville Police Chief Darrell Knox. Mrs. Rollins told Chief Knox that in March 2003, defendant confessed to her that he had killed Highsmith. Mrs. Rollins told Chief Knox that her conscience had been bothering her "for some time" and that she had tried to contact him several times, but could never reach him. When Mrs. Rollins communicated this information to Chief Knox there was a reward being offered for information in the Highsmith case.

The next day, 14 October 2003, S.B.I. Agent Brown interviewed Mrs. Rollins. The details Mrs. Rollins provided concerning the murder were consistent with evidence found at the crime scene. Agent Brown asked Mrs. Rollins if she would wear a recording device and visit defendant in prison. Mrs. Rollins agreed to do so.

Over the next two months, Mrs. Rollins visited defendant on five occasions at three different correctional facilities. Each meeting took place in public visiting areas of the facilities. During each visit, defendant admitted to killing Highsmith and discussed details of the crime. On three of the visits Mrs. Rollins wore a recording device;

1. As a teenager, defendant lived across the street from Highsmith with his aunt. Defendant and Highsmith developed a friendship while defendant lived in the neighborhood. Highsmith took an interest in defendant's high school football career and would often give him gifts to encourage him before his high school football games.

however, the first recording was inaudible because of the loud noises surrounding the couple in the DOC visiting room. After each visit with defendant, Mrs. Rollins informed law enforcement as to the contents of her conversations with defendant. Consistent with standard law enforcement procedure, Mrs. Rollins received money to reimburse her for expenses she incurred during the course of her visits with defendant. She received a total of $840 from the S.B.I. and the Robersonville Police Department for various expenses.

Defendant was arrested for the murder of Highsmith on 5 December 2003. On 2 February 2004, a Martin County Grand Jury returned true bills of indictment charging defendant with murder, first-degree kidnapping, robbery with a dangerous weapon, and breaking or entering. On 13 September 2004 defendant filed a motion to suppress the statements he made to his wife regarding the Highsmith murder. The motion to suppress was denied at a 27 June 2005 hearing in Superior Court, Martin County.[2] A written order, consistent with the 27 June 2005 order, was entered on 19 August 2005.

Defendant pleaded guilty on 6 October 2006 in exchange for imposition of a sentence of life imprisonment without parole. With the plea, defendant reserved the right to appeal from the order denying his motion to suppress. The trial court, in accordance with the plea arrangement, sentenced defendant to life imprisonment without parole.

On 10 October 2006, defendant filed notice of appeal to the Court of Appeals. In an 18 March 2008 opinion, the Court of Appeals reversed the denial of defendant's motion to suppress, ruling that the marital communications privilege protected defendant's statements to his wife made in the public visiting areas of the DOC. The Court of Appeals remanded the case for a new trial. This Court allowed the State's petition for discretionary review on 26 August 2008.

ANALYSIS

This case requires us to examine the definition of a "confidential communication" under North Carolina law. Defendant argues that the conversations between his wife and him that occurred in the DOC facilities are protected as confidential communications under N.C.G.S. § 8-57(c). The State contends that these conversations lack the requisite expectation of privacy essential to a confidential com-

2. Defendant also filed a second motion to suppress relating to an issue that is not before this Court.

munication and thus, they are not protected. We conclude that the conversations between defendant and his wife in the public areas of DOC facilities do not qualify as confidential communications under section 8-57(c).[3]

History of the Marital Communications Privilege

Section 8-57 is a product of the continually evolving common law marital privileges that historically sought to promote credibility and protect the intimacy of the marital union. The traditional common law rule, which can be traced as far back as 1580, disqualified one spouse from testifying for or against the other spouse in a criminal action on the basis of incompetency[4]. As the Supreme Court of the United States explained in *Trammel v. United States*,

> [The rule] sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one."

445 U.S. 40, 44 (1980). This spousal incompetency rule, and its underlying justifications, survived well into the nineteenth century, although statutory modifications and exceptions were numerous. *See* James P. Nehf, Note, State v. Freeman*: Adverse Marital Testimony in North Carolina Criminal Actions—Can Spousal Testimony Be Compelled?*, 60 N.C. L. Rev. 874, 877 n.24 (1982) [hereinafter, *Adverse Marital Testimony*].[5] The exceptions to the rule made clarification of the privilege necessary, and in the mid-nineteenth century, the specific marital communications privilege emerged. *Id.* at 878. This priv-

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3. The trial court made no ruling whether the March 2003 conversation between defendant and Mrs. Rollins was protected by the marital privilege, and we decline to address that issue, as it is not before the Court.

4. The first written recognition of a marital privilege is found in the 1580 case of *Bent v. Allot*, in which a husband was allowed to suppress adverse testimony by his wife. *Bent v. Allot*, (1579-80) 21 Eng. Rep. 50 (Ch). Nearly fifty years later, Lord Coke wrote in his legal commentaries: "[I]t hath been resolved by the justices, that a wife cannot be produced either against or for her husband . . . and it might be a cause of implacable discord and dissention between the husband and the wife" 1 Edowardo Coke, *A Commentary upon Littleton* ch. 1, § 1, subsec. 6.b (Francis Hargrave & Charles Butler eds., Philadelphia, Small 19th ed. 1853) (1628) (footnote omitted).

5. For example, the rule preventing spouses from testifying on behalf of one another was abandoned in the early 20th century. 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 59 (2d. rev. ed. 1982); *see also State v. Rice*, 222 N.C. 634, 24 S.E.2d 483 (1943).

ilege is distinct from the spousal incompetency rule of the common law, in that it protects confidential communications between spouses made during the marriage.[6] Unlike the spousal incompetency rule, which seeks to promote credible testimony, the marital communications privilege is premised upon the belief that the marital union is sacred and that its intimacy and confidences deserves legal protection. *See Hicks v. Hicks*, 271 N.C. 204, 205, 155 S.E.2d 799, 800 (1967) (" '[W]hatever is known by reason of that intimacy [marriage] should be regarded as knowledge confidentially acquired, and that neither [husband nor wife] should be allowed to divulge it to the danger or disgrace of the other.' " (quoting *State v. Jolly*, 20 N.C. 86, 89, 20 N.C. 108, 112 (1838) (alterations in the original))).

In 1868 the North Carolina General Assembly preserved both the spousal incompetency rule and the marital communications privilege of the common law in our statutes. *See* Victor C. Barringer, et al., *The Code of Civil Procedure of North Carolina* tit. XIV, ch. VI, § 341 (Raleigh, Paige 1868) (discussing marital privilege as related to both civil and criminal proceedings). However, the *Freeman* decision in 1981 modified the common law spousal incompetency rule, prompting the legislature's enactment of the current section 8-57. *See State v. Holmes*, 330 N.C. 826, 828-35, 412 S.E.2d 660, 661-64 (1992) (detailing the history of the enactment of and legislative changes to section 8-57). The first two subsections of the current section 8-57 reflect the *Freeman* holding, establishing that one spouse is *competent*, but not *compellable*, to testify against another in a criminal proceeding, except in a few specific situations. N.C.G.S. § 8- 57(a),(b) (2007). The codification of the marital communications privilege remains intact and is preserved in subsection 8-57(c).

Subsection 8-57(c) states: "No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage." This Court has ruled that the privilege is held by both spouses—meaning that either spouse can prevent the other from testifying to a confidential communication. *Holmes*, 330 N.C. at 834, 412 S.E.2d at 665 (stating that subsection 8-57(c) protects the defendant's privilege "to keep the other spouse *in any event* from disclosing any confidential communication made by one to the other during their marriage").

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6. We recognize that these two privileges have often been confused and commingled in our jurisprudence. *See State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981); *Adverse Marital Testimony* at 878. Despite the past confusion, we emphasize that the two privileges are separate protections, with unique justifications.

Confidential Communication

To assess whether the conversations between defendant and his wife were in fact protected by subsection 8-57(c), our analysis turns on whether there was a "confidential communication" between defendant and his wife in the DOC facilities. When defining a confidential communication in the context of the marital communications privilege, this Court has asked "whether the communication . . . was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship." *State v. Freeman*, 302 N.C. 591, 598, 276 S.E.2d 450, 454 (1981) (citations omitted); *see also Holmes*, 330 N.C. at 828, 412 S.E.2d at 661 (stating a confidential communication is "information privately disclosed between a husband and wife in the confidence of the marital relationship" (citing *Trammel*, 445 U.S. 40)).

Other considerations have also influenced our previous determinations of whether certain communications qualify as "confidential." The circumstances in which the communication takes place, including the physical location and presence of other individuals, have been relevant when answering the question: "Has the veil of confidence been removed . . . ?" *Hicks*, 271 N.C. at 206, 155 S.E.2d at 801. Defendant argues that the setting and physical circumstances of the communication are irrelevant in analyzing whether the privilege applies, but we find that argument unsupported by precedent.

For instance, in *Freeman*, this Court ruled that a defendant's incriminating statement to his wife in a public parking lot while in the presence of the wife's brother was not a confidential communication. 302 N.C. at 598, 276 S.E.2d at 454-55. On the other hand, this Court determined a marital communication to be confidential in *Holmes* when the defendant ordered two men out of his home before making a statement to his wife that he was going to kill one of them. 330 N.C. at 835, 412 S.E.2d at 665. Likewise, in *Hicks*, communications between a husband and wife were confidential when made in the basement of the couple's home, even though their eight-year-old daughter was " 'singing or playing in the area.' " 271 N.C. at 205-07, 155 S.E.2d at 800-02. This Court in *Hicks* noted that the factual circumstances surrounding the wife's utterances stamped them as confidential. *Id.* at 207, 155 S.E.2d at 802. These cases illustrate that actual physical privacy, as well as a desire for and ex-

pectation of confidentiality, are important in establishing a confidential communication.[7]

Legal scholars have also noted that physical privacy is germane to the existence of a confidential communication:

> The situs of the communication is a relevant factor in determining whether there was the requisite confidentiality at the time of the communication. It is possible to have a confidential conversation in a public place, but the public nature of the situs makes it more difficult to find the requisite privacy. The layperson must have a reasonable expectation of confidentiality.

Edward J. Imwinkelried, *The New Wigmore: A Treatise on Evidence* § 6.8.1, at 674-75 (Richard D. Friedman ed. 2002) (footnotes omitted); *see also* Robert P. Mosteller et al., *North Carolina Evidentiary Foundations* § 8-2, at 8-6 (2d ed. 2004) (stating that a confidential communication requires "(1) physical privacy, and (2) an intent on the holder's part to maintain secrecy").

Essential to the question of determining whether the "veil of confidentially [has] been removed" from a marital communication are the physical surroundings and intent of the husband and wife in making the communication. For purposes of a confidential marital communication under subsection 8-57(c), there must be a reasonable expectation of privacy on the part of the holder and the intent that the communication be kept secret. Relevant factors in making this determination necessarily include the physical location where the communication is made and whether there are other individuals present at the time of the communication.[8]

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7. The intention of the person disclosing information that the communication remain a secret is consistent with privileges in other confidential relationships outside of marriage. *See, e.g.*, *State v. McIntosh*, 336 N.C. 517, 523, 444 S.E.2d 438, 442 (1994) ("[T]he justification for granting the [attorney-client] privilege ceases when the client does not appear to have been desirous of secrecy." (citations and internal quotation marks omitted)).

8. This analysis for determining the existence of a confidential communication is in line with other jurisdictions that have specifically defined the term in the context of a marital communication. *See, e.g.*, *People v. Von Villas*, 11 Cal. App. 4th 175, 220, 15 Cal. Rptr. 2d 112, 138 (Cal. Ct. App. 1992) (holding that to make a marital communication in confidence, "one must intend nondisclosure and have a reasonable expectation of privacy" (citation and internal quotation marks omitted)), *cert. denied*, 510 U.S. 838 (1993).

Reasonable Expectation of Privacy in Public Visiting Areas of Department of Correction Facilities

The State contends that defendant had no reasonable expectation of privacy in any conversation that took place in a public visiting area of DOC facility, and therefore, the communications between defendant and Mrs. Rollins were not protected. We agree.

There is no question that incarcerated persons have a diminished expectation of privacy. "Given the realities of institutional confinement, any reasonable expectation of privacy a detainee retains necessarily is of diminished scope." *State v. Wiley*, 355 N.C. 592, 603, 565 S.E.2d 22, 32 (2002), *cert. denied*, 537 U.S. 1117 (2003); *see also Bell v. Wolfish*, 441 U.S. 520, 557 (1979). For purposes of the Fourth Amendment to the United States Constitution, the Supreme Court of the United States has stated that the traditional right to privacy is "fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." *Hudson v. Palmer*, 468 U.S. 517, 527-28 (1984). Prisoners in confinement know, or should know, that their statements may be monitored and even recorded. *See United States v. Paul*, 614 F.2d 115, 116 (6th Cir.) ("[J]ail officials are free to intercept conversations between a prisoner and a visitor."), *cert. denied*, 446 U.S. 941 (1980); *see also Lanza v. New York*, 370 U.S. 139, 143 (1962) ("[T]o say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure . . . is at best a novel argument. . . . In prison, official surveillance has traditionally been the order of the day." (footnotes omitted)).

While prisoners have a diminished expectation of privacy during confinement, this is not to say that their communications can never be private and completely confidential. Certain relationships, such as those between an attorney and client, are "endowed with particularized confidentiality" and "must continue to receive unceasing protection" even in prisons. *Lanza*, 370 U.S. at 143-44. For this reason, prisoners are given great latitude when speaking with their attorneys. However, even in these situations, special actions must be taken to ensure the confidentiality of these communications. For instance, letters between a prisoner and counsel must be identified as legal correspondence in order to receive protection. *See Wolff v. McDonnell*, 418 U.S. 539, 576 (1974) (holding that a state may "require any [attorney-client] communications to be specially marked as originating from an attorney . . . if they are to receive special treatment").

As this Court has stated, the union of husband and wife is a "sacred institution" and its preservation and protection are "necessary to every well-ordered civilized society." *Whitford v. N. State Life Ins. Co.*, 163 N.C. 179, 182, 163 N.C. 223, 226, 79 S.E. 501, 502 (1913). However, as with other confidential relationships, the protection afforded marital communications is not absolute and is inapplicable when no reasonable expectation of privacy exists. In the instant case, any reasonable expectation of privacy in the marital communications evaporated because each conversation took place in the public visiting areas of DOC facilities. As *McCormick on Evidence* states:

> The rationale that the spouses may ordinarily take effective measures to communicate confidentially tends to break down where one or both are incarcerated. However, communications in the jailhouse are frequently held not privileged, often on the theory that no confidentiality was or could have been expected.

1 Kenneth S. Broun et al., *McCormick on Evidence* § 82, at 377 (6th ed. 2006) (footnote omitted). This is not to say that special precautions cannot be taken in correctional institutions to protect the privacy of conversations between a husband and wife, just as precautions can be taken between prisoners and their attorneys.[9] However, communications occurring during ordinary DOC visits, in public visiting areas, do not invoke the protection subsection 8-57(c) affords to confidential communications because there is no reasonable expectation of privacy in such communications.

The record clearly shows that the conversations between defendant and his wife occurred during routine DOC visits and thereby lacked any reasonable expectation of privacy. During each visit defendant and his wife were in public visiting areas of DOC correctional facilities, in the presence of other people. Mrs. Rollins testified that at times other people were in close proximity and even spoke to defendant and her during the course of their conversations. Furthermore, it can be inferred from the record that defendant doubted the privacy of the couple's conversations. On one occa-

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9. For example, we note two California cases in which confidential marital communications between husband and wife were also statutorily protected. In one, a conversation between a detainee-defendant and his wife that occurred in a police detective's office was protected because the couple were lulled into believing that the conversation was covered by the cloak of confidentiality. *North v. Superior Court*, 8 Cal. 3d 301, 311, 502 P.2d 1305, 1311 (1972) (en banc). However, the same protection was not extended to marital conversations which occurred in an "ordinary jailhouse visiting area" because there was "no justifiable expectation of privacy." *Von Villas*, 11 Cal. App. 4th at 220-21, 15 Cal. Rptr.2d at 139.

sion defendant physically inspected Mrs. Rollins to check for the presence of a recording device. Mrs. Rollins also told S.B.I. agents that defendant refrained from telling her particular details of the Highsmith murder during one meeting, but said he would tell her "something important" later, after he was released from prison and the two had "pillow talk."[10]

CONCLUSION

As defendant had no reasonable expectation of privacy in the conversations between his wife and him in the public visiting areas of the DOC facilities, the conversations were not confidential communications under subsection 8-57(c) and therefore, are not protected. We reverse the decision of the Court of Appeals as to the issue before us on appeal and hold that the trial court's denial of defendant's motion to suppress under subsection 8-57(c) was appropriate. This case is remanded to the Court of Appeals for consideration of defendant's assignments of error not previously addressed by that court.

REVERSED AND REMANDED.

Justice TIMMONS-GOODSON dissenting.

Because the majority departs from our established case law and holds that the confidential marital communications privilege is defeated simply because the conversation occurred in the visiting area of a prison, I respectfully dissent.

While I agree with the majority that the physical environment in which a marital conversation takes place may be *one* factor in determining whether a particular disclosure is confidential, it is neither the sole nor the determinative factor. The circumstances in the present case indicate that the communication at issue was not overheard by any third party and was clearly induced by the marital relationship. I therefore agree with the Court of Appeals that defendant's communications to his wife are protected by marital privilege. In its analysis, the majority overemphasizes the nature of the general prison setting, instead of focusing on the actual facts presented by this case. In so doing, the majority unnecessarily blurs the line between confidential communications and the "reasonable expectation of privacy" doctrine prevalent in the Fourth Amendment arena.

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10. Mrs. Rollins explained to S.B.I. agents that "pillow talk" was the time the couple shared in their bed before going to sleep when they would talk about "everything."

In determining whether a particular statement is privileged as a marital communication, "the question is whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship." *State v. Freeman*, 302 N.C. 591, 598, 276 S.E.2d 450, 454 (1981) (citations omitted); *see also State v. Holmes*, 330 N.C. 826, 828, 412 S.E.2d 660, 661 (1992) (defining confidential marital communications as "information privately disclosed between a husband and wife in the confidence of the marital relationship" (citations omitted)). There is no question in the present case that defendant's statements to his wife were induced and prompted by the marital relationship. Tolvi Rollins, defendant's wife, testified she married defendant in 2001. Mrs. Rollins verified that when she visited defendant at the Franklin Correctional Center, she was affectionate, kissed defendant, and brought him food. Mrs. Rollins also agreed that defendant trusted her and that she encouraged him to confide in her and promised to return and visit regularly. When Mrs. Rollins visited defendant at the Dan River facility, she was again affectionate, brought defendant a pecan pie, told defendant she "would be there when he got out of prison" and promised she "would never tell anybody about what [defendant] confided in [her] about the death of Mrs. Highsmith." While visiting defendant at the Carteret Correctional Center, Mrs. Rollins again "loved on him" and assured defendant she would "be there for him" and that they would have children together and all "move away." Mrs. Rollins explicitly agreed that defendant's statements to her were confidential. There is no evidence in the present case to indicate that defendant's statements to his wife were prompted by anything other than the affection and confidence of the marital relationship between them.

The only question then becomes whether the communications between defendant and his wife occurred in a confidential and private manner. *See Holmes*, 330 N.C. at 828, 412 S.E.2d at 661. Such determination necessarily encompasses *some* consideration of the physical environment at the time of the disclosure, but this Court has never held that actual physical privacy is necessary for a confidential communication, the majority's assertions to the contrary notwithstanding. Rather, this Court has repeatedly emphasized (1) the intent of the parties and (2) whether the communication was made in the presence of third parties capable of both hearing and comprehending the conversation. For example, in *Hicks v. Hicks*, 271 N.C. 204, 207, 155 S.E.2d 799, 801-02 (1967), the Court held that the presence of the married couple's eight-year-old daughter, who was " 'singing or play-

ing in the area' " at the time of the marital communications, did not remove the marital veil of confidence, because the parties intended their conversations to be private, and because the child was not competent "to comprehend the conversation[s]." The Court did not mention the situs of the marital communications—the basement of the couple's home—in its analysis. *Id.* Likewise, in *Holmes*, the Court focused on the fact that the "defendant's statements [were] made only in the presence of his wife [and] were induced by the confidence of the marital relationship." 330 N.C. at 835, 412 S.E.2d at 665 (citing *Hicks*). That the statements occurred in the home merited no discussion by the Court in *Holmes*. *See id*; *see also State v. Freeman*, 197 N.C. 376, 378-79, 148 S.E. 450, 451 (1929) (holding that remarks made by the defendant and his wife to each other in the presence of police officers were not confidential communications). Thus, I disagree with the majority's emphasis upon the public versus private nature of the physical locale in which the communication occurs.

Here, the evidence shows that, although defendant and his wife met in public visiting areas of the various facilities, they took steps to ensure the confidential nature of their communications, and their communications did not occur in the immediate presence of any third party who overheard or comprehended them. Mrs. Rollins repeatedly and explicitly testified that defendant's statements were made to her in confidence, that nobody else was listening, that no one else could hear them, and that "they were done exclusively so that only [she] and [defendant] could hear the conversation." Thus, all of the evidence shows that defendant and his wife intended to keep their conversations private and, indeed, as noted by the Court of Appeals, succeeded in keeping their conversations private.

The majority states that "the physical surroundings and intent of the husband and wife in making the communication" are "essential to the question of determining whether the 'veil of confidentiality has been removed from a marital communication.' " Instead of analyzing the intent of defendant and his wife and their physical surroundings, however, the majority inexplicably shifts its focus to require "a reasonable expectation of privacy on the part of the holder" in order to assert the privilege. However, this "reasonable expectation of privacy" is a Fourth Amendment concept that need not be applied here and serves only to muddy the already murky waters of our law of confidential communications. *See Holmes*, 330 N.C. at 833, 412 S.E.2d at 664 (noting that the cases and statutes addressing confidential marital communications "have not been models of clarity"). The majority

spends much of its time citing irrelevant Fourth Amendment cases addressing the reasonable expectation of privacy in prisons, ultimately determining that, because defendant could have *no* reasonable expectation of privacy in *any* conversation that took place in the public visiting area of a prison, the communication was not a confidential one entitled to protection. As I have pointed out, however, the evidence in this case shows that the conversations between defendant and his wife were, in fact, private, albeit occurring in a public place. That the public place was a prison should have no bearing on the determination of whether the communication was in fact confidential, except to the extent that actual circumstances show the prison setting prevented confidential communications.

While the majority points to evidence in the record indicating that other persons were present in the prison visiting area, the specific testimony by defendant's wife irrefutably shows that she and defendant intended and succeeded in keeping their conversations private. Under the majority's analysis, even a whispered conversation between husband and wife occurring in a DOC public visiting area would not be considered confidential.

As the actual circumstances here indicate that the communications at issue were both induced by the marital relationship and spoken in a confidential manner, and were neither overheard nor comprehended by any third party, the communications are privileged and entitled to protection as confidential marital communications. I would, therefore, affirm the Court of Appeals.

Chief Justice PARKER and Justice HUDSON join in this dissenting opinion.

IN THE MATTER OF W.R.

No. 560PA06

(Filed 1 May 2009)

Confessions and Incriminating Statements; Juveniles— juvenile delinquency—custody—participation of resource officer during questioning

The trial court did not commit plain error in a juvenile delinquency case based on the unlawful and willful possession of a weapon on school property in violation of N.C.G.S. § 14-269.2(d)

by admitting, without objection, evidence of respondent juvenile's statements to school officials that he possessed a knife on school property even though the juvenile contends he was in custody and subject to custodial interrogation because: (1) *Miranda* is limited to custodial interrogations, and statements made to private individuals unconnected with law enforcement are admissible so long as they were made freely and voluntarily; (2) even if the person occupies some official capacity or position of authority, *Miranda* does not apply to questioning by such persons unless the person is acting as an agent of law enforcement; (3) inasmuch as no motion to suppress was made, no evidence was presented and no findings were made as to either the school resource officer's actual participation in the questioning of the juvenile or the custodial or noncustodial nature of the interrogation, nor were any findings made as to whether the statements were freely and voluntarily made; (4) based on the limited record, our Supreme Court could not conclude that the presence and participation of the school resource officer at the request of school administrators conducting the investigation rendered the questioning of respondent juvenile a custodial interrogation requiring *Miranda* warnings and the protections of N.C.G.S. § 7B-2101; and (5) no conflicting evidence having been presented, the trial court, sitting as judge and jury, was not required to make findings of fact and conclusions of law as to the voluntariness of the statement.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 179 N.C. App. 642, 634 S.E.2d 923 (2006), vacating both an adjudication order entered on 21 January 2005 by Judge Lillian B. Jordan and a juvenile dispositional order entered on 4 March 2005 by Judge Wendy M. Enochs, both in District Court, Guilford County. Heard in the Supreme Court 12 February 2008.

Roy Cooper, *Attorney General*, *by William P. Hart*, *Senior Deputy Attorney General*, *for the State-appellant.*

Michelle FormyDuval Lynch for juvenile-appellee.

PARKER, Chief Justice.

The issue before this Court is whether the Court of Appeals erred in finding plain error in the trial court's admission of evidence of defendant's statements to school officials. For the reasons stated herein, we reverse the decision of the Court of Appeals.

The record shows that on 19 August 2004, Jesse Pratt, the principal of Allen Middle School in Guilford County, received a call from a concerned parent. Based on the information gathered in that call, Mr. Pratt and Dr. Judy Flake, the assistant principal, went to W.R.'s classroom and escorted W.R., a fourteen-year-old seventh grader, to Dr. Flake's office. While in the office, Mr. Pratt and Dr. Flake asked W.R. several times whether he had anything in his possession at school then or on the previous day that he should not have had. W.R. repeatedly answered that he had not.

At some point the school resource officer, Officer E.W. Warren, joined Mr. Pratt and Dr. Flake in their questioning of W.R. After about fifteen minutes of questioning, W.R. was asked to empty his pockets, and Officer Warren did a basic search for weapons. W.R.'s locker was also searched. The searches revealed nothing.

Mr. Pratt, Dr. Flake, and Officer Warren left the office at various times during the questioning. During these times W.R. was never left unsupervised, and Officer Warren remained in the room during most of the questioning. After talking with other students, Dr. Flake informed W.R. that other students had said that W.R. possessed a knife at school the day before. Dr. Flake also told W.R. that "this is very serious. If you did you need to tell us the truth." At this point, which was approximately thirty minutes after the questioning began, upon being told of the other students' allegations, W.R. admitted possessing a knife the day before at school and on the bus.

While this investigation was taking place, a search of W.R.'s records revealed that W.R. did not live in that school district, so the decision was made not to return W.R. to his class but to have his parents pick him up and take him to his assigned school. W.R. was kept in Dr. Flake's office until his mother arrived about an hour and a half after W.R. had been removed from class.

On 7 October 2004, Officer Warren filed a petition in District Court, Guilford County alleging W.R. was a delinquent juvenile as defined by N.C.G.S. § 7B-1501(7) in that he unlawfully and willfully possessed a weapon on school property in violation of N.C.G.S. § 14-269.2(d). On 21 January 2005, the trial court adjudicated W.R. delinquent and subsequently entered a dispositional order placing W.R. on Level One probation for six months. W.R. appealed, and on 3 October 2006, the Court of Appeals issued a unanimous opinion vacating the adjudication of delinquency and subsequent dispositional order. *In re W.R.*, 179 N.C. App. 642, 634 S.E.2d 923 (2006). The

State filed an application for temporary stay, a petition for writ of supersedeas, and a petition for discretionary review, all of which were allowed by this Court.

Before the Court of Appeals, respondent, contending that he was in custody during the interrogation, argued that the trial court committed plain error by admitting evidence of statements respondent made as a result of the interrogation without making a finding that he waived his rights, in violation of N.C.G.S. § 7B-2101 and the Fifth Amendment to the United States Constitution. The Court of Appeals agreed, holding that respondent was in custody and that the trial court committed plain error in admitting respondent's incriminatory statements. *Id.* at 646, 634 S.E.2d at 926-27. Before this Court, the State contends that the Court of Appeals erred in its determination that respondent was in custody and subjected to custodial interrogation when he admitted to possessing the knife on school property.

At the outset we note that respondent did not make a motion to suppress or object when his admissions came into evidence and did not raise these statutory and constitutional issues at trial; consequently, the trial court did not have the opportunity to consider or rule on these issues. *See*, N.C. R. App. P. 10(b)(1). Thus, respondent failed to preserve these issues for appellate review. *See*, *e.g.*, *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000) (holding that defendant failed to raise a constitutional issue at trial and therefore, waived appellate review of that issue), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). Under the plain error doctrine, errors or defects affecting a fundamental right may be addressed even though they were not previously brought to the attention of the court. N.C. R. App. P. 10(c)(4); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "However, plain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence." *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230-31 (2000) (citing *State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

As the Court of Appeals noted, *Miranda* warnings and the protections of N.C.G.S. § 7B-2101 apply only to custodial interrogations. *In re W.R.*, 179 N.C. App. at 645, 634 S.E.2d at 926. "Custodial interrogation" is defined as " 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any *significant* way.' " *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 826 (2001) (quoting

Miranda v. Arizona, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966) (emphasis added)). The test for determining if a person is in custody is whether, considering all the circumstances, a reasonable person would not have thought that he was free to leave because he had been formally arrested or had had his freedom of movement restrained to the degree associated with a formal arrest. *Id.* at 338-40, 543 S.E.2d at 827-28. Absent indicia of formal arrest, that police have identified the person interviewed as a suspect and that the interview was designed to produce incriminating responses from the person are not relevant in assessing whether that person was in custody for *Miranda* purposes. *Stansbury v. California*, 511 U.S. 318, 324, 128 L. Ed. 2d 293, 300 (1994).

Because *Miranda* is limited to custodial interrogations, "statements made to private individuals unconnected with law enforcement are admissible so long as they were made freely and voluntarily." *State v. Etheridge*, 319 N.C. 34, 43, 352 S.E.2d 673, 679 (1987) (citations omitted). Even if the person occupies some official capacity or position of authority, *Miranda* does not apply to questioning by such persons unless the person is acting as an agent of law enforcement. *Id.* at 43-44, 352 S.E.2d at 679 (citations omitted).

In the present case, the Court of Appeals placed substantial emphasis on the role of the school resource officer. *In re W.R.*, 179 N.C. App. at 643, 646, 634 S.E.2d at 925, 926-27. However, no motion to suppress respondent's statement was made and no objection was raised at the time the inculpatory statement came into evidence. In fact defense counsel first elicited the statement on cross-examination of the State's first witness, Jesse Pratt, the school principal. Inasmuch as no motion to suppress was made, no evidence was presented and no findings were made as to either the school resource officer's actual participation in the questioning of W.R. or the custodial or noncustodial nature of the interrogation. Nor were any findings made as to whether the statements were freely and voluntarily made.

After careful review, we are not prepared based on the limited record before this Court to conclude that the presence and participation of the school resource officer at the request of school administrators conducting the investigation rendered the questioning of respondent juvenile a "custodial interrogation," requiring *Miranda* warnings and the protections of N.C.G.S. § 7B-2101.

No conflicting evidence having been presented, the trial court, sitting as judge and jury, was not required to make findings of fact

and conclusions of law as to the voluntariness of the statement. *See State v. Keith*, 266 N.C. 263, 266-67, 145 S.E.2d 841, 843-44 (1966) (holding that when on *voir dire* the evidence is not in conflict as to the voluntariness of a confession, the trial judge is not required to make findings of fact before ruling on defendant's objection to introduction of the confession). Under these circumstances, the trial court did not err in admitting, without objection, respondent's statement admitting that he possessed the knife on school property.

For the foregoing reasons, the decision of the Court of Appeals is reversed.

REVERSED.

ESTATE OF RANDY BENNETT FREEMAN, EMPLOYEE, DEBORAH LYNN FREEMAN, FIDUCIARY v. J.L. ROTHROCK, INC., EMPLOYER, NORTH AMERICAN SPECIALTY, CARRIER, AEQUICAP CLAIMS SERVICES, INC. (FORMERLY CLAIMS CONTROL, INC.), ADMINISTRATOR

No. 163A08

(Filed 1 May 2009)

Workers' Compensation— employee misrepresentation at hiring—adoption of Larson test—judicial legislation

The decision of the Court of Appeals in this case that an employee was barred from receiving workers' compensation benefits for his injury because of misrepresentations at the time of his hiring is reversed for the reason stated in the dissenting opinion that the adoption of the Larson test by the majority opinion in the Court of Appeals constitutes impermissible judicial legislation.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 189 N.C. App. 31, 657 S.E.2d 389 (2008), reversing an opinion and award filed 9 November 2006 by the North Carolina Industrial Commission. On 11 June 2008, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court 16 December 2008.

Jay Gervasi, P.A., by Jay A. Gervasi, Jr., for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer and Ginny P. Lanier, for defendant-appellees.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion, and the case is remanded to the Court of Appeals for consideration of the remaining assignments of error. Discretionary review was improvidently allowed as to the additional issues.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

JANELL WYLMA McMICKLE BRYANT, Employee v. TAYLOR KING FURNITURE, Employer, WAUSAU INSURANCE COMPANIES, Carrier

No. 167PA08

(Filed 1 May 2009)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 189 N.C. App. 530, 659 S.E.2d 489 (2008), affirming an opinion and award filed on 27 April 2007 by the North Carolina Industrial Commission. Heard in the Supreme Court 30 March 2009.

Randy D. Duncan for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Allen C. Smith and Jennifer L. Gauger, for defendant-appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. WESLEY DAVID BOLLINGER

No. 449A08

(Filed 1 May 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 192 N.C. App. ——, 665 S.E.2d 136 (2008), finding no prejudicial error at a trial resulting in a judgment entered on 21 February 2007 by Judge Christopher M. Collier in Superior Court, Cabarrus County. Heard in the Supreme Court 30 March 2009.

Roy Cooper, Attorney General, by Charles E. Reece, Assistant Attorney General, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

PER CURIAM.

AFFIRMED.

SHEPARD v. BONITA VISTA PROPS., L.P.

[363 N.C. 252 (2009)]

TAMITHA SHEPARD, BEATRICE PERRY, WILLIAM GMOSER, AND DEBRA ROSSETER
v. BONITA VISTA PROPERTIES, L.P.; VICKIE L. SAFELY-SMITH, AS GENERAL PARTNER OF BONITA VISTA PROPERTIES, L.P.; VICKIE L. SAFELY-SMITH, TRUSTEE OF FVS TRUST, GENERAL PARTNER OF BONITA VISTA PROPERTIES, L.P.; AND VICKIE L. SAFELY-SMITH, INDIVIDUALLY

No. 404A08

(Filed 1 May 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 191 N.C. App. ––, 664 S.E.2d 388 (2008), affirming in part and remanding in part a judgment entered on 5 April 2007 by Judge William C. McIlwain in District Court, Scotland County. Heard in the Supreme Court 24 February 2009.

Kurtz and Blum, PLLC, by Timothy E. Wipperman, for plaintiff-appellees.

Van Camp, Meacham & Newman, PLLC, by Evelyn M. Savage, for defendant-appellants.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. AMY REBECCA McARTHUR

No. 363PA08

(Filed 1 May 2009)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 191 N.C. App. ——, 662 S.E.2d 579 (2008), finding no prejudicial error at a trial resulting in a judgment entered 6 February 2007 by Judge Lindsay R. Davis, Jr. in Superior Court, Randolph County, following a jury verdict finding defendant guilty of voluntary manslaughter. Heard in the Supreme Court 1 April 2009.

Roy Cooper, Attorney General, by Thomas J. Ziko, Senior Deputy Attorney General, for the State.

Mark Montgomery for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE A.S.

[363 N.C. 254 (2009)]

IN THE MATTER OF A.S.

No. 310A08

(Filed 1 May 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 190 N.C. App. ——, 661 S.E.2d 313 (2008), affirming in part and vacating and remanding in part an order entered 24 August 2007 by Judge J. Stanley Carmical in District Court, Robeson County. Heard in the Supreme Court 30 March 2009.

No brief filed for petitioner Robeson County Department of Social Services.

Pamela Newell Williams, GAL Appellate Counsel, for appellee Guardian ad Litem.

Annick Lenoir-Peek, Assistant Appellate Defender, for respondent-appellant mother.

PER CURIAM.

AFFIRMED.

HENSLEY v. NATIONAL FREIGHT TRANSP., INC.

[363 N.C. 255 (2009)]

DEBRA SIZEMORE HENSLEY, ADMINISTRATRIX OF THE ESTATE OF ASHLEY NICOLE HENSLEY RAYMER, DECEASED v. NATIONAL FREIGHT TRANSPORTATION, INC.; TDY INDUSTRIES, INC. D/B/A ALLVAC; LARRY ALLEN SMITH, INDIVIDUALLY AND D/B/A LARRY ALLEN SMITH TRUCKING; PAUL WAYNE SMITH, INDIVIDUALLY AND D/B/A LARRY ALLEN SMITH TRUCKING; ROBERT E. SMITH, INDIVIDUALLY AND D/B/A LARRY ALLEN SMITH TRUCKING; AND LARRY ALLEN SMITH TRUCKING, A DE FACTO NORTH CAROLINA PARTNERSHIP

No. 536A08

(Filed 1 May 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 193 N.C. App. ——, 668 S.E.2d 349 (2008), reversing an order granting summary judgment for defendant TDY Industries, Inc. d/b/a ALLVAC entered on 23 August 2007 by Judge Timothy L. Patti in Superior Court, Mecklenburg County, and remanding for further proceedings. Heard in the Supreme Court 31 March 2009.

Guthrie, Davis, Henderson & Staton, P.L.L.C., by Dennis L. Guthrie, John H. Hasty, and Justin N. Davis, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by James P. Cooney and Tricia Morvan Derr, for defendant-appellant TDY Industries, Inc. d/b/a ALLVAC.

PER CURIAM.

AFFIRMED.

BARNEY BRITT	)	
	)	
v.	)	ORDER
	)	
STATE OF NORTH CAROLINA	)	

No. 488A07

Having reviewed the briefs and heard oral arguments on plaintiff's appeal on 5 May 2008, the Court now *ex mero motu* withdraws its previous order, dated 6 December 2007, dismissing *ex mero motu* plaintiff's notice of appeal (substantial constitutional question), and retains plaintiff's notice of appeal as to the following issue only: Whether the application of the 2004 amendment to N.C.G.S. § 14-415.1 to plaintiff violates his rights under N.C. Const. art. I, § 30.

Plaintiff shall have forty-five (45) days from the date of this order to file and serve his brief and defendant shall have 45 days from the service of plaintiff's brief to file and serve its brief. There will be no further oral argument in this matter.

By Order of the Court in Conference, this 24th day of March, 2009.

s/Hudson, J.
For the Court

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

Allen v. Care Focus Case below: 195 N.C. App. 459	No. 131P09	Defs' (Health Mgmt. & Liberty Mutual) PDR Under N.C.G.S. § 7A-31 (COA07-852)	Denied 04/30/09
Alphin v. Tart L.P. Gas Co. Case below: 192 N.C. App. 576	No. 480P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-731) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 04/30/09 2. Dismissed as Moot
Babb v. Graham Case below: 190 N.C. App. 463	No. 296P08	Def's (Jerry L. Newton, III) PDR Under N.C.G.S. § 7A-31 (COA07-848)	Denied 04/30/09
Burton v. Phoenix Fabricators & Erectors, Inc. Case below: 194 N.C. App. 779	No. 447P07-2	Plts' (Burton and Davis) PDR Under N.C.G.S. § 7A-31 (COA06-1195-2)	Denied 04/30/09
Department of Transp. v. Blevins Case below: 194 N.C. App. 637	No. 059A09	1. Plt's NOA (Dissent) (COA08-266) 2. Plt's PDR as to Additional Issues 3. Plt's Motion to Dismiss Appeal 4. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied 04/30/09 3. Allowed 04/30/09 4. Denied 04/30/09
Fink v. Goodyear Tire & Rubber Co. Case below: 194 N.C. App. 200	No. 012P09	1. Defs' Motion for Temporary Stay (COA07-1371) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 1/08/09 363 N.C. 125 Stay Dissolved 04/30/09 2. Denied 04/30/09 3. Denied 04/30/09 **Hudson, J., Recused**
Hall v. Toreros, II, Inc. Case below: 363 N.C. 114 176 N.C. App. 309	No. 187PA06	Plts' Verified Motion for Relief Pursuant to Rule 2 (COA05-199)	Denied 04/30/09 **Martin, J., Recused**

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

Helms v. Helms Case below: 191 N.C. App. 19	No. 340A08	Def's Motion to Withdraw Appeal (COA07-1090)	Allowed 03/25/09
Horry v. Woodbury Case below: 362 N.C. 470 189 N.C. App. 669	No. 198A08-2	Def's Petition for Rehearing of PDR (COA07-477)	Denied 04/13/09
Odell v. Legal Bucks, LLC Case below: 192 N.C. App. 298	No. 466P08	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA07-1094) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 04/30/09 2. Dismissed as Moot 04/30/09
Sisk v. Transylvania Cmty. Hosp., Inc. Case below: 194 N.C. App. 811	No. 067P09	1. Defs' (Abbott Lab) PDR Under N.C.G.S. § 7A-31 (COA08-471) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 04/30/09 2. Allowed 04/30/09
Stacy v. Merrill Case below: 193 N.C. App. 247	No. 488P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-437)	Denied 04/30/09
State v. Bowden Case below: 193 N.C. App. 597	No. 514P08	1. State's Motion for Temporary Stay (COA08-372) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dismiss PDR	1. Allowed 11/21/08 2. Allowed 04/30/09 3. Allowed 04/30/09 4. Dismissed as Moot 04/30/09
State v. Corry Case below: 193 N.C. App. 753	No. 112P09	Def's PWC to Review the Decision of the COA (COA08-11)	Denied 04/30/09
State v. Fields Case below: 195 N.C. App. —— (17 March 2009)	No. 139P09	State's Motion for Temporary stay (COA08-627)	Allowed 04/02/09

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

State v. Fleming Case below: 195 N.C. App. 325	No. 095P09	1. Def's NOA Based Upon a Constitutional Question (COA08-433) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 04/30/09 3. Denied 04/30/09
State v. Ford Case below: 194 N.C. App. 468	No. 036A09	1. Def-Appellant's NOA (Dissent) (COA08-227) 2. Def-Appellant's PDR 3. State's Motion to Deny NOA	1. Dismissed *Ex Mero Motu* 04/30/09 2. Denied 04/30/09 3. Dismissed as Moot 04/30/09
State v. Mabry Case below: 195 N.C. App. 598	No. 126P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-729)	Denied 04/30/09
State v. Maynard Case below: 195 N.C. App. 757	No. 137P09	1. Def's Motion for Temporary Stay (COA08-847) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 04/01/09 Stay Dissolved 04/30/09 2. Denied 04/30/09 3. Denied 04/30/09
State v. Miller Case below: 194 N.C. App. 821	No. 061P09	1. Def's NOA Based Upon a Constitutional Question (COA08-770) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 04/30/09 3. Denied 04/30/09
State v. Smith Case below: 195 N.C. App. 462	No. 114P09	1. Def's NOA Based Upon a Constitutional Question (COA08-559) 2. State's Motion to Deny [sic] Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 04/30/09 3. Denied 04/30/09

State ex rel. Utilities Comm'n v. Town of Kill Devil Hills Case below: 194 N.C. App. 561	No. 068A09	1. Intervenor's (Town of Kill Devil Hills) NOA (Dissent) (COA08-42) 2. Intervenor's (Town of Kill Devil Hills) NOA Based Upon a Constitutional Question	1. —— 2. Dismissed *Ex Mero Motu* 04/30/09
Welliver McGuire, Inc. v. Members Interior Constr., Inc. Case below: 194 N.C. App. 202	No. 565P08	Def and Third Party Plt 's (Members Interior Construction) PDR Under N.C.G.S. § 7A-31 (COA08-408)	Denied 04/30/09
Yorke v. Novant Health, Inc. Case below: 192 N.C. App. 340	No. 485P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-503)	Denied 04/30/09

PETITION TO REHEAR

Richardson v. Maxim Healthcare/Allegis Grp. Case below: 362 N.C. 657	No. 102A08-2	Defs' Petition for Rehearing (COA06-875)	Denied 04/06/09

STATE OF NORTH CAROLINA v. DARRELL WAYNE MANESS

No. 402A06

(Filed 18 June 2009)

1. Jury— capital selection—voir dire—stake out questions—repetitive questions

The trial court did not abuse its discretion in a capital first-degree murder case by not allowing defense counsel to question prospective jurors about their ability to surrender their honest convictions for the purpose of returning a sentencing recommendation, and to recommend a life sentence even if other jurors disagreed, because: (1) in regard to the voir dire of one prospective juror, the hypothetical question was an impermissible "stake out" question designed to determine how well a prospective juror would withstand pressure to change his or her mind when jurors disagree; and (2) in regard to the voir dire of a second prospective juror, the questions asked this prospective juror were redundant where a review of the complete voir dire revealed that the trial court previously had allowed defense counsel to ask the prospective juror if he could consider life in prison without parole as an appropriate punishment, follow the law as instructed by the trial court, independently weigh the evidence and respect the opinion of other jurors, and be strong enough to ask other jurors to respect his opinion.

2. Jury— capital selection—peremptory challenges—*Batson* challenge—gender challenge

Defendant's constitutional right to a jury selected without regard to race or to gender was not violated when the trial court overruled his objections to the State's use of peremptory challenges against five prospective jurors who were either female, African-American, or both in a prosecution for capital first-degree murder and other crimes because: (1) in regard to the *Batson* challenge of prospective juror Maultsby, the State met its burden and gave several race neutral reasons to combat a prima facie case of race-based discrimination; (2) as to defendant's claim of impermissible gender discrimination, defendant amended the record on appeal to include an assignment of error alleging gender discrimination against prospective juror Maultsby, but an assignment of error cannot substitute for proper preservation of an issue before the trial court, defendant

failed to argue plain error, and defendant's claim of gender bias in the State's peremptory challenge of a prospective juror was not an exceptional circumstance calling for invocation of N.C. R. App. P. Rule 2; (3) in regard to four other prospective jurors where defendant addresses both their race and their gender, neither the United States Supreme Court or our Supreme Court has found that being a female member of a racial minority group is an independent basis for an objection to the State's exercise of a peremptory challenge; (4) defendant did not raise and preserve the issue of gender discrimination before the trial court, and thus as to prospective jurors Gilliard and Boyd, defendant may not make a gender discrimination argument for the first time on appeal; (5) in regard to prospective juror Simmons, a prima facie showing is not automatically made when the minority acceptance rate is 37.5%; (6) in regard to prospective jurors Simmons and Gilliard, defendant does not assert, and the record does not indicate, that the race of defendant, the victim, or any key witness was a factor in defendant's trial; and (7) although defendant used a similar statistical analysis to support a claim that the State's peremptory challenge of prospective juror Britt was made on the basis of gender discrimination, the trial court noted that the State had at that point seated three females, used an almost equal number of challenges on males and females, and treated Britt no differently than other prospective jurors during questioning.

3. Jury— jury request to review exhibits—abuse of discretion standard

The trial court did not commit prejudicial error or abuse its discretion in a prosecution for capital first-degree murder and other crimes when it denied a jury request to review certain exhibits because: (1) the trial court noted numerous times that it was denying the jury's request in its discretion, and thus it correctly understood that it was permitted to exercise its discretion pursuant to N.C.G.S. § 15A-1233; (2) although the trial court made a trivial mistake when it attempted to recall specific words spoken when the exhibits were first discussed, the trial court's ruling was amply supported by the record since the exhibits were admitted solely for the purpose of illustrating an expert's testimony, the jury already had seen the exhibits in their entirety, and the transcript of the discussion between the trial court and the parties when the exhibits were initially admitted indicated that these exhibits did contain some inadmissible material; and (3)

although defendant now contends that the trial court's action violated his constitutional rights to present evidence, a fair trial, due process of law, and a reliable capital sentencing hearing, defendant did not raise these constitutional issues below, and constitutional issues not raised at trial will generally not be considered for the first time on appeal.

4. Criminal Law— motion for mistrial—officers approached jury box

The trial court did not err in a prosecution for capital first-degree murder of a law enforcement officer and other crimes by denying defendant's motion for a mistrial made when law enforcement officers approached the jury box while autopsy photographs of the victim were being circulated to the jury because: (1) the officers were immediately directed to sit back down as soon as the court perceived what was happening; (2) the judge who observed the episode believed that jurors may not have even noticed the officers' conduct; did not believe that any jurors had been intimidated; found that little, if any, potential prejudice had occurred; and concluded that any further mention of the incident to the jurors would be counterproductive; and (3) assuming that the jurors did notice the officers' conduct, several plausible inferences could have been drawn including the State's suggestion to the trial court that the officers were shielding the victim's mother from the photographs, or the court's response that the officers may have wanted to look at the photographs themselves; and whatever the cause of the officers' behavior, the trial court acted promptly and effectively to regain control of the courtroom.

5. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence—weapon stolen from victim—continuous transaction

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon even though defendant contends he was not armed until he took the victim police officer's firearm and the object taken in the robbery was the officer's firearm because: (1) an armed robbery can be a continuous transaction, and where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial; (2) despite defendant's argument to the contrary, there is no reason why the use of a weapon stolen from the victim cannot also be a part of the con-

tinuing transaction of the armed robbery; and (3) the evidence presented was sufficient for the jury to find that defendant's use of the gun was inseparable from the taking of it and defendant's efforts to flee.

6. Sentencing— capital—nonunanimous recommendation—instruction to resume deliberations—failure to impose life sentence

The trial court did not err in a capital sentencing proceeding by concluding that it lacked authority to impose a life sentence in this case at the time defendant made his motion when the jury initially returned with a nonunanimous sentencing recommendation and by instructing the jury to resume its deliberations because: (1) contrary to defendant's argument, N.C.G.S. § 15A-2000(b) requires that a sentence recommendation in a capital case be agreed upon by a unanimous vote of twelve jurors, and the statute authorizes the court to impose a sentence of life imprisonment in the absence of jury unanimity only when the jury cannot, within a reasonable time, agree on its sentence recommendation; (2) a nonunanimous poll does not necessarily indicate that a jury cannot agree to a unanimous sentencing recommendation within a reasonable time, nor does such a poll automatically give the trial court authority to impose a life sentence; (3) the jury had deliberated for little more than an hour and a half, no evidence suggested that the jury could not agree, and the jury had given no indication that it was having trouble reaching a sentencing recommendation; and (4) the issue whether the jury might be unable to agree unanimously on a sentence recommendation was never raised.

7. Criminal Law— capital sentencing—motion for mistrial—exercise of discretion

The trial court did not fail to exercise its discretion in a capital sentencing proceeding when it denied defendant's motions for a mistrial based on the premise that jurors had seen the reactions of those in the courtroom when the initial verdict indicating a recommendation of a life sentence was read because: (1) the record did not indicate that the trial court believed it had no discretion to declare a mistrial; and (2) each time it ruled on defendant's mistrial motions, the trial court specifically stated that it was denying the motions in its discretion.

8. Sentencing— capital—aggravating circumstances—avoiding lawful arrest—committed against law enforcement officer

The trial court did not commit plain error in a capital sentencing proceeding by allowing the jury to consider both the N.C.G.S. § 15A-2000(e)(4) (crime committed to avoid or prevent a lawful arrest) and N.C.G.S. § 15A-2000(e)(8) (crime committed against law enforcement officer while engaged in performance of official duties) aggravating circumstances because: (1) our Supreme Court has already concluded that the (e)(4) aggravating circumstance focuses on the defendant's subjective motivation for his actions whereas (e)(8) pertains to the underlying factual basis of the crime; and (2) in the instant case, the (e)(4) aggravating circumstance focused on defendant's subjective intention to avoid being arrested, while the (e)(8) aggravating circumstance addressed the objective fact that the victim was a law enforcement officer performing his official duties.

9. Sentencing— capital—nonstatutory mitigating circumstances—cooperative with officers and polite during interviews—acceptance of responsibility for his criminal conduct

The trial court did not err in a capital sentencing proceeding by failing to give requested peremptory instructions as to two nonstatutory mitigating circumstances that defendant was cooperative with officers after being taken into custody and polite during interviews, and defendant has accepted responsibility for his criminal conduct, because: (1) as to the instruction that defendant was cooperative and polite, while some evidence supported the instruction, other evidence indicated that defendant was neither cooperative with officers after being apprehended nor polite during interviews; and (2) as to defendant's requested instruction that he accepted responsibility for his criminal conduct, the record indicated that while defendant admitted killing the officer and acknowledged that the killing was a terrible mistake, he authorized his attorneys to concede guilt to second-degree murder only; and our Supreme Court has previously concluded that a defendant's willingness to plead guilty to second-degree murder is evidence only of defendant's willingness to lessen his exposure to the death penalty or a life sentence upon a first-degree murder conviction.

10. Sentencing— death penalty—proportionality

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate because: (1) defendant was convicted of first-degree murder on the basis of malice, premeditation, and deliberation, and under the felony murder rule; (2) the trial court found the four aggravating circumstances that the murder was committed for the purpose of avoiding or preventing a lawful arrest, the murder was committed while defendant was engaged in the commission of robbery with a dangerous weapon, the murder was committed against a law enforcement officer while engaged in the performance of his official duties, and the murder was part of a course of conduct in which defendant engaged that included the commission by defendant of other crimes of violence against other persons; (3) nothing in the record indicated that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (4) our Supreme Court has never found a death sentence to be disproportionate when the jury found more than two aggravating circumstances to exist, and has found the N.C.G.S. § 15A-2000(e)(11) violent course of conduct circumstance, standing alone, sufficient to support a death sentence.

Justice HUDSON dissenting.

Justice TIMMONS-GOODSON joins in the dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge D. Jack Hooks, Jr. on 4 April 2006 in Superior Court, Brunswick County, upon a jury verdict finding defendant guilty of first-degree murder. On 10 July 2008, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 10 September 2008.

Roy Cooper, *Attorney General*, *by Barry S. McNeill*, *Special Deputy Attorney General*, *for the State.*

M. Gordon Widenhouse, *Jr.; and Staples S. Hughes*, *Appellate Defender*, *by Katherine Jane Allen*, *Assistant Appellate Defender*, *for defendant-appellant.*

EDMUNDS, Justice.

Defendant Darrell Wayne Maness was indicted for one count of murder, three counts of attempted first-degree murder, three counts

of assault with a deadly weapon with the intent to kill, three counts of assault with a firearm on a law enforcement officer, and one count of robbery with a dangerous weapon. Defendant was tried by jury and on 31 March 2006 was convicted of one count of first-degree murder on the basis of malice, premeditation and deliberation, and also under the felony murder rule. He was also convicted of two counts of attempted first-degree murder, two counts of assault with a deadly weapon with the intent to kill, two counts of assault with a firearm on a law enforcement officer, and one count of robbery with a firearm. Following a capital sentencing hearing, the jury recommended a sentence of death.

Defendant appealed his capital conviction to this Court and we allowed his motion to bypass the Court of Appeals as to his other convictions. We find that defendant's trial and capital sentencing proceeding were free from error and that defendant's sentence of death is not disproportionate.

At approximately one o'clock a.m. on 18 January 2005, Officer Mitchell Prince of the Boiling Spring Lakes Police Department pulled over a gray Honda after it swerved to avoid a deer. Defendant was driving, Michael Brennan sat in the passenger seat, and Tia Isley was in the back seat. Officer Prince asked defendant for his driver's license and vehicle registration. According to Brennan, defendant gave Officer Prince the registration but claimed he did not have identification. Officer Prince took the registration back to his car, where he determined that the Honda was registered under Tia Isley's name. Officer Prince returned to the Honda, asked defendant a few questions, then requested that he step out of the car. Officer Prince searched defendant and found an empty marijuana baggie and, in defendant's back pocket, an identification card.

Defendant told Officer Prince that marijuana was beneath the passenger seat. Officer Prince looked but did not find marijuana in the car, although he did find a partially full E & J Brandy bottle. Brennan poured out the brandy and Isley placed the empty bottle in a trash bag on the floorboard. Officer Prince then saw a bag of marijuana underneath the Honda and asked defendant to show him where the rest of it was. Although witnesses testified that defendant knew marijuana was in a backpack in the Honda's trunk, defendant looked only in the passenger compartment, without success.

When defendant failed to locate contraband, Officer Prince attempted to handcuff him. Defendant resisted by picking up the

trash bag containing the empty brandy bottle and repeatedly hitting Officer Prince on the head with it. As Officer Prince struggled to subdue defendant, they fell into a water-filled ditch beside the road. Defendant emerged with Officer Prince's gun, and Officer Prince crawled out of the ditch repeating words to the effect of, "Please don't kill me; please don't kill me." Brennan testified that defendant told Officer Prince to "shut up." Then, as a backup police car arrived, defendant shot Officer Prince three times while Officer Prince was on his knees. Officer Prince suffered two gunshot wounds to his head, while the third shot hit him in the right shoulder. He died before he could be taken to a hospital.

Defendant then fired at the backup officer, reentered the Honda, and drove away. Brennan and Isley remained at the scene, refusing defendant's directive to get back in the car. A chase involving two police vehicles ended after approximately two miles when defendant stopped, exited the Honda, and shot out a window of one of the pursuing police cars. The officers returned fire and defendant ran to a nearby mobile home. Two men and two women, one carrying an infant, emerged from the mobile home in response to police instructions. The record contains no indiction that these individuals knew defendant or had any connection with him. Defendant was discovered hiding beneath the home by the officers, who pulled him out and arrested him.

Defendant was placed inside a sheriff's department S.W.A.T. van and advised of his *Miranda* rights. Defendant agreed to speak to the investigators and stated that he hit Officer Prince with the bottle at least twice, that Officer Prince was begging "Please, don't shoot. Please. Please," and that he blacked out and shot Officer Prince. When Brunswick County Sheriff's Department Chief Deputy Cummings asked defendant why he shot at the other officers, defendant responded that he shot one, so why not two.

Additional facts will be set forth as necessary for the discussion of specific issues.

JURY SELECTION ISSUES

[1] Defendant contends the trial court erred by not allowing defense counsel to question prospective jurors about their ability (1) to not surrender their honest convictions for the purpose of returning a sentencing recommendation and (2) to recommend a life sentence even if other jurors disagreed. "The *voir dire* of prospective jurors serves a two-fold purpose: (i) to determine whether a basis for chal-

lenge for cause exists, and (ii) to enable counsel to intelligently exercise peremptory challenges." *State v. Gregory*, 340 N.C. 365, 388, 459 S.E.2d 638, 651 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). A defendant in a capital case "should be given great latitude in examining potential jurors." *State v. Conner*, 335 N.C. 618, 629, 440 S.E.2d 826, 832 (1994). Nevertheless, "[r]egulation of the manner and the extent of inquiries on *voir dire* rests largely in the trial court's discretion." *State v. Green*, 336 N.C. 142, 164, 443 S.E.2d 14, 27, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). A defendant claiming that his or her *voir dire* was erroneously restricted must show both that the restriction was an abuse of discretion and that he or she was prejudiced thereby. *State v. Jones*, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). The trial court has significant discretion in controlling the jury *voir dire*. *See Gregory*, 340 N.C. at 389, 459 S.E.2d at 651 (finding no abuse of discretion when "[t]he majority of defendant's questions to which the prosecutor's objections were sustained were either irrelevant, improper in form, attempts to 'stake out' a juror, questions to which the answer was admitted in response to another question, or questions that contained an incomplete statement of the law").

Defendant contends the trial court erred in restricting his *voir dire* of prospective juror Teresa Register. The following exchange took place between defense counsel and Register:

> Q. Do you think you could, if you were convinced that life imprisonment without parole was the appropriate penalty after hearing the facts, the evidence, and the law from the Judge and you were convinced that it was the appropriate penalty, could you come back and return a verdict of life imprisonment without parole?
>
> A. Yes.
>
> Q. Even if your fellow jurors were of different opinions?
>
> [PROSECUTOR]: Well, objection.
>
> [THE] COURT: Sustained.

The State responds that defense counsel was attempting to stake out the juror. "Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts." *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *judgment vacated in part*

on other grounds, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976). "[S]uch questions tend to 'stake out' the juror and cause him to pledge himself to a future course of action." *Id.* In addition, hypothetical questions tend to confuse jurors who have not yet heard evidence or been instructed on the applicable law. *Id.*

This Court has held that it was not error for a trial court to disallow the following attempted *voir dire* query:

> "If, after the State has put on all of its evidence and after you have heard all the evidence in the case and after the Judge has instructed you, you held an opinion that the defendant was not guilty, that the State had not met its burden of proof in this case, would you change that opinion simply because eleven other jurors held a different opinion, that opinion being that the Defendant is guilty? Would any of you change your opinion simply for that reason?"

State v. Bracey, 303 N.C. 112, 118-19, 277 S.E.2d 390, 395 (1981). Such a question, designed to determine how well a prospective juror would withstand pressure to change his or her mind when jurors disagree, is an impermissible "stake out." *State v. Elliot*t, 344 N.C. 242, 262, 475 S.E.2d 202, 209, *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). The hypothetical question at issue here was a "stake out" question similar to the one disallowed in *Bracey*, and the trial court did not err in excluding it.

Defendant also argues that the trial court erred in restricting his *voir dire* of prospective juror Chester Davis. During his questioning of the prospective juror, defense counsel stated that: "Now, his Honor may charge you at one point on what some attorneys call an Allen charge and I'm going to read it to you and ask you if you would be able to follow that law if the Judge did instruct you that way." The prosecutor objected, and, outside the presence of the jury, defense counsel advised the trial court that he intended to read the following to prospective juror Davis:

> [I]f you were given an instruction that you, all as jurors, have a duty to consult with one another and to deliberate with a view of reaching an agreement if it can be done without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with fellow jurors.
>
> . . . .

> In the course of deliberations, each of you should not hesitate to reexamine your own views and change your opinion if it is erroneous. But none of you should surrender your honest conviction as to the weight or the effect of the evidence solely because [sic] your opinion or your fellow juror's, or for the mere purpose of returning a verdict.

After considering arguments of counsel, the trial court sustained the prosecutor's objection.

Our review of the complete *voir dire* of prospective juror Davis reveals that the trial court previously had allowed defense counsel to ask Davis if he could consider life in prison without parole as an appropriate punishment, follow the law as instructed by the trial court, independently weigh the evidence and respect the opinion of other jurors, and be strong enough to ask other jurors to respect his opinion. Thus, defendant's proposed question added little new. A trial court permissibly may limit redundant questions during *voir dire*. *State v. Huffstetler*, 312 N.C 92, 104, 322 S.E.2d 110, 118 (1984) ("The trial court did not abuse its discretion or commit error by preventing repetitious questions to prospective jurors."), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). Moreover, there was no indication at this early stage of the trial that an *Allen* instruction would be either necessary or given. The trial court did not refuse to allow a permissible line of *voir dire* inquiry. Accordingly, the trial court did not abuse its discretion in sustaining the State's objection.

[2] Defendant next contends he is entitled to a new trial because his constitutional right to a jury selected without regard to race or to gender was violated when the trial court overruled his objections to the State's use of peremptory challenges against five prospective jurors who were either female, African-American, or both. Article I, Section 26 of the North Carolina Constitution prohibits exclusion "from jury service on account of sex, race, color, religion, or national origin." The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution also prohibits discrimination in jury selection on the basis of race, *see Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), or gender, *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 L. Ed. 2d 89 (1994).

Our review of race-based or gender-based claims of discrimination in petit jury selection has been the same under the Constitution of the United States and the North Carolina Constitution. *See State v.*

Taylor, 362 N.C. 514, 527, 669 S.E.2d 239, 253-54 (2008) (race); *State v. Bates*, 343 N.C. 564, 595-96, 473 S.E.2d 269, 286-87 (1996) (gender), *cert. denied*, 519 U.S. 1131, 136 L. Ed. 2d 873 (1997); *but cf. State v. Cofield*, 320 N.C. 297, 301-08, 357 S.E.2d 622, 624-29 (1987) (finding that racial discrimination in selection of a grand jury foreperson violates the United States and North Carolina Constitutions, and stating that "Article I, section 26 (of the North Carolina Constitution) does more than protect individuals from unequal treatment"). A party alleging either a race-based or gender-based discriminatory peremptory challenge of a prospective juror "must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike." *J.E.B.*, 511 U.S. at 144-45, 128 L. Ed. 2d at 106-07 (citing *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88). If a prima facie case of gender-based discriminatory dismissal is established, the burden shifts to the prosecutor to articulate a gender-neutral explanation. *Id.* Similarly, if a defendant establishes a prima facie case of race-based discriminatory dismissal, the burden shifts to the prosecutor to establish a race-neutral explanation. *Rice v. Collins*, 546 U.S. 333, 338, 163 L. Ed. 2d 824, 831 (2006). The prosecutor's explanation need not rise to the level of a challenge for cause, but it must be comprehensible and not pretextual. *Id.*; *J.E.B.*, 511 U.S. at 145, 128 L. Ed. 2d at 107. A defendant may respond by introducing evidence that the State's explanations are in fact a pretext. *Bates*, 343 N.C. at 596, 473 S.E.2d at 287 (citing *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991)). The trial court's findings regarding intentional discrimination will not be disturbed unless clearly erroneous. *Id.*

When the State excused prospective juror Sanica Maultsby, defense counsel objected "on a *Batson* ground." "[F]inding the existence of at least what can be described as a prima facie case," the trial court directed the State to offer "a race neutral reason." The prosecutors indicated that, because prospective juror Maultsby had been treated for obsessive compulsive disorder and also had worked as a detoxification nurse involved in mental health counseling and in working with substance abusers, they feared she would overly identify with defense evidence pertaining to defendant's cannabis dependence and attention deficit disorder. Defense counsel declined to be heard in response and the trial court overruled the objection, finding that the State had "announced several race neutral reasons, that it's not a discriminatory challenge, and any accompanying motion with the objection would be denied."

Although defendant's citation of *Batson* indicated to the trial court that his objection to the State's peremptory challenge was based solely upon alleged racial discrimination, defendant contends in his brief to this Court that Maultsby's peremptory excusal was also improper gender discrimination. As to defendant's claim of racial discrimination, we have reviewed the trial court's findings and conclude that they are not clearly erroneous. Accordingly, defendant's *Batson* objection to the State's peremptory challenge was properly overruled.

As to defendant's claim of impermissible gender discrimination, we note that defendant amended the record on appeal to include an assignment of error alleging gender discrimination against prospective juror Maultsby. However, an assignment of error cannot substitute for proper preservation of an issue before the trial court. "[T]o preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1). The only exception is when a defendant claims plain error, and defendant has not made such a claim here. *Id.* 10(c)(4).

Ordinarily, failure to follow Rule 10(b)(1) justifies an "appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008); *see also State v. Raines*, 362 N.C. 1, 18, 26, 653 S.E.2d 126, 137, 142 (2007) (affirming the defendant's two capital sentences and not considering the merits of his constitutional arguments raised for the first time on appeal). A similar scenario arose in *State v. Best*, when the defendant objected at trial to the dismissal of female African-American prospective jurors on the basis of racial discrimination. 342 N.C. 502, 511, 467 S.E.2d 45, 51, *cert. denied*, 519 U.S. 878, 136 L. Ed. 2d 139 (1996). On appeal, the defendant additionally argued that the State's peremptory challenges of seven of nine African-American women established a prima facie case of gender discrimination. *Id.* at 513, 467 S.E.2d at 52. This Court held that because the defendant had not objected to any of the State's peremptory challenges on the ground of discrimination against women or African-American women, he could not raise the issue for the first time on appeal. *Id.*

Nevertheless, "[t]he imperative to correct fundamental error . . . may necessitate appellate review of the merits despite the occurrence of default." *Dogwood*, 362 N.C. at 196, 657 S.E.2d at 364.

Appellate courts may excuse a party's default when necessary to "expedite decision in the public interest" or to "prevent manifest injustice to a party." N.C. R. App. P. 2; *Dogwood*, 362 N.C. at 196, 657 S.E.2d at 364. This Court utilizes Rule 2 in its discretion to excuse default only "in exceptional circumstances." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999). We conclude that defendant's claim of gender bias in the State's peremptory challenge of prospective juror Maultsby is not an exceptional circumstance calling for invocation of Rule 2. Accordingly, defendant may not raise this question for the first time on appeal.

Defendant argues the trial court erred in overruling defense counsel's objections to the State's use of peremptory challenges against prospective jurors Recaldo Simmons, Nancy Britt, Katrina Gilliard,[1] and Jamie Boyd. Simmons is an African-American male, and the other three are African-American females. In each instance, the trial court considered defendant's objections and found no prima facie case of discrimination. When the trial court finds no such showing has been made, "our review is limited to whether the trial court erred in finding that defendant failed to make a prima facie showing, even if the State offers reasons for its exercise of the peremptory challenges." *State v. Smith*, 351 N.C. 251, 262, 524 S.E.2d 28, 37, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000). The trial court's ruling will be disturbed only if it is clearly erroneous. *State v. Augustine*, 359 N.C. 709, 715, 616 S.E.2d 515, 522 (2005), *cert. denied*, 548 U.S. 925, 165 L. Ed. 2d 988 (2006).

As to prospective jurors Britt, Gilliard, and Boyd, defendant's arguments address both their race and their gender, sometimes together. Because neither the Supreme Court of the United States nor this Court has found that being a female member of a racial minority group is an independent basis for an objection to the State's exercise of a peremptory challenge, we will consider defendant's *Batson* arguments (race) and *J.E.B.* arguments (gender) separately.

Defendant argues that the record established a prima facie case of gender discrimination at the time of the State's peremptory challenges of prospective jurors Britt, Gilliard, and Boyd. As with prospective juror Maultsby, above, defendant amended the record on appeal to include assignments of error relating to allegations of gender discrimination against prospective jurors Gilliard and Boyd and

1. This prospective juror's name is spelled at different points in the materials filed with the appeal as "Gilliard," "Gillard," "Gilliand," and "Gilland."

to include an assignment of error relating to claims of both race and gender discrimination against prospective juror Britt. However, as stated above, an assignment of error cannot substitute for proper preservation of issues before the trial court, except when plain error is alleged. N.C. R. App. P. 10(b)(1); *id.* 10(c)(4). As with prospective juror Maultsby, defendant's trial counsel objected to the peremptory removal of Gilliard and Boyd on *Batson* grounds only. Defendant does not allege plain error. Moreover, we discern no exceptional circumstances meriting departure from the Appellate Rules here. *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300. Because he did not raise and preserve the issue of gender discrimination before the trial court, defendant may not make a gender discrimination argument for the first time on appeal as to these two jurors.

Defendant next argues that the record established a prima facie case of racial discrimination at the time of his objection to the State's peremptory challenges of prospective jurors Simmons and Gilliard. However, the record does not support defendant's argument. We consider a number of factors that may be relevant in determining whether a defendant has raised an inference of discrimination. *State v. Quick*, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995).

> Those factors include 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.

Id.

Focusing on prospective juror Simmons, defendant argues that the trial court's inquiry was insufficient because it did not consider the numbers and percentages of African-American prospective jurors who were challenged. Defendant asserts that when the State struck prospective juror Simmons, five of the State's eight strikes (62.5%) had been against African-Americans and the State had only accepted three of eight African-Americans (37.5%). However, numerical analysis in this inquiry, while often useful, is not necessarily dispositive, and a prima facie showing is not automatically made when the minority acceptance rate is 37.5%. *State v. Barden*, 356 N.C. 316, 344, 572 S.E.2d 108, 127-28 (2002) (citing, *inter alia*, *Gregory*, 340 N.C. at 398,

459 S.E.2d at 657), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Moreover, defendant does not assert, and the record does not indicate, that the race of defendant, the victim, or any key witness was a factor in defendant's trial; moreover, the trial court indicated that, in denying defendant's motion, it considered the race of defendant and the victim, the consistent manner in which the State questioned Simmons and previous prospective jurors, and that the State had seated three African-Americans among the nine jurors then seated. In addition, as to prospective juror Gilliard, the trial court found no prima facie case after considering the way Gilliard was questioned, her questionnaire, the number of minorities seated, and the manner in which the State used its peremptory challenges. We conclude that the trial court did not err in finding no prima facie case of racial discrimination was established as to Simmons or Gilliard.

Defendant uses a similar statistical analysis to support in his claim that the State's peremptory challenge of prospective juror Britt was made on the basis of gender discrimination. The trial court noted that the State had at that point seated three females, used an almost equal number of challenges on males and females, and treated Britt no differently from other prospective jurors during questioning. Our review of the record confirms this assessment. We conclude that the trial court did not err in finding no prima facie case of gender discrimination in this challenge.

In short, upon thorough review of the record, we have found no prima facie case of discrimination based on race, gender, or, for that matter, a combination of race and gender as to prospective jurors Simmons, Britt, Gilliard, or Boyd. These assignments of error are overruled.

GUILT PHASE ISSUES

[3] Defendant contends the trial court committed prejudicial error when it denied a jury request to review certain exhibits. Defendant argues that the trial court's denial was an abuse of discretion pursuant to N.C.G.S. § 15A-1233(a). Defendant also claims that the denial violated his constitutional rights to present evidence, to a fair trial, to due process of law, and to a reliable capital sentencing hearing. Defendant contends that he is entitled to a new trial or a new sentencing proceeding.

The trial transcript indicates that defendant intended to supplement the testimony of his expert witness, psychiatrist Moira Artigues (Dr. Artigues), by projecting her reports on a screen that the jury

could view as she testified. However, when technical difficulties with projection equipment cropped up unexpectedly, the documents were hurriedly photocopied for each juror. While the copies were being made, the State noted that Dr. Artigues had, up to that point, been testifying only from portions of her reports and the prosecution expressed concern that the jury might have access in the hard copies to inadmissible information upon which Dr. Artigues had not relied. The State indicated that the possible problem would be resolved if the documents were collected after Dr. Artigues' testimony and not used for other purposes. Defense counsel responded that their intention was to let the jury have the exhibits during the testimony for illustrative purposes only and then collect them. The State indicated its satisfaction with this procedure. The photocopies were provided to the jury and introduced into evidence for purposes of illustrating Dr. Artigues' testimony as defendant's Exhibits 19 through 44 and 46 through 58.

Two days later, during its deliberations at the guilt-innocence phase, the jury submitted a note requesting that the trial court "[p]lease provide a list of exhibits so that we may select which ones we would like to review. We would like [numbers] 19 [through] 58 (Defense)." In the ensuing colloquy between trial counsel and the trial court, the court accurately recalled that the exhibits were offered for illustrative purposes. However, when the judge stated, inaccurately, that he recalled the statement "we do not intend to send those items to the jury" was made, defense counsel responded that he did not remember saying the exhibits would not go back to the jury room, but only "that they would be removed from the jurors after" the testimony or after the jurors "looked at" the exhibits. The trial court then stated:

> The other option is simply this: in the court's discretion, I may instruct: "You have seen and heard all of the testimony and evidence. It is your duty to recall the same. If your recollection differs from that urged upon you by counsel, you shall in your deliberations be guided exclusively by your recollection of the testimony and the evidence. In the court's discretion, your request is denied."

The trial court also asked counsel if they could resolve the issue before the court made its final decision, but no agreement was reached. Defense counsel noted that by statute a judge may permit the jury to take exhibits to the jury room only with consent of all par-

ties, and prosecutors confirmed that they did not consent. After further discussion as to whether the judge's instruction to the jury should name the non-consenting party or cite the controlling statute, the trial judge stated: "The statutory reference in the case law is, in the court's discretion, denied. Bring [the jurors] in." The trial court instructed the jury that its duty was to recall the evidence and that, in the trial court's discretion, its request for those exhibits was denied.

Section 15A-1233 provides in pertinent part:

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence.
>
> (b) Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence.

N.C.G.S. § 15A-1233 (2007). To comply with this statute, a court must exercise its discretion in determining whether or not to permit the jury to examine the evidence. *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985). A court does not exercise its discretion when it believes it has no discretion or acts as a matter of law. *Id.* at 35-36, 331 S.E.2d at 656-57 (citing *State v. Lang*, 301 N.C. 508, 510-11, 272 S.E.2d 123, 125 (1980)). However, when a trial court assigns no reason for a ruling which is to be made as a matter of discretion, the reviewing court on appeal presumes that the trial court exercised its discretion. *State v. Guevara*, 349 N.C. 243, 252, 506 S.E.2d 711, 717 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999).

A similar situation arose in *State v. Fullwood*, where the trial judge denied a jury request to review a portion of testimony because the court reporter who had recorded the testimony was no longer in the courthouse. 343 N.C. 725, 742, 472 S.E.2d 883, 892 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997). The trial judge explained the situation to the jury, added that the decision was in his discretion, and reminded the jury to rely on its own recollection of the evidence. *Id.* After reviewing the record and transcripts, this Court found that the trial court plainly exercised its discretion. *Id.* at

743, 472 S.E.2d at 892. In contrast, we held in *State v. Ashe* that the trial court erred when it denied a jury request for a transcript by stating that there was no transcript at that point. 314 N.C. at 34-35, 331 S.E.2d at 656-57 (citing *Lang*, 301 N.C. at 510-11, 272 S.E.2d at 125). We noted that various methods existed for allowing a jury to review testimony, *id.* at 35 n.6, 331 S.E.2d at 657 n.6, then found that the court's response indicated that the judge mistakenly believed he was unable to grant the request and thus had no discretion to exercise, *id.* at 34-35, 331 S.E.2d at 656-57. Here, the trial judge noted numerous times that he was denying the jury's request in his discretion. Accordingly, we conclude that the trial court correctly understood that it was permitted to exercise its discretion pursuant to N.C.G.S. § 15A-1233.

Nor did the trial court abuse its discretion. Such an abuse occurs when a ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Peterson*, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227 (2007) (internal quotation marks omitted), *cert. denied*, —— U.S. ——, 170 L. Ed. 2d 377 (2008). "In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007).

Although the trial court made a trivial mistake when it attempted to recall specific words spoken when the exhibits were first discussed, the trial court's ruling is amply supported by the record. The exhibits were admitted solely for the purpose of illustrating an expert's testimony and the jury already had seen the exhibits in their entirety. The transcript of the discussion between the trial court and the parties when the exhibits were initially admitted indicates that these exhibits did indeed contain some inadmissible material. The trial court's decision was not an abuse of discretion.

Defendant also now contends that the trial court's action violated his constitutional rights to present evidence, a fair trial, due process of law, and a reliable capital sentencing hearing. However, we have held that "[a] constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (citing *State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999); *Porter v. Suburban Sanitation Serv., Inc.*, 283 N.C. 479, 490, 196 S.E.2d 760, 767 (1973)). Because defendant did not raise these constitutional issues below, we decline to address them now.

[4] Defendant next contends that the trial court erred in denying his motion for a mistrial, made when law enforcement officers approached the jury box. Defendant argues that the denial of his motion was, under the totality of the circumstances, an abuse of discretion and that his constitutional rights to a fair trial and a reliable sentencing proceeding were violated.

This case understandably generated interest among law enforcement, and defendant made a pretrial motion to limit the presence of uniformed officers at trial. The trial judge declined to issue a blanket order but noted that he was aware of potential problems and would "keep a constant eye on" the situation. The trial court suggested that the prosecutor advise any officers who came to observe that it might be prudent if they dressed in mufti and also asked trial counsel to alert him if counsel saw a troubling number of uniformed officers.

During the guilt-innocence phase of defendant's trial, the State tendered into evidence autopsy photographs of Officer Prince. The photographs were then circulated to jurors who wished to see them. As the photographs circulated, three uniformed law enforcement officers (including one who had been a participant in the events of 18 January 2005 and had testified for the State earlier in the trial) stepped up to the courtroom bar, approximately eighteen inches to three feet from the jury.

As soon as the incident occurred, the officers were directed to sit down and the court held a bench conference. Counsel for the State informed the court that the officers stepped forward to form a shield to keep Officer Prince's mother from seeing the photographs. Defense counsel responded that the officers' actions could reasonably be inferred as intending to intimidate the jurors, then moved for a mistrial. The court ruled that:

> Motion for a mistrial, in the court's discretion, is denied. The court notes most of the jurors seemed to be looking in my direction. I owe an apology to every one of them but that would make it—I'm not sure they knew they were there. As far as intimidating effect, it was peculiar, but I don't think any jurors were intimidated.

The trial judge did not address the jurors about the incident but commented that "[t]hey wouldn't notice until we brought it to their attention. For all they know, the officers were up there trying to get a look at the pictures." Defendant renewed his motion for a

mistrial at the close of the State's evidence, and the court again denied the motion.

Defendant argues that the trial court abused its discretion in denying his motion for a mistrial. Defendant, contending that the behavior of the officers was inherently prejudicial, cites cases from other jurisdictions in which courtroom spectators' demonstrations of support for the victim were found to be grounds for a new trial: *Woods v. Dugger*, 923 F.2d 1454 (11th Cir.) (fair trial denied to the defendant when prison guards constituted approximately half the spectators filling the courtroom during a trial for murder of a prison guard), *cert. denied*, 502 U.S. 953, 116 L. Ed. 2d 355 (1991); *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990) (fair trial denied to the defendant when female spectators wore large buttons bearing the slogan "Women Against Rape" at the defendant's trial for kidnapping and non-consensual sexual intercourse); *State v. Franklin*, 174 W. Va. 469, 327 S.E.2d 449 (1985) (fair trial denied to the defendant when several spectators wore MADD buttons at the defendant's trial for driving under the influence resulting in death). Defendant further argues that the behavior of the officers was reflected in the subsequent unusual events at defendant's sentencing proceeding, which are detailed later in this opinion, thereby calling into question the reliability of defendant's sentence.

Our research has found no instance of similar conduct by police officers attending a criminal trial. A somewhat analogous situation arose in *Holbrook v. Flynn*, when four uniformed and armed state troopers sat in the front row of the spectator section at the defendant's trial. 475 U.S. 560, 562, 89 L. Ed. 2d 525, 530 (1986). The record in *Holbrook* indicated that the officers were present to ensure courtroom security. *Id.* at 562-63, 89 L. Ed. 2d at 530-31. In finding no error, the Supreme Court observed that a juror might draw any of several reasonable inferences from the presence of uniformed officers in a courtroom, whereas other procedures such as trying a defendant who is wearing prison garb are inherently prejudicial. *Id.* at 569, 89 L. Ed. 2d at 534-35. The Supreme Court declined to presume that any use of identifiable security guards in a courtroom is inherently prejudicial and adopted instead a case-by-case approach. *Id.* at 568-69, 89 L. Ed. 2d at 534-35. In *State v. Braxton*, some trial spectators wore badges that appeared to be photographs of one of the victims. 344 N.C. 702, 709-10, 477 S.E.2d 172, 176 (1996). The defendant argued that the presence of these badges was inherently prejudicial to his right to a fair trial. *Id.* at 710, 477 S.E.2d at 176. The record did

not indicate who wore the buttons, who was depicted on the buttons, or whether the jurors even noticed the buttons. *Id.* at 710, 477 S.E.2d at 177. This Court found that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial based on the buttons. *Id.*

We are mindful of the troubling aspects of the officers' behavior. While the record is unclear as to whether the officers actually came within the bar of the courtroom, the transcript leaves no doubt that some were quite close to several of the jurors. The record does not indicate whether the episode was planned or was spontaneous, but it is apparent that the trial court, counsel for the State, and counsel for defendant were unsure what had just happened, and why. Nevertheless, our review of the record satisfies us that the trial court did not abuse its discretion in denying defendant's motion for mistrial. The officers were immediately directed to sit back down as soon as the court perceived what was happening. The judge who observed the episode believed that jurors may not have even noticed the officers' conduct; did not believe that any jurors had been intimidated; found that little, if any, potential prejudice had occurred; and concluded that any further mention of the incident to the jurors would be counterproductive. Assuming that the jurors did notice the officers' conduct, several plausible inferences could have been drawn as in *Holbrook*, such as the State's suggestion to the trial court that the officers were shielding the victim's mother from the photographs, or the court's response that the officers may have wanted to look at the photographs themselves. Whatever the cause of the officers' behavior, the trial court acted promptly and effectively to regain control of the courtroom. We will not second-guess the trial court to presume that this incident was fatally prejudicial as a matter of law, and we do not perceive any abuse in the judge's exercise of his discretion to deny defendant's motion for a mistrial. N.C.G.S. § 15A-1061 (2007). This assignment of error is overruled.

[5] Defendant next contends the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon. Pointing out that defendant was not armed until he took Officer Prince's firearm, defendant argues that he cannot be convicted of robbery with a dangerous weapon when the object taken in the robbery is also the firearm used to perpetrate the offense. Defendant asserts that the State is required to prove that defendant actually possessed and used the weapon at the time the assault and robbery is committed. When the weapon is the object of the robbery, a defend-

ant does not control it before the taking. Therefore, according to defendant, the weapon used and the property obtained must be two distinct items. In addition, defendant argues that his conviction cannot be sustained under the continuous transaction theory because defendant was charged with taking only Officer Prince's weapon. Defendant contends that, even where the continuous transaction theory is applicable, a defendant cannot be convicted of robbery with a dangerous weapon solely for stealing the same weapon used to commit the robbery.

Section 14-87(a) provides in pertinent part:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . shall be guilty of a Class D felony.

N.C.G.S. § 14-87(a) (2007).

"[U]nder N.C.G.S. § 14-87(a), armed robbery is: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Hope*, 317 N.C. 302, 305, 345 S.E.2d 361, 363 (1986) (citation and internal quotation marks omitted). Under the facts of the case at bar, the only element in question is whether defendant's taking of Officer Prince's weapon was accomplished by use or threatened use of a firearm.

We have previously held that an armed robbery can be a continuous transaction, *id.* at 305-06, 345 S.E.2d at 363-64, and " '[w]here a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial,' " *State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (quoting *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992)), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). Under analogous circumstances, when a defendant took a knife from the victim, threatened the victim with that knife, and then left the victim's store with the knife, *State v. Black*, 286 N.C. 191, 192, 209 S.E.2d 458, 459 (1974), we concluded that "[c]learly, defendant robbed [the victim] with a knife, or he did not rob [the victim] at all," *id.* at 196, 209 S.E.2d at 462.

Here, defendant emerged from the fight with Officer Prince's gun. Despite defendant's argument to the contrary, we see no reason

why the use of a weapon stolen from the victim cannot also be a part of the continuing transaction of the armed robbery. The evidence presented was sufficient for the jury to find that defendant's use of the gun was inseparable from the taking of it and defendant's efforts to flee. This assignment of error is overruled.

SENTENCING PROCEEDING

[6] Defendant contends that the trial court committed reversible error in its rulings when the jury initially returned with a nonunanimous sentencing recommendation. First, defendant argues that the trial court misinterpreted the applicable statutes when it stated that it was required to instruct the jury to resume its deliberations. Second, defendant argues that the trial court failed to exercise its discretion when it denied his motions to impose a life sentence and for a mistrial. However, because the trial court correctly interpreted the statutes, because a nonunanimous poll alone does not provide authority to impose a life sentence, and because the record indicates that the trial court did exercise its discretion in denying a mistrial, these contentions are without merit.

After deliberating in the sentencing proceeding for just over one and one-half hours, the jury indicated it had reached a verdict. Upon inquiry by the trial court, the foreperson responded that the jury had arrived at a unanimous recommendation as to sentence and that he had personally answered, dated, and signed the Issues and Recommendation As To Punishment form (sentencing form). The foreperson affirmed that on the sentencing form the jury unanimously answered Issue One, "Yes"; Issue Two, "Yes"; and Issue Three, "No," and that it recommended that defendant be sentenced to life imprisonment. When the clerk asked whether this was the unanimous recommendation of the jury, the foreperson answered, "Yes." The clerk then asked, "So say you all?" and the jurors answered "Yes." These oral responses were consistent with the answers written on the sentencing form.

Then, as required by N.C.G.S. § 15A-2000(b), the trial court began polling the jurors individually. The court restated that the sentencing form responses were "Yes" as to Issues One and Two, and "No" as to Issue Three, with a unanimous recommendation of a sentence of life imprisonment, then asked the foreperson if this was still his recommendation. The foreperson responded, "Yes, sir." When the next two jurors were similarly questioned, both affirmed that their recommendation was consistent with the answers given on the verdict sheet.

However, the fourth juror polled answered "No" when asked whether his recommendation was consistent with the verdict sheet. The trial court immediately called a bench conference and defense counsel moved that the court impose a life sentence. The court responded: "Denied at this time. As I recall the statute it says it's my duty to direct them to retire and begin deliberations. Is that not correct?" State's counsel responded, "Yes, sir." Defense counsel then asked that the polling be completed. Counsel for the State agreed and the court completed polling the jury. Six of the remaining eight jurors stated that they disagreed with the responses that had been set out on the sentencing form, while two jurors affirmed agreement with the responses. After the polling appeared to be complete, the third juror polled (who had initially affirmed her agreement with the sentencing form responses) raised her hand and stated: "I think maybe I answered that the wrong way. I meant 'No' for mine."

The trial court then declared that there was not a unanimous sentencing recommendation and that its duty under North Carolina law was to direct the jury to resume deliberations. The jury was given a recess and defense counsel moved for a mistrial. The trial court responded: "In the court's discretion, the same is denied. These jurors have been out two, two and a half hours?" State's counsel answered, "An hour and 40 minutes."

After the recess, defense counsel "renew[ed] our motion for mistrial," pointing out that the jurors "had an opportunity to witness all emotions on both sides" and "reactions to their verdict." When the court asked defense counsel to clarify the grounds for his motion, defense counsel responded: "I mean specifically, there was crying. There was probably some happiness. I'm sure there was sadness and reactions on the other side. I only observed, myself personally, the reactions that were on this side of the bench. They varied from joy to crying." Defense counsel argued that in light of the reactions of spectators and the third juror's reversal of her position after the polling had appeared complete, no verdict could command confidence. As a result, defense counsel argued, the court should declare a mistrial. The court responded: "All right. The motion has been renewed. I've heard counsels' arguments and considered the same and, in the court's discretion, the motion is denied. The statute says that we shall—or the law says, we shall begin deliberations anew. And so we're going to try."

The trial court instructed the jury regarding the deliberative process, then directed the jurors to resume deliberations. Just over

an hour later, the jury again indicated that it had reached a verdict and defendant again renewed his motion for mistrial. After calculating the approximate time the jury had deliberated since being reinstructed, the court stated, "In the court's discretion denied." Upon returning to the courtroom, the foreperson indicated that changes to the sentencing form had been made in blue ink and that he had dated and re-signed the sentencing form. The altered sentencing form reflected a unanimous recommendation of death. The jury was polled in accordance with N.C.G.S. § 15A-2000(b), and each juror confirmed this recommendation.

Prior to entry of judgment, defense counsel stated:

> Judge, we respectfully renew our motion for mistrial. The grounds for that is the 6th, 8th, 9th and 14th amendments of the United States Constitution, Article One, Section One. 19, 23, 27, and 26. And the grounds really being that there was a very significant emotional response when the verdict was being read. And it was subsequent to that, that apparently they—a considerable reversal was had by the way of the jurors in the box, which led them to a—re-deliberations, which led to even more of a reversal even as to issues three and four. We think that the emotional outburst and such was something that'd be very difficult, especially to see the reaction of people, the victim's family to what would amount to a life sentence. And then the jury to go back and deliberate without being impaired by that process.

The court responded: "In the court's discretion, having had the opportunity to witness all of what occurred after the announcement that the verdict was not unanimous when first taken, denied."

Although defense counsel cited the constitutions of the United States and of North Carolina to the trial court in his motion for mistrial, and although defendant's assignment of error alleges that the trial court's rulings denied defendant his constitutional rights, in the body of his brief defendant makes only a statutory argument. "Questions raised by assignments of error . . . but not then presented and discussed in a party's brief, are deemed abandoned." N.C. R. App. P. 28(a). Defendant also contends that the court failed to exercise its discretion when it denied defendant's motion to impose a life sentence.

> When a trial court fails to exercise its discretion in the erroneous belief that it has no discretion as to the question presented, there

> is error. Where the error is prejudicial to a party, that party is entitled to have the question reconsidered and passed upon as a discretionary matter.

State v. McAvoy, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992).

Section 15A-1238, dealing with criminal trials in superior court generally, provides:

> Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled. The judge may also upon his own motion require the polling of the jury. . . . If upon the poll there is not unanimous concurrence, the jury must be directed to retire for further deliberations.

N.C.G.S. § 15A-1238 (2007).

Section 15A-2000(b) specifically addresses sentencing proceedings in capital cases and provides in relevant part:

> The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.
>
> If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

Id. § 15A-2000(b) (2007).

While section 15A-1238 explicitly states that if a poll reveals lack of unanimity, the jury must be directed to retire for further deliberations, section 15A-2000(b) is silent as to what a court can or cannot do when the polling reveals a nonunanimous sentencing recommendation in a capital case. Defendant interprets these two statutes to support his argument that the trial court erred when it concluded that it did not have authority to impose a life sentence once the jury revealed itself to be nonunanimous. However, section 15A-2000(b) requires that a sentence recommendation in a capital case be agreed upon by a unanimous vote of twelve jurors. The statute authorizes the court to impose a sentence of life imprisonment in the absence of

jury unanimity only when the jury cannot, within a reasonable time, agree on its sentence recommendation.

Even when, as here, an inconsistency arises between the verdict and the responses of jurors during the polling process, the trial court must nevertheless allow the jury a reasonable opportunity to attempt to reach a unanimous sentence recommendation. Only when the court concludes that "the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation" may the court impose a life sentence. *Id.* § 15A-2000(b). A nonunanimous poll does not necessarily indicate that a jury cannot agree to a unanimous sentencing recommendation within a reasonable time, nor does such a poll automatically give the trial court authority to impose a life sentence. When defendant made his motion for a life sentence, the trial court affirmed that the jury had deliberated for little more than an hour and a half at the time it delivered its initial sentencing recommendation. No evidence suggested that the jury could not agree and the jury had given no indication that it was having trouble reaching a sentencing recommendation. The issue whether the jury might be unable to agree unanimously on a sentence recommendation was never raised. The trial court was correct in its conclusion that it lacked authority to impose a life sentence in this case at the time defendant made his motion.[2]

[7] Defendant also contends that the trial court failed to exercise its discretion in denying his motions for a mistrial. A trial judge may declare a mistrial at any time during the trial upon defendant's motion or with defendant's concurrence. *Id.* § 15A-1061 (2007). Although "[t]he decision to grant or deny a mistrial rests within the sound discretion of the trial court," *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991), a trial court errs when it fails "to exercise its discretion in the erroneous belief that it has no discretion as to the question presented," *McAvoy*, 331 N.C. at 591, 417 S.E.2d at 494.

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2. The dissent argues that a trial court in a capital case has the discretionary power to impose a life sentence whenever a jury deliberating the appropriate sentence recommendation is not unanimous. However, the General Assembly has set out specific procedures to be followed in capital sentencing, thereby limiting and in some instances foreclosing the exercise of discretion by the trial court. Under the statute applicable here, the only contingency in which a trial court unilaterally shall impose a life sentence in a capital case is when the jury is nonunanimous after having deliberated for a "reasonable time." N.C.G.S. § 15A-2000(b). Otherwise, a capital sentencing recommendation is exclusively the province of the jury, *id.*; *State v. Smith*, 305 N.C. 691, 711, 292 S.E.2d 264, 276, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982) (trial court must enter judgment consistent with jury's recommendation of death), and the statute permits the trial court to intervene and impose a life sentence only when the jury cannot agree, not when the jury merely has not agreed.

Here, as detailed above, when the polling of the jury revealed a lack of unanimity, defendant initially moved for the trial court to impose a life sentence, and the trial court correctly concluded that it then lacked authority to grant such a motion. Defendant's motions for mistrial came later and were based on the premise that jurors had seen the reactions of those in the courtroom when the initial verdict indicating a recommendation of a life sentence was read. The record does not indicate that the trial court believed it had no discretion to declare a mistrial. Instead, each time it ruled on defendant's mistrial motions, the trial court specifically stated that it was denying the motions in its discretion. Accordingly, this assignment of error is overruled.

[8] Defendant argues the trial court committed plain error by allowing the jury to consider both the N.C.G.S. § 15A-2000(e)(4) and (e)(8) aggravating circumstances. However, we have held that submission of both the (e)(4) (crime committed for the purpose of avoiding or preventing a lawful arrest) and (e)(8) (crime committed against a law-enforcement officer while engaged in the performance of official duties) aggravating circumstances is not error because the (e)(4) aggravating circumstance focuses on the defendant's subjective motivation for his actions, while (e)(8) pertains to the underlying factual basis of the crime. *State v. Nicholson*, 355 N.C. 1, 47-49, 558 S.E.2d 109, 140-41, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002); *State v. Golphin*, 352 N.C. 364, 481-82, 533 S.E.2d 168, 243-44 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). We have recently treated this issue as a preservation issue, *State v. Polke*, 361 N.C. 65, 75, 638 S.E.2d 189, 195 (2006), *cert. denied*, —— U.S. ——, 169 L. Ed. 2d 55 (2007). However, because defendant has not denominated this issue in his brief as a preservation issue and has made a lengthy and sustained argument, we will address the merits of defendant's contention.

Defendant seeks to distinguish *Nicholson* and *Golphin*, claiming that in those cases the State presented distinct and separate evidence supporting each aggravating circumstance. Specifically, defendant argues that the motive of the defendant in *Nicholson* for killing an officer performing the official duty of responding to a domestic disturbance call was to avoid being arrested for having assaulted his wife. In *Golphin*, the officer was enforcing the traffic law, while the defendant's motive for killing the officer was to avoid arrest for auto theft. Defendant argues that, in contrast, his motive for killing Officer Prince was to avoid the very arrest that the officer was attempting to

carry out and that therefore, the evidence supporting the (e)(4) and (e)(8) aggravating circumstances impermissibly overlapped. However, our analysis in *Nicholson* applies here because the (e)(4) aggravating circumstance in this case focused on defendant's subjective intention to avoid being arrested, while the (e)(8) aggravating circumstance addressed the objective fact that the victim was a law enforcement officer performing his official duties. The facts here are almost identical to those in *Polke*, in which the defendant stole the service weapon of a sheriff's deputy who was attempting to arrest the defendant, then used the weapon to kill the deputy. 361 N.C. at 67, 638 S.E.2d at 190. Accordingly, we find no plain error in the trial court's instructions. This assignment of error is overruled.

[9] Defendant next contends the trial court erred by failing to give requested peremptory instructions as to two nonstatutory mitigating circumstances. Defendant asked the court to instruct that: "The defendant was cooperative with officers after being taken into custody and polite during interviews," and "The defendant has accepted responsibility for his criminal conduct." The trial court did give these instructions, but not peremptorily. Defendant argues that these circumstances were uncontradicted and supported by manifestly credible evidence and that the trial court was therefore required to give the instructions peremptorily, pursuant to *State v. McLaughlin*, 341 N.C. 426, 449, 462 S.E.2d 1, 13 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996).

The record indicates that before the jury began its sentencing proceeding deliberations, the trial court gave peremptory instructions as to three statutory mitigating circumstances. The trial court also gave nonperemptory instructions as to one other statutory mitigating circumstance and submitted the statutory catchall mitigating circumstance. In addition, the trial court gave peremptory instructions as to twenty-one nonstatutory mitigating circumstances submitted by defendant. One of these was "at [an] early stage of the criminal process, the Defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer," and at least one juror found that this circumstance existed and had mitigating value.

However, while agreeing to instruct on defendant's requested nonstatutory mitigating circumstances that "[t]he Defendant was cooperative with officers after being taken into custody and polite during interviews" and "[t]he Defendant has accepted responsibility for his criminal conduct," the trial court declined to instruct

peremptorily. At least one juror found that the former mitigating circumstance existed and had mitigating value, but no juror found the latter circumstance. Defendant argues that the trial court erred in not instructing peremptorily as to these two nonstatutory mitigating circumstances.

"[A] trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted and manifestly credible evidence." *Id.* at 449, 462 S.E.2d at 13. However, a peremptory instruction is not appropriate when the evidence is conflicting as to the circumstance. *State v. Call*, 353 N.C. 400, 412, 545 S.E.2d 190, 198, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001).

As to the instruction that defendant was cooperative and polite, while some evidence supported the instruction, other evidence indicated that defendant was neither cooperative with officers after being apprehended nor polite during interviews. For instance, defendant claimed to interrogating officers that he blacked out both when Officer Prince grabbed him and later when he took Officer Prince's weapon, even though he also described what happened after the purported blackouts. Defendant initially denied knowing what was in the bag with which he hit Officer Prince and only later, when confronted, admitted that he knew a bottle had been in the bag. Moreover, State Bureau of Investigation Agent Francisco testified that defendant "kept trying to minimize the fact that he had struck Officer Prince with a weapon." Also, defendant's statements to the authorities were inconsistent with other evidence regarding the distance from which defendant shot Officer Prince. One of the officers who interviewed defendant testified that defendant was "[v]ery cocky" and "appeared almost proud of what he had done." Because the evidence was conflicting as to whether defendant was cooperative and polite after being apprehended and during interviews, the trial court did not err in declining to instruct peremptorily on this nonstatutory mitigating circumstance.

As to defendant's requested instruction that he accepted responsibility for his criminal conduct, the record indicates that, while defendant admitted killing Officer Prince and acknowledged that the killing was a terrible mistake, he authorized his attorneys to concede guilt to second-degree murder only. This Court has stated that a defendant's willingness to plead guilty to second-degree murder "is evidence only of defendant's willingness to lessen his exposure to the death penalty or a life sentence upon a first-degree murder convic-

tion." *State v. Carroll*, 356 N.C. 526, 549, 573 S.E.2d 899, 914 (2002), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d 640 (2003); *see also State v. Thompson*, 359 N.C. 77, 95, 604 S.E.2d 850, 865 (2004) (finding difficulty in assessing whether a defendant's willingness to plead guilty to first-degree murder in exchange for a sentence of life without parole had mitigating value in demonstrating an admission of the defendant's responsibility), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). Defendant's admissions regarding his behavior and concession of guilt to second-degree murder constituted a voluntary acknowledgment of wrongdoing, as to which the trial court instructed peremptorily and which at least one juror found to exist and have mitigating value, but these admissions constituted only a partial acceptance of responsibility for his criminal conduct, which the jury found beyond a reasonable doubt to be first-degree murder. Accordingly, the trial court did not err in declining to give this instruction peremptorily.

PRESERVATION ISSUES

Defendant raises ten additional issues that he concedes previously have been decided by this Court contrary to his position. Defendant contends the trial court erred by sentencing him for both assault with a deadly weapon with intent to kill and attempted first-degree murder based upon the same conduct. As defendant acknowledges, we have rejected this argument. *State v. Tirado*, 358 N.C. 551, 578-79, 599 S.E.2d 515, 534 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). Defendant next maintains that the trial court committed constitutional error because a short-form indictment is not sufficient to charge a defendant with first-degree murder, as was done here. This Court has consistently held that such indictments "are in compliance with both the North Carolina and United States Constitutions." *State v. Lawrence*, 352 N.C. 1, 10, 530 S.E.2d 807, 813-14 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001); *State v. Wallace*, 351 N.C. 481, 504-05, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000).

Defendant asserts the trial court committed plain error by instructing the jury that it had to return unanimous answers to the sentencing form issues, because in practice a sentence of life without parole results when the jury does not unanimously answer "Yes." This Court has previously considered and rejected this argument. *State v. DeCastro*, 342 N.C. 667, 686-88, 467 S.E.2d 653, 662-64, *cert. denied*, 519 U.S. 896, 136 L. Ed. 2d 170 (1996); *State v. McCarver*, 341 N.C.

364, 388-94, 462 S.E.2d 25, 38-42 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). Defendant also assigns as plain error the trial court's use of "satisfy" in explaining the burden of proof on mitigation. Instructions using this term to explain the burden of proof have been found adequate. *State v. Payne*, 337 N.C. 505, 531-33, 448 S.E.2d 93, 108-09 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). Defendant also asserts that the trial court erred by instructing jurors to decide whether nonstatutory mitigating circumstances, including those circumstances which are uncontroverted, have mitigating value. This Court has previously considered and rejected this argument. *State v. Duke*, 360 N.C. 110, 141, 623 S.E.2d 11, 31 (2005) (citing *Payne*, 337 N.C. at 533, 448 S.E.2d at 109-10), *cert. denied*, 549 U.S. 855, 166 L. Ed. 2d 96 (2006).

Defendant assigns as plain error the trial court's jury instructions on the definition of "mitigation," contending that the definition is too narrow and precludes jury consideration of all proffered aspects of defendant's character. This Court has previously considered and rejected this argument. *State v. Goss*, 361 N.C. 610, 627, 651 S.E.2d 867, 878 (2007), *cert. denied*, ––– U.S. –––, 172 L. Ed. 2d 58 (2008); *State v. Conaway*, 339 N.C. 487, 533-34, 453 S.E.2d 824, 853-54, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). Defendant contends the trial court committed plain error by its use of the term "may" instead of "must" in sentencing Issues Three and Four, thereby making consideration of proven mitigation discretionary. We have rejected this argument. *Duke*, 360 N.C. at 141-42, 623 S.E.2d at 31-32; *State v. Lee*, 335 N.C. 244, 286-87, 439 S.E.2d 547, 569-70, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994).

Defendant next argues that the trial court unconstitutionally precluded full and free consideration of mitigation in the balancing and weighing stages of the sentencing proceeding by instructing that each juror could consider at Issues Three and Four only those mitigating circumstances which that particular juror had found at Issue Two. This Court has previously considered and rejected this argument. *Lee*, 355 N.C. at 286-87, 439 S.E.2d at 569-70. Defendant contends that the trial court erred by allowing jurors who express unequivocal opposition to the death penalty to be struck for cause. This Court has "repeatedly held that prospective jurors who express an unequivocal opposition to the death penalty may be excused without violating a defendant's constitutional rights." *State v. Morgan*, 359 N.C. 131, 172, 604 S.E.2d 886, 911 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005).

Finally, defendant contends that the death penalty is inherently cruel and unusual, that North Carolina's capital sentencing scheme is vague and overbroad and involves subjective discretion, and that capital punishment is applied arbitrarily and capriciously pursuant to a pattern and practice of discrimination on the basis of race, sex, and poverty, all in violation of the North Carolina and United States Constitutions. This Court has previously considered and rejected these arguments. *See*, *e.g.*, *Duke*, 360 N.C. at 142, 623 S.E.2d at 32; *Morgan*, 359 N.C. at 168-70, 604 S.E.2d at 908-09; *State v. Williams*, 304 N.C. 394, 409-11, 284 S.E.2d 437, 448 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982).

We have considered defendant's contentions on these issues and find no reason to depart from our prior holdings. Thus, we reject these arguments.

PROPORTIONALITY REVIEW

[10] In accordance with section 15A-2000(d)(2), we now consider whether the record supports the aggravating circumstances found by the jury, whether the death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," and whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2007).

We begin with the aggravating circumstances. Defendant was convicted of one count of first-degree murder on the basis of malice, premeditation, and deliberation, and under the felony murder rule. The trial court submitted the following four aggravating circumstances: (1) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (2) the murder was committed while defendant was engaged in the commission of robbery with a dangerous weapon, to wit, an E & J Brandy bottle; (3) the murder was committed against a law enforcement officer while engaged in the performance of his official duties; and (4) the murder was part of a course of conduct in which defendant engaged that included the commission by defendant of other crimes of violence against other persons. *Id.* § 15A-2000(e) (2007). The jury found each of these aggravating circumstances beyond a reasonable doubt. Our review of the record indicates that each of the four circumstances is fully supported.

Defendant contends that the death sentence was imposed under the influence of passion and prejudice. Defendant supports this argu-

ment by citing the incidents at trial where police officers approached the jury box as jurors viewed autopsy photographs, the jury's original nonunanimous recommendation of a life sentence, and the reaction in the courtroom to the jury's original sentencing recommendation. None of these incidents, as discussed above, nor anything else in the record indicates that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we turn to the issue of proportionality. We must determine whether the sentence of death is excessive or disproportionate by comparing this case with other cases where we have found the death sentence to be disproportionate. *Augustine*, 359 N.C. at 739, 616 S.E.2d at 536. This Court has found a death sentence disproportionate on eight occasions. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that defendant's case is not substantially similar to any of these.

First, the evidence shows that for the purpose of evading lawful arrest, defendant intentionally murdered a law enforcement officer who was performing his official duties. "[T]he N.C.G.S. § 15A-2000(e)(4) and (e)(8) aggravating circumstances reflect the General Assembly's recognition that 'the collective conscience requires the most severe penalty for those who flout our system of law enforcement.' " *Golphin*, 352 N.C. at 487, 533 S.E.2d at 247 (quoting *State v. Brown*, 320 N.C. 179, 230, 358 S.E.2d 1, 33, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)).

> The murder of a law enforcement officer *engaged in the performance of his official duties* differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public—the body politic—and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive.

Id. at 487-88, 533 S.E.2d at 247 (quoting *Hill*, 311 N.C. at 488, 319 S.E.2d at 177 (Mitchell, J. (later C.J.), concurring in part and dissenting in part)).

In addition, defendant was convicted of first-degree murder both under the felony murder rule and on the basis of malice, premeditation, and deliberation. "Although a death sentence may properly be imposed for convictions based solely on felony murder, a finding of premeditation and deliberation indicates a more calculated and cold-blooded crime for which the death penalty is more often appropriate." *Taylor*, 362 N.C. at 563, 669 S.E.2d at 276 (internal citations and quotation marks omitted).

Moreover, the evidence shows that despite the kneeling officer's pleas for mercy, defendant fatally shot Officer Prince multiple times. The evidence further indicates that defendant shot at the arriving back-up officer, fled the scene with Officer Prince's weapon, shot again when he abandoned his car, then hid under an occupied mobile home as armed police officers closed in, potentially endangering the innocent occupants. The jury found that the murder of Officer Prince was part of a course of conduct that included violent crimes against another person or persons, constituting the (e)(11) aggravating circumstance. This Court has never found a death sentence to be disproportionate when the jury found more than two aggravating circumstances to exist, and has found the N.C.G.S. § 15A-2000(e)(11) circumstance, standing alone, sufficient to support a death sentence. *Polke*, 361 N.C. at 77, 638 S.E.2d at 196.

This Court also compares the instant case with cases in which we have found the death penalty to be proportionate. *State v. Al-Bayyinah*, 359 N.C. 741, 762, 616 S.E.2d 500, 515 (2005), *cert. denied*, 547 U.S. 1076, 164 L. Ed. 2d 528 (2006). After carefully reviewing the record, we conclude that this case is more analogous to cases in which we have found the sentence of death proportionate than to the cases in which we have found it disproportionate or cases in which juries have consistently recommended sentences of life imprisonment. Although defense counsel assiduously presented pertinent mitigating circumstances and aspects of this case, including defendant's youth and difficult upbringing, we are nonetheless convinced that the sentence of death here is not disproportionate.

Accordingly, we conclude defendant received a fair trial and capital sentencing proceeding, free from error, and the death sen-

tence recommended by the jury and ordered by the trial court is not disproportionate.

NO ERROR.

Justice HUDSON dissenting.

Because I conclude that the trial judge here acted under the misapprehension that, when polling revealed the jury was not unanimous, he had no discretion to direct the jury to resume deliberations or instead to impose a life sentence on defendant, I respectfully dissent. I concur in the majority opinion except as to this sentencing issue. In my opinion, this failure to exercise discretion has profoundly prejudiced defendant, as it undermines confidence in the fairness of the ultimate sentence here—the death penalty. I would hold that the trial court's conclusion was an error of law and would vacate the sentence and remand for a new sentencing hearing.

This Court has consistently recognized—indeed, emphasized—the inherent authority and discretion of the trial judge to supervise and control the proceedings before him "to ensure fair and impartial justice for both parties." *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732 (citation omitted), *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). Since our earliest cases, we have entrusted trial judges with great discretion in assessing the possibility of undue influence on a jury:

> [A trial judge] is clothed with this power because of his learning and integrity, and of the superior knowledge which his presence at and participation in the trial gives him over any other forum. However great and responsible this power, the law intends that the Judge will exercise it to further the ends of justice, and though doubtless, it is occasionally abused, it would be difficult to fix upon a safer tribunal for the exercise of this discretionary power, which must be lodged somewhere.

Moore v. Edmiston, 70 N.C. 382, 390, 70 N.C. 470, 481 (1874). Although *Moore* specifically involved the trial court's discretion in dealing with undue influence on a jury, we have stressed the importance and scope of that discretion in all aspects of managing a trial by jury. *See, e.g.*, *State v. Davis*, 317 N.C. 315, 318, 345 S.E.2d 176, 178 (1986) ("The trial judge has inherent authority to supervise and control trial proceedings. The manner of the presentation of the evidence is largely within the sound discretion of the trial judge and his con-

trol of a case will not be disturbed absent a manifest abuse of discretion." (citations omitted)); *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985) ("In this connection it is well settled that it is the duty of the trial judge to supervise and control the course of a trial so as to insure justice to all parties.").

Here, the majority's construction of N.C.G.S. §§ 15A-1238 and -2000(b) restricts that principle, unnecessarily in my view. Moreover, the majority opinion's repeated statement that the trial court "lacked authority to impose a life sentence" inadvisably constrains the discretion of a trial judge overseeing a capital sentencing proceeding while also incorrectly framing the question before us. The issue is whether, given the language of N.C.G.S. § 15A-2000(b), the trial court had the discretion to choose among these options: (1) order the jury to resume deliberations; (2) impose a life sentence; or (3) declare a mistrial. The canons of statutory construction and prior case law demonstrate that it did.

According to the majority, the trial court's authority here was defined by N.C.G.S. § 15A-1238, which reads:

> Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled. The judge may also upon his own motion require the polling of the jury. The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not unanimous concurrence, the jury *must be directed* to retire for further deliberations.

N.C.G.S. § 15A-1238 (2007) (emphasis added). The majority maintains that § 15A-1238 controlled the situation faced by this trial judge because § 15A-2000(b) is "silent as to what a court can or cannot do where the polling reveals a nonunanimous jury as to sentencing recommendation in a capital case." The relevant portion of § 15A-2000(b) provides:

> The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.
>
> If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge *shall impose* a

> sentence of life imprisonment; provided, however, that the judge *shall in no instance impose* the death penalty when the jury cannot agree unanimously to its sentence recommendation.

Id. § 15A-2000(b) (2007) (emphases added). Thus, § 15A-2000(b) tracks the basic outline of § 15A-1238 as to the return of a verdict by a jury and the subsequent polling of the jury, but § 15A-2000(b) eliminates the legislative command that "the jury must be directed to retire for further deliberations" if not unanimous.

The majority would graft that language onto § 15A-2000(b) with its holding that the trial court "lacked authority to impose a life sentence." Had the General Assembly intended to limit the trial court's discretion when a jury is nonunanimous in its capital sentencing recommendation, the language of § 15A-1238 clearly shows that it knows how to do so. *See*, *e.g.*, *N.C. Baptist Hosps.*, *Inc. v. Mitchell*, 323 N.C. 528, 538, 374 S.E.2d 844, 849 (1988) (in construing statute, noting "[t]here is no doubt that the legislature knows how to draft such language when it chooses to do so"). Nevertheless, " '[t]he short answer is that [the legislature] did not write the statute that way.' " *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 24 (1983) (quoting *United States v. Naftalin*, 441 U.S. 768, 773, 60 L. Ed. 2d 624, 630 (1979)).

Likewise, we have long held that, "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985) (citations omitted); *see also Lowder v. All Star Mills*, *Inc.*, 301 N.C. 561, 579, 273 S.E.2d 247, 257 (1981) ("Where two statutory provisions appear, a special or particular provision will control over a general one." (citation omitted)); *State v. Baldwin*, 205 N.C. 174, 176, 170 S.E. 645, 646 (1933) ("A settled rule of construction requires that all statutes relating to the same subject shall be compared and harmonized if this end can be attained by any fair and reasonable interpretation, and that if two statutes are apparently incompatible, one general in its terms and the other special and expressive of a restricted application, the latter may be considered in the nature of an exception and sustained upon this theory." (citations omitted)); *State v. Johnson*, 170 N.C. 771, 776, 170 N.C. 685, 690-91, 86 S.E. 788, 791 (1915) (stating that a special statute controls over general statute that relates to the same subject matter and is inconsistent).

Here, section 15A-1238 falls under Article 73, "Criminal Jury Trial in Superior Court," while § 15A-2000(b) is within Article 100, "Capital Punishment," which the legislature specifically drafted to govern the conduct of capital proceedings. There is no indication that the General Assembly intended to make § 15A-1238, the more general act, controlling over § 15A-2000(b). *See Nat'l Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 629, 151 S.E.2d 582, 586 (1966) ("[T]o the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling . . . ." (citation and internal quotation marks omitted)). Further, the rule of lenity requires us to "construe[] strictly" and resolve "[a]ll conflicts and inconsistencies" in penal statutes "in favor of the defendant." *State v. Scoggin*, 236 N.C. 1, 10, 72 S.E.2d 97, 103 (1952).

Although the unique factual situation presented by this case has never before been considered by this Court, we have discussed the discretion of the trial court in the context of N.C.G.S. § 15A-2000. In *State v. Sanders*, this Court affirmed the trial court's declaration of a mistrial based on a finding of "manifest necessity" after learning of juror misconduct during deliberations, including the jury's acting contrary to the instructions given by the trial court. 347 N.C. 587, 599, 496 S.E.2d 568, 576 (1998). The trial court sent the jury to deliberate, or resume deliberations, on three separate occasions before ultimately declaring a mistrial upon the State's motion. *Id.* at 597-98, 496 S.E.2d at 575. Our "thorough review of the record" led us to conclude that "the trial court properly exercised its discretion in ordering a mistrial." *Id.* at 599, 496 S.E.2d at 576.

This is not to suggest that *Sanders* should be read as having compelled the trial judge here to declare a mistrial. Rather, *Sanders* is instructive in that it discussed approvingly the trial court's "exploring alternative remedies which could have allowed the sentencing proceeding to continue" before its ultimate declaration of a mistrial. *Id.* at 600-01, 496 S.E.2d at 576-77. Sending the jury back to resume deliberations was one such option employed by the trial court in *Sanders*. Justice Frye, in his dissent in *Sanders*, stated even more succinctly his view of the "alternative remedies" available to the trial court under § 15A-2000(b), when faced with a nonunanimous jury: "The appropriate action was for the judge to either impose a sentence of life imprisonment or encourage the jurors to continue deliberating

to see if they could unanimously agree to a sentencing recommendation." *Id.* at 601, 496 S.E.2d at 577 (Frye, J., dissenting).

This language—admittedly, dicta—strongly suggests that this Court previously concluded that the trial court is vested with discretion to determine the most appropriate action when faced with a nonunanimous jury in a capital sentencing proceeding. Sending the jury back to resume deliberations is one acceptable option. However, according to the plain language of § 15A-2000(b), if the trial court determines that the jury has deliberated for a "reasonable time," imposing a life sentence is another alternative. *See State v. Johnson*, 298 N.C. 355, 370, 259 S.E.2d 752, 762 (1979) ("[W]hat constitutes a 'reasonable time' for jury deliberation in the sentencing phase should be left to the trial judge's discretion.").

Nevertheless, as reflected in the transcript, and as argued by defendant in his brief, the trial judge's error here was in believing that he was *required* to send the jury back to resume deliberations. The following excerpts from the transcript of sentencing, immediately after polling initially showed that the jury was not unanimous, clearly reflect that the trial judge believed he had no discretion at this point:

> [DEFENSE COUNSEL]: I move that you impose a life sentence.
>
> THE COURT: Denied at this time. *As I recall the statute it says it's my duty to direct them to retire and begin deliberations.* Is that not correct?
>
> [DISTRICT ATTORNEY]: Yes, sir.
>
> . . . .
>
> [Again, after polling was concluded:]
>
> THE COURT: . . . . Ladies and gentlemen, finding that there is not, at this time, a unanimous recommendation as to sentence . . . . *Under North Carolina law, it is thus my duty to direct you to retire and resume your deliberations.*

(Emphases added.) The trial court then sent the jury out for a short recess, during which defense counsel renewed the motion for a mistrial and mentioned the jury's "opportunity to witness all emotions on both sides," arguing that it was "prejudicial" for jury to see "emotions" and "reactions" to the sentencing recommendation, including "crying" and "some happiness." Defense counsel also referred to

Alicia Patrick, the third juror polled, changing her mind at the end of the polling, and he stated that "when you have a situation like that, we just are not going to be able to achieve a verdict that we could have confidence in." The defense again renewed its motion for a mistrial, and the trial court responded: "I've heard counsels' arguments and considered the same and, in the court's discretion, the motion is denied. *The statute says that we shall—or the law says, we shall begin deliberations anew.* And so we're going to try." (Emphasis added.)

> As quoted by the majority, and under long-standing precedent:
>
> When a trial court fails to exercise its discretion in the erroneous belief that it has no discretion as to the question presented, there is error. Where the error is prejudicial to a party, that party is entitled to have the question reconsidered and passed upon as a discretionary matter. In such cases, this Court may remand the case or take such other actions as the rights of the parties and applicable law may require.

State v. McAvoy, 331 N.C. 583, 591, 417 S.E.2d 489, 494-95 (1992) (citations omitted); *see also State v. Ashe*, 314 N.C. 28, 36-37, 331 S.E.2d 652, 657-58 (1985) (concluding that a trial court's complete failure to exercise discretion amounted to reversible error).

Here, the error was neither the denial of defendant's motion for a sentence of life imprisonment nor sending the jury back to resume deliberations. Instead, the error was the trial judge's erroneous belief, apparent from the transcript, that he had no discretion in reaching his decision. The trial judge faced a highly unusual situation: the jury indicated its unanimity; then, on polling, some individual jurors disavowed their assent to that unanimous recommendation, including one juror who changed her vote after already having been polled, all following emotional reactions in the courtroom to the initial recommendation of life imprisonment for a defendant convicted of killing a police officer. In light of these circumstances, it is impossible to determine how the trial judge might have ruled on defendant's motion for imposition of a sentence of life imprisonment had he been aware such a ruling was discretionary. Thus, this failure to exercise discretion was fundamental to the fairness of defendant's sentencing proceeding.

The authority of the trial judge to supervise and control proceedings in the courtroom is paramount in our criminal justice system. I do not necessarily find error in the trial court's decision to direct the

jury to resume deliberations; rather, I conclude only that the court erred in believing that decision was mandated. In my view, our precedents and long-standing rules of statutory construction clearly indicate that such a decision is discretionary. The trial court thus erred by failing to make the decision as an exercise of that discretion, resulting in the most extreme prejudice possible to defendant, a sentence of death. As such, I would vacate and remand for a new sentencing hearing for defendant.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. LORI SHANNON ICARD

No. 236A08

(Filed 18 June 2009)

Search and Seizure— search of pocketbook—not consensual

The trial court erred by denying defendant's motion to suppress evidence seized pursuant to a search of her purse because the search of defendant's purse occurred after she was illegally seized where an officer in a high crime area approached defendant and a companion who were parked in a pick-up truck, requested identification and asked other questions, called for back-up, and ultimately found drug-related items in defendant's purse after she handed it to him when asked. The encounter began legally, but under the totality of the circumstances the officers mounted a show of authority and a reasonable person in defendant's place would have shared the officer's belief that defendant was not free to leave or otherwise terminate the encounter. The trial court erred when it concluded that defendant's interaction with the officers was consensual.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 190 N.C. App. 76, 660 S.E.2d 142 (2008), finding no error in part in a judgment entered on 1 December 2006 by Judge Robert C. Ervin in Superior Court, Catawba County, and remanding for further findings in part. Heard in the Supreme Court 15 October 2008.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

C. Scott Holmes for defendant-appellee.

EDMUNDS, Justice.

This case presents the question whether a police encounter with defendant triggered defendant's Fourth Amendment protection against unreasonable seizure. We conclude that a reasonable person in defendant's position would not have felt free to refuse an officer's request to search her purse or otherwise terminate the encounter under the totality of circumstances that here included the officer's initiation of the encounter, his declaration to defendant and her companion that he was investigating drug crimes and prostitution, his call for a backup officer, his persistence when defendant did not respond to his initial efforts to make contact, his request that defendant produce identification, and his requests to defendant that she both exit the vehicle with her purse and allow him to ascertain its contents. Accordingly, we determine that defendant was seized within the meaning of the Fourth Amendment. Because the taint of the illegal seizure of defendant had no opportunity to dissipate before the search of her purse, we hold that the trial court erred in denying defendant's motion to suppress.

At defendant's trial, the State presented evidence that at approximately 12:30 a.m. on 21 September 2004, Maiden Police Department Officer Curt Moore drove into the parking lot of Fairview Market, a truck stop on the corner of West Maiden Road and Startown Road in Maiden, North Carolina. Officer Moore considered Fairview Market to be a high crime area because of complaints of prostitution and drug-related activity there. As he entered the parking lot, Officer Moore noticed a pickup truck approximately fifteen feet from the northwest corner of the Fairview Market building. He did not then see anyone in the truck. Although the truck was taking up two spaces, it was not illegally parked.

Officer Moore drove past the truck from behind, then circled the building. As he again approached the truck, he observed a silhouette above the steering wheel that, because of the lighting, he could not identify. Officer Moore parked his police vehicle directly behind the truck with his headlights on and his blue strobe visor lights activated. The truck was not pinned in by the police car. Officer Moore provided the truck's plate number and description to his dispatcher.

Officer Moore, who was in uniform with his service revolver visible, exited his vehicle and walked toward the driver's side door of the truck. As he approached, the driver partially lowered his window and Officer Moore observed two individuals sitting in the truck. He subsequently learned that the driver was Carmen Coleman and the passenger was defendant Lori Icard. Officer Moore requested Coleman's driver's license and vehicle registration and also asked why he and defendant were parked at Fairview Market. Coleman explained that they were from Connelly Springs, North Carolina, and were waiting to meet a friend named Jody who was coming from Taylorsville, North Carolina. Officer Moore advised Coleman that he and defendant were being "checked out . . . because of the numerous complaints of prostitution and drugs in that area." He took Coleman's driver's license and registration back to his police vehicle, where he requested a warrant check, a license check, and backup assistance. Although these checks did not reveal anything suspicious, Officer Moore held on to Coleman's license and registration.

Responding to Officer Moore's call for backup, Officer Darby Hedrick arrived in a marked police car and parked behind Coleman's truck, parallel to Officer Moore's vehicle. Officer Moore turned off his visor lights and Officer Hedrick activated his take-down spotlights to illuminate defendant's side of the truck. Officer Moore approached the truck door on defendant's side, while Officer Hedrick stood behind him at the midpoint of the truck bed.

Officer Moore rapped on defendant's side window with his knuckles, but she did not respond. He rapped again, and when defendant again did not respond, Officer Moore opened the truck door, identified himself as a police officer, and asked if she was carrying identification. Although defendant answered that her ID card was in her other purse, Officer Moore pointed to a small black zippered bag on the truck's floorboard and asked if the ID might be inside. Defendant opened the bag and removed a billfold, from which she produced a North Carolina identification card. Officer Moore looked at the card, then asked defendant to bring her purse with her to the back of the truck, where both officers proceeded to question her. During the questioning, Officer Moore asked if he could look in defendant's purse. She responded by handing it to him. Officer Moore searched the purse and in it found several bullets, a glass tube that appeared burned at one end, and a clear plastic bag containing a residue that was later determined to be methamphetamine.

The officers had separated defendant from Coleman to determine whether they gave consistent stories. When Coleman was questioned, Officer Moore took a lockblade clip-type knife from Coleman's pocket. Coleman also handed Officer Moore a clear plastic bag containing marijuana, and another clear plastic bag containing a white- and tan-colored powder. Coleman then struggled briefly and unsuccessfully with Officer Moore. Once Coleman was subdued, a search of the truck revealed glass pipes commonly used to inhale controlled substances, crack pipes, a digital scale, a loaded Rossi .357 pistol, and a transparent yellow plastic bag containing tan powder.

Defendant was charged with resisting and obstructing a law enforcement officer, possession with intent to sell and deliver cocaine, possession with intent to sell and deliver marijuana, possession with intent to sell and deliver methamphetamine, carrying a concealed weapon, and possession of drug paraphernalia. At trial, defendant made an oral motion to suppress the State's evidence. The trial court conducted a *voir dire* hearing on defendant's motion outside the presence of the jury. In addition to the evidence recited above, Officer Moore testified that he had not observed any contraband and did not have a reason to pat down defendant for weapons when he asked her to step out of the truck. Officer Moore believed his encounter with defendant was consensual because she complied with his verbal instructions. However, Officer Moore testified that he did not tell defendant she was free to leave, that in fact she was not free to leave, and that he would not have allowed defendant to walk away from the truck.

The trial court denied defendant's motion to suppress, orally stating that, as a matter of law, defendant was not seized at the time she consented to the search of her purse. In its subsequent written order, the trial court made findings of fact that Officer Moore "did not pat down or frisk the defendant for weapons," "did not threaten the defendant in any way," and "did not place his hand on her at any time." The court also found that while Officer Moore carried a service weapon, "[h]e did not remove that weapon from its holster." Finally, the trial court found that Officer Moore "did not apply physical force, make any threat of force or make a show of authority at any time prior to the discovery of the drug paraphernalia in the defendant's purse," and "did not coerce the defendant's cooperation with his requests." Based upon "the totality of the circumstances," the trial court concluded as a matter of law that "the defendant would not have felt that she was not free to terminate the encounter or decline

[Officer] Moore's requests," and that "[b]ased on the totality of the circumstances, the defendant cooperated with [Officer] Moore's requests and her cooperation was not coerced by physical force or a show of authority."

When the case was called for trial, the State voluntarily dismissed the charge of possession with intent to sell and deliver cocaine. Defendant moved to dismiss all the remaining charges at the close of the State's evidence, and the trial court allowed defendant's motion as to the charges of possession with intent to sell and deliver marijuana and carrying a concealed weapon. The court also dismissed the charge of possession with intent to sell and deliver methamphetamine, but found sufficient evidence to support submission of the lesser-included offense of simple possession of methamphetamine. The court denied defendant's motions to dismiss the charges of possession of drug paraphernalia and resisting and obstructing a law enforcement officer. The jury found defendant guilty of simple possession of methamphetamine and acquitted her of the remaining charges.

Defendant appealed her conviction and sentence to the Court of Appeals, arguing the trial court erred in concluding that the episode was a noncoercive encounter between citizen and officer that fell outside the protections of the Fourth Amendment. The Court of Appeals majority found that Officer Moore seized defendant and that, as a result, the search of defendant's purse was subject to Fourth Amendment analysis. *State v. Icard*, 190 N.C. App. 76, 660 S.E.2d 142 (2008). The majority emphasized that defendant did not live near Fairview Market and that to terminate the encounter, defendant would have had to leave the Market and enter a high crime area on foot, after midnight. *Id.* at 84, 660 S.E.2d at 148 ("At 12:30 a.m. in an area known for drug activity and prostitution, any passenger, particularly a female, would undoubtedly have felt uncomfortable or unsafe by attempting to leave the parking lot on foot."). Because the trial court had not made findings of fact as to whether defendant's consent to search her purse was voluntary or coerced, the majority remanded the case to Superior Court, Catawba County for additional findings. *Id.* at 86, 660 S.E.2d at 149.

The dissent argued that the majority's emphasis on the location of the encounter was misplaced and that a police officer's "words and actions" effect a seizure. *Id.* at 89, 660 S.E.2d at 150 (Bryant, J., dissenting) (internal quotation marks omitted). Finding no "show of authority amounting to a restraint on [d]efendant's liberty," the dis-

senting judge would have affirmed the trial court's order denying defendant's motion to suppress. *Id.* at 89-90, 660 S.E.2d at 151. The State appealed to this Court as a matter of right.

On appeal from denial of a motion to suppress, the trial court's findings of fact are binding when supported by competent evidence, while conclusions of law are "fully reviewable" by the appellate court. *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994) (internal quotation marks omitted). Here, the trial court made numerous findings of fact that are supported by substantial competent evidence presented at the suppression hearing. However, two of the trial court's concluding three findings of fact are as follows:

> 37. [Officer] Moore did not apply physical force, make any threat of force, or make a show of authority at any time prior to the discovery of the drug paraphernalia in the defendant's purse.
>
> . . . .
>
> 39. [Officer] Moore did not coerce the defendant's cooperation with his requests. Moore did not tell the defendant that she was not free to terminate this interaction.

Although labeled findings of fact, these quoted findings mingle findings of fact and conclusions of law. For instance, that Officer Moore did not apply physical force is a finding of fact, but the statement in Finding No. 37 that Officer Moore's actions did not amount to a show of authority resolves a question of law. The finding that Officer Moore did not tell defendant she was not free to terminate the encounter is a factual matter, but the court's determination in Finding No. 39 that Officer Moore did not coerce defendant is a conclusion of law. While we give appropriate deference to the portions of Findings No. 37 and 39 that are findings of fact, we review de novo the portions of those findings that are conclusions of law. *Id.*

An individual is seized by a police officer and is thus within the protection of the Fourth Amendment when the officer's conduct "would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Florida v. Bostick*, 501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 100 L. Ed. 2d 565, 569 (1988)) (describing the above-quoted standard as "the crucial test"). A reviewing court determines whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter by examining the totality of circum-

stances. *Id.* at 436-37, 115 L. Ed. 2d at 400; *Brooks*, 337 N.C. at 142, 446 S.E.2d at 586.

The totality of circumstances "test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Chesternut*, 486 U.S. at 573, 100 L. Ed. 2d at 572. Moreover, "an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave" or otherwise terminate the encounter. *INS v. Delgado*, 466 U.S. 210, 215, 80 L. Ed. 2d 247, 255 (1984) (internal quotation marks omitted); *see also Bostick*, 501 U.S. at 436-37, 115 L. Ed. 2d at 400.

Although the standard is not satisfied when a police officer merely engages an individual in conversation in a public place, *see, e.g.*, *Brooks*, 337 N.C. at 142, 446 S.E.2d at 586, additional circumstances attending such an encounter may reveal that the individual is not participating consensually but instead has submitted to the officer's authority, *see Bostick*, 501 U.S. at 434, 115 L. Ed. 2d at 398 (explaining that a police officer may seize an individual through a "show of authority" that "restrain[s] the liberty of a citizen"). Relevant circumstances include, but are not limited to, the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification or property, the location of the encounter, and whether the officer blocked the individual's path. *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 153 L. Ed. 2d 242 (2002); *Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389; *State v. Farmer*, 333 N.C. 172, 424 S.E.2d 120 (1993).

The State cites *State v. Brooks*, where this Court conducted a totality of the circumstances review of an encounter in which a uniformed SBI agent approached the defendant as he was sitting in the driver's seat of a car parked at a nightclub. 337 N.C. at 136-37, 446 S.E.2d at 583. The driver's door was open and the defendant had been talking with another individual outside the car who hastened away as the agent approached. *Id.* at 142, 446 S.E.2d at 586. The agent observed an empty unsnapped holster within the defendant's reach, and when the agent asked, "Where is your gun?," the defendant responded, "I'm sitting on it." *Id.* at 137, 446 S.E.2d at 583. Under the

totality of circumstances present in *Brooks*, this Court held that the agent did not seize the defendant by approaching his open car door and asking a single brief question. *Id.* at 142, 446 S.E.2d at 586. Instead, we concluded that the defendant's response gave the officer probable cause to believe the defendant was carrying a concealed weapon and justified the defendant's arrest. *Id.* at 145, 446 S.E.2d at 588.

In contrast, the encounter between the officers and defendant in the case at bar was significantly longer in duration and more intrusive in substance. The record reveals that much of the evidence presented to the trial court during the *voir dire* hearing regarding the seizure was not contested. According to this uncontested evidence, Officer Moore parked directly behind the vehicle in which defendant was a passenger, with his blue lights flashing. Officer Moore, who was in uniform and armed, told Coleman in defendant's presence that the two were being checked out because the area was known for drugs and prostitution. When Officer Moore requested assistance, Officer Hedrick arrived in a marked police car and used his take-down lights to illuminate defendant's side of the truck. Both officers then approached defendant. When defendant twice failed to respond to Officer Moore's attempts to initiate an exchange, the officer opened defendant's door, compelling contact. Officer Moore requested that defendant produce her identification, then asked defendant to come with her purse to the rear of the vehicle where he and Officer Hedrick continued to ask questions. When Officer Moore left defendant to deal with Coleman, he did not return her purse but instead handed it to Officer Hedrick. The encounter took place late at night, some distance from the address listed on defendant's identification.

Under the totality of these uncontradicted circumstances, we conclude that the officers mounted a show of authority when: (1) Officer Moore, who was armed and in uniform, initiated the encounter, telling the occupants of the truck that the area was known for drug crimes and prostitution; (2) Officer Moore called for backup assistance; (3) Officer Moore initially illuminated the truck with blue lights; (4) Officer Hedrick illuminated defendant's side of the truck with his take-down lights; (5) Officer Moore opened defendant's door, giving her no choice but to respond to him; and (6) Officer Moore instructed defendant to exit the truck and bring her purse. By the time defendant stepped out of the truck at Officer Moore's request, a reasonable person in defendant's place would have shared the officer's belief that she was not free to leave or otherwise terminate the encounter.

See Bostick, 501 U.S. at 437, 115 L. Ed. 2d at 400. Therefore, we find the trial court erred when it concluded as a matter of law that defendant's interaction with Officers Moore and Hedrick was consensual.[1]

In so holding, we acknowledge that this encounter between defendant and the officers began legally. Police are free to approach and question individuals in public places when circumstances indicate that citizens may need help or mischief might be afoot. *Terry v. Ohio*, 392 U.S. 1, 22, 20 L. Ed. 2d 889, 906-07 (1968); *State v. Streeter*, 283 N.C. 203, 208, 195 S.E.2d 502, 505-06 (1973). Here, the officers' instincts were sound, as evidenced by Coleman's guilty pleas to several felonies. Nevertheless, because the search of defendant's purse occurred after she was illegally seized but before the taint of the illegal seizure could have dissipated, *see Wong Sun v. United States*, 371 U.S. 471, 491, 9 L. Ed. 2d 441, 457 (1963), we conclude that the trial court erred in denying defendant's motion to suppress the fruits of the search, *see Florida v. Royer*, 460 U.S. 491, 496-97, 75 L. Ed. 2d 229, 235-36 (1983) (plurality).

For the reasons stated above, we affirm that part of the decision of the Court of Appeals which held Officer Moore seized defendant and that, as a result, the search of defendant's purse was subject to Fourth Amendment analysis. We reverse that part of the decision of the Court of Appeals which remanded the matter to Superior Court, Catawba County for additional findings of fact as to whether defendant's consent to search her purse was voluntary or coerced. We remand this matter to the Court of Appeals for further remand to Superior Court, Catawba County with instructions to grant defendant's motion to suppress and for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice NEWBY dissenting.

This Court substitutes its judgment for that of the trial court and grants defendant a new trial by re-weighing the evidence and con-

1. We do not hold, as the dissent suggests, that the circumstances here "convert" every similar encounter between a law enforcement officer and citizen "to an unlawful seizure." We hold only that the totality of circumstances establishes that defendant was seized. While such seizures are lawful when supported by reasonable articulable suspicion, *see Terry v. Ohio*, 392 U.S. 1, 22 L. Ed. 2d 889 (1968), the State did not argue either at trial or on appeal that particularized suspicion exists in this case. Once defendant was seized, the immediately subsequent search of her purse was not consensual.

cluding the search of defendant's purse was illegal because she had been unlawfully seized in violation of the Fourth Amendment. This decision fails to give proper deference to the factual findings of the trial court and misapplies federal and state jurisprudence long understood to mean that not all personal exchanges between police officers and citizens involve a seizure. The Court's analysis also leaves law enforcement officers without adequate guidance needed to enable them to enforce the laws of the State and protect its citizens. Because I believe the evidence supports the decision of the trial court that defendant voluntarily consented to the search of her purse, I respectfully dissent.

The standard of review under which we evaluate the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. *See*, *e.g.*, *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994). The trial court's findings "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). The trial court determines the credibility of the witnesses who testify, weighs the evidence, and determines the reasonable inferences to be drawn therefrom. *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). If different inferences may be drawn from the evidence, the trial court decides which inferences to draw and which to reject. *Id.* Appellate courts are bound by the trial court's findings if there is some evidence to support them, and may not substitute their own judgment for that of the trial court even when there is evidence which could sustain findings to the contrary. *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984). "Where the findings of fact support the conclusions of law, such findings and conclusions are binding upon us on appeal." *State v. Wynn*e, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991) (citations and internal quotation marks omitted).

At trial, the encounter with defendant was described by Officer Curt Moore of the Maiden Police Department, a twenty-two year veteran of law enforcement who had previously worked for the North Carolina State Highway Patrol, the Hickory Police Department and the Catawba County Sheriff's Department. On 21 September 2004, Officer Moore was on duty as a supervisor of the night patrol division, which required him to monitor the security of businesses and people within the city limits and to address any problems that arose during the shift. One such business was the Fairview Market, a gas

station and sandwich shop situated at the intersection of West Maiden Road and Startown Road in Maiden, North Carolina. On the side of the building that faced the road was a large, private parking lot for automobiles and tractor-trailers containing three rows of parking spaces. Two "No Trespassing" signs were posted on either side of the front of the building stating that violators after business hours would be subject to law enforcement by the Town of Maiden. Officer Moore recalled that this particular area was known for its high rate of criminal activity, that there had been numerous complaints regarding drugs and prostitution in the area, and that he had made several arrests there.

At approximately 12:30 a.m., Officer Moore pulled into the parking lot of the Fairview Market to perform an after-hours check of the premises because the business had closed at 10:00 p.m. While turning into the lot, he noticed only one vehicle there—a pickup truck pulled diagonally across two parking spaces in the front row within fifteen feet of the side of the building. Although the truck was not parked illegally, the abnormal positioning caused Officer Moore to observe it more closely as he drove past. When his headlights crossed through the back windshield, the cab of the truck appeared to be unoccupied. Officer Moore continued past the truck and circled around the building. As he rounded the front corner of the building, his headlights illuminated the front windshield of the truck and he saw a silhouette about six inches above the steering wheel.

Officer Moore drove around the truck and, upon parking behind it, noticed movement in the cab. He stated that although the truck would have been unable to back up because his car was parked directly behind it, it could have freely driven forward at any time to leave the lot. Officer Moore was driving a low-profile police car which had police department decals on each side but did not have the standard light bar on top of the roof. In order to identify himself as a police officer, he left his headlights on and activated his blue visor lights. He then called the Catawba County Justice Center to give them a description of the vehicle and the license plate number. As Officer Moore approached the driver's side of the truck, he noticed a passenger, who was later identified as defendant. The driver partially rolled down his window to speak with Officer Moore and eventually opened his door to continue the conversation. After examining his driver's license and registration, Officer Moore asked the driver his purpose for being there. The driver responded that they had come from Connelly Springs to meet their friend "Jody" who was driving

down from Taylorsville. Officer Moore inquired further because the Fairview Market in Maiden seemed to be an illogical and geographically inconvenient place to meet, or in his words, "way out of the way." He also informed the occupants of the truck that his purpose for speaking with them was related to the numerous complaints regarding drugs and prostitution in the area. At that point, he returned to his police car with the driver's license and registration to begin an "identification process," which he testified is a standard procedure when the police find a vehicle at a business after hours. Because there were two occupants in the truck, Officer Moore called his secondary patrol officer, Officer Darby Hedrick, and requested that he report to the location as back-up. Officer Moore waited in his vehicle for results of the identification process and for Officer Hedrick to arrive.

After a minute or two, the license, registration, and warrant checks were verified. Officer Moore turned off his blue visor lights before approaching the vehicle for a second time, this time on the passenger side where defendant was sitting. By that time Officer Hedrick had arrived and parked his marked police car parallel to the right side of Officer Moore's car with his headlights and stationary, front-facing spotlights shining toward the truck. Officer Moore briefly explained the situation to Officer Hedrick before they approached the truck. When he got to the passenger's door, Officer Moore attempted to gain defendant's attention by tapping on the window with his knuckle, but defendant did not respond. Officer Hedrick remained several feet away, near the middle or rear of the truck bed. Officer Moore tapped on the window a second time, and when defendant again did not respond he opened the truck door, identified himself, and requested her identification. Defendant replied that she did not have a driver's license or identification card with her because it was in another purse. However, visible at her feet on the floorboard was what appeared to be a purse. Officer Moore asked if there were any forms of identification in the purse. Defendant replied that she did not think it contained any, but voluntarily reached down, picked up the bag, and unzipped it. Immediately visible near the top of the bag was a bifold wallet from which defendant produced a North Carolina identification card. Officer Moore asked defendant if she would step out of the truck and bring her purse to the rear of the vehicle where Officer Hedrick was standing. Defendant agreed, and as she walked towards the rear of the truck she was still "fumbling" through her purse. Officer Moore asked defendant for permission to look through the bag and then inquired

as to whether there was anything in the purse that she needed to tell him about. Defendant answered in the negative, consented to a search of the bag, and handed it to the officer. Visible in the center of the bag, lying loose on top of some other items, was the blackened end of a glass pipe which, based on Officer Moore's training and experience, appeared to be a "crack pipe." Officer Moore also saw an open pouch that held some bullets and the other end of the glass pipe, and a clear plastic bag with a stamp of a skunk on the outside containing a substance that later tested positive for methamphetamine. Before he could finish the interview with defendant, Officer Moore was distracted by suspicious movements in the cab of the truck by the driver, who appeared to be sliding towards the passenger side. He handed the purse to Officer Hedrick and walked around to the driver's side of the truck where he was involved in an altercation with the driver. The incident resulted in the arrest of both defendant and the driver, and a search of the vehicle that yielded a loaded handgun, a knife, drugs, and drug paraphernalia.

Based upon this evidence, the trial court made the following pertinent findings of fact:

19. When Moore arrived at the passenger door of the truck, he tapped on the window. The defendant did not respond. Moore knocked on the window a second time and the defendant again did not respond.

20. Moore identified himself to the defendant and he was wearing his police uniform at the time of this incident.

21. Moore then opened the passenger door of the truck.

22. Moore asked the defendant for her identification.

23. The defendant told Moore that she had left her identification in another purse.

24. Moore observed a purse or bag in the floorboard of the Dodge truck at her feet.

25. Moore asked about that purse and the defendant said that she didn't think her identification was in that purse.

26. The defendant then reached down and unzipped the purse. There was a bi-fold billfold on top and the defendant fumbled through it.

27. The defendant produced her [identification card] for Officer Moore.

28. Moore then asked the defendant to step out of the Dodge truck.

29. Once the defendant got out of the truck, Moore asked her to accompany him to the back of the truck. The defendant complied with Moore's request.

30. Moore asked the defendant if he could look in her purse and if there was anything in her purse that she needed to tell him about.

31. The defendant said no and handed her purse to Officer Moore.

32. When Moore looked inside of the defendant's purse he observed a piece of glass pipe and several bullets. The glass tube had a burned or smoked area on one end. Moore was of the opinion, based on his training and experience, that the glass pipe was a crack pipe.

. . . .

34. Moore did not pat down or frisk the defendant for weapons.

35. Moore did not threaten the defendant in any way and he did not place his hand on her at any time.

36. Moore had a handgun on his person. He did not remove that weapon from its holster.

37. Moore did not apply physical force, make any threat of force or make a show of authority at anytime prior to the discovery of the drug paraphernalia in the defendant's purse.

38. The defendant consented to producing her identification to Officer Moore and she agreed to go to the back of the truck. The defendant also agreed to permit Moore to examine the contents of her purse.

39. Moore did not coerce the defendant's cooperation with his requests. Moore did not tell the defendant that she was not free to terminate this interaction.

Based on these findings of fact, which were supported by competent evidence, the trial court made the following conclusions of law:

1. No one is protected by the Constitution against the mere approach of police officers in a public place. *State v.*

Campbell, 359 N.C. 644, 662, 617 S.E.2d 1 (2005); *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579 (1994).

2. Thus, a communication between the police and citizens involving no coercion or detention falls outside the compass of the Fourth Amendment. *Brooks*, 337 N.C. at 141.

3. Police officers may approach individuals in public to ask them questions and even request consent to search their belongings, so long as a reasonable person would understand that he or she could refuse to cooperate. *Brooks*, 337 N.C. at 142.

4. A seizure does not occur simply because a police officer approaches an individual and asks a few questions. Such encounters are considered consensual and no reasonable suspicion is necessary. *Campbell*, 359 N.C. at 662; *Brooks*, 337 N.C. at 142.

5. The test for determining whether a seizure has occurred is whether under the totality of the circumstances a reasonable person would feel that he was not free to decline the officers' request or otherwise terminate the encounter. *Brooks*, 337 N.C. at 142.

6. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred. *Campbell*, 359 N.C. at 662.

7. Based on the totality of the circumstances, the defendant would not have felt that she was not free to terminate the encounter or decline Moore's requests.

8. Based on the totality of the circumstances, the defendant cooperated with Moore's requests and her cooperation was not coerced by physical force or a show of authority.

Each of the trial court's conclusions is supported by the findings of fact and is based upon an accurate assessment of the law. As previously stated by this Court, " 'not all personal intercourse between policemen and citizens involve 'seizures' of persons.' " *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389, 398 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968))), *cert. denied*, 547 U.S.

1073, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006). It is well established that " '[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen.' " *Campbell*, 359 N.C. at 662, 617 S.E.2d at 13 (quoting *United States v. Drayton*, 536 U.S. 194, 200, 122 S. Ct. 2105, 2110, 153 L. Ed. 2d 242, 251 (2002) (alteration in original)). An encounter is consensual and does not constitute a seizure "[S]o long as a reasonable person would feel free to disregard the police and go about his business." *Campbell*, 359 N.C. at 662, 617 S.E.2d at 13 (quoting *Bostick*, 501 U.S. at 434, 111 S. Ct. at 2386, 115 L. Ed. 2d at 398 (quoting *California v. Hodari D.*, 499 U.S. 621, 628, 111 S. Ct. 1547, 1552, 113 L. Ed. 2d 690, 698 (1991)). " 'Only when the officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.' " *Id.* (quoting *Bostick*, 501 U.S. at 434, 111 S. Ct. at 2386, 115 L. Ed. 2d at 398 (quoting *Terry*, 392 U.S. at 19 n.16, 88 S. Ct. at 1879 n.16, 20 L. Ed. 2d at 905 n.16)).

In determining whether the officer's actions constituted a show of authority that implicates the protections of the Fourth Amendment, the question is "not whether the citizen *perceived* that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a *reasonable person*." *California v. Hodari D.*, 499 U.S. at 628, 111 S. Ct. at 1552, 113 L. Ed. 2d at 698 (emphasis added) (citation omitted). This objective test permits a trial court to conclude that a seizure has occurred "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980); or to "decline the officers' requests or otherwise terminate the encounter," *Bostick*, 501 U.S. at 438, 111 S. Ct. at 2389, 115 L. Ed. 2d at 402. Likewise, the Fourth Amendment does not include a consideration of the officer's subjective intent, and his motive will not "invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Whren v. United States*, 517 U.S. 806, 812-13, 116 S. Ct. 1769, 1774, 135 L. Ed. 2d 89, 98 (1996) (quoting *Scott v. United States*, 436 U.S. 128, 138, 98 S. Ct. 1717, 1723, 56 L. Ed. 2d 168, 178 (1978)).

In *Mendenhall*, the Supreme Court of the United States enumerated several circumstances that could support the trial court's determination that a show of authority had occurred, such as "the threat-

ening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." 446 U.S. at 554, 100 S. Ct. at 1877, 64 L. Ed. 2d at 509 (citation omitted). Hearing live testimony, the trial court is in the best position to weigh the evidence. In the case *sub judice*, the trial court properly considered each of these circumstances and made detailed findings that Officer Moore did not make a show of authority during the encounter. Pursuant to current Fourth Amendment jurisprudence, the trial court's decision should be affirmed because it is based on sound factual findings and an accurate application of the law.

The majority, however, isolates two phrases in the trial court's findings, characterizes them as conclusions of law, re-weighs the evidence, and makes its own findings to support its conclusion that defendant was seized and her consent involuntary. As noted in the majority opinion, "The totality of the circumstances 'test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, *rather than to focus on particular details of that conduct in isolation*.' " (emphasis added) (citation omitted). After correctly stating the applicable test, the majority then misapplies it. The trial court made thirty-nine detailed findings of fact, considering the encounter between defendant and Officer Moore in its full context; the majority focuses on two "particular details of th[e] conduct in isolation." After discussing the circumstances of the encounter, the trial court states in Finding 37: "Moore did not apply physical force, make any threat of force or make a show of authority at anytime prior to the discovery of the drug paraphernalia in the defendant's purse." In Finding 39, the trial court states: "Moore did not coerce the defendant's cooperation with his requests. Moore did not tell the defendant that she was not free to terminate this interaction." The majority admits that most of these statements are factual, yet determines the findings, "Moore did not . . . make a show of authority" and "Moore did not coerce the defendant's cooperation with his requests," are conclusions of law. However, as noted by the trial court, even these two findings contain both factual and legal components. This duality was considered by the trial court as it analyzed the "show of authority" and "coercion" elements in its findings of fact and conclusions of law. Viewed in the context of the other findings of fact, there is competent evidence to support the trial court's factual determinations that Officer Moore did not "make a show of authority" and "did not coerce the defendant's cooperation,"

and these findings should not be subject to de novo review. Instead of looking at the totality of the circumstances, the majority isolates these two findings, which have both factual and legal components, ignores the role of the trial court in weighing the factual nature of the findings, and substitutes its own judgment for that of the trial court before which the testimony was given.

Considering the totality of the circumstances, the trial court found in Finding 38: "The defendant consented to producing her identification to Officer Moore and she agreed to go to the back of the truck. The defendant also agreed to permit Moore to examine the contents of her purse." In assessing the voluntariness of the search, the majority ignores this crucial finding and recharacterizes the critical events of the encounter between Officer Moore and defendant. When Officer Moore opened the door of the truck and asked defendant for her identification, she did not communicate any desire for the encounter not to occur. She responded to his question and stated she did not have any identification, having left it in a purse at home. Officer Moore noticed the purse on the floor of the truck and asked defendant if her identification could be in it. The encounter could have ended at that juncture. A reasonable person would have believed she could have terminated the encounter, having stated that she left her identification at home. Defendant, nonetheless, voluntarily picked up the purse and opened it. Disproving defendant's prior statement, the identification was in the top of the purse. Contrary to the evidence and the findings by the trial court, the majority characterizes these critical events of the encounter by simply stating: "Officer Moore requested that defendant produce her identification." After voluntarily opening the purse and revealing her identification, defendant agreed to exit the truck, bringing her purse with her. As explicitly found by the trial court, defendant then consented to the search of her purse.

The majority concludes with a list of six events it determines amounted to a show of authority, converting the voluntary encounter to an unlawful seizure. This analysis could well describe most police encounters. Further, it again reweighs the evidence, substituting the judgment of an appellate court for that of the trial court that heard the testimony. The first event listed is "Officer Moore, who was armed and in uniform, initiated the encounter . . . ." Defendant was in a truck parked in a public area outside a closed business. Under these circumstances an officer should investigate. The driver of the truck could have driven away, but chose to stay. Further, it is almost invari-

able that law enforcement officers will be "armed and in uniform." These circumstances do not preclude voluntary cooperation. As the case law directs and as observed by the trial court, the pertinent inquiry is whether the officer did more than simply have his weapon in its holster. The next factor is that "Officer Moore called for backup assistance." It is standard procedure to have backup when the initial officer observes more than one individual in a vehicle. In hindsight, having backup was prudent as the officers subsequently determined there was a loaded pistol in the truck. The majority also finds pertinent the fact that "Officer Moore initially illuminated the truck with blue lights." While Officer Moore at first utilized his blue visor lights to identify himself as a police officer, he subsequently turned them off before his encounter with defendant. Similarly, the majority's test includes the finding that "Officer Hedrick illuminated defendant's side of the truck with his take-down lights," however, the use of Officer Hedrick's spotlights was necessary for the safety of all in the dimly lit parking lot.

The final elements relied upon by the majority are newly minted factual determinations based on its interpretation of the evidence. The majority states that "Officer Moore opened defendant's door, giving her no choice but to respond to him." Although Officer Moore's actions made a response from defendant likely, there is nothing in the record that requires a finding that he gave her "no choice but to respond to him," and the trial court did not so hold. As stated above, this finding is contradicted by the facts as found by the trial court; defendant had the opportunity to decline further interaction, but voluntarily picked up her purse, opened it, and produced her identification. Whereas the majority says, "Officer Moore instructed defendant to exit the truck," the trial court found the officer "asked the defendant to step out of the . . . truck" and that she did so voluntarily. From these circumstances, the majority concludes that defendant was seized "by the time [she] stepped out of the truck at Officer Moore's request." However, the evidence and factual findings support the trial court's conclusion that defendant voluntarily interacted with Officer Moore, willingly exited the truck, and consented to the search of her purse. While a trial court might have found the facts as the majority has done, the trial court in this case did not. The majority's re-weighing of the evidence in order to support its determination that defendant was seized violates our standard of deference to the trial court.

Considered in light of the facts as found by the trial court, the actions of the law enforcement officer were supported by law. While

the truck in this case was not violating any traffic laws, Officer Moore is permitted by law to approach a person or vehicle in a public place, *Bostick*, 501 U.S. at 434, 111 S. Ct. at 2386, 115 L. Ed. 2d at 398, ask questions of the driver and passenger, including their reasons for being there, if they are willing to listen, *Drayton*, 536 U.S. at 200, 122 S. Ct. at 2110, 153 L. Ed. 2d at 251, request to examine the individuals' identification, *see INS v. Delgado*, 466 U.S. 210, 216, 104 S. Ct. 1758, 1762, 80 L. Ed. 2d 247, 255 (1984), and request consent to search their luggage, *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S. Ct. 1319, 1323-24, 75 L. Ed. 2d 229, 236-37 (1983), so long as the officer does not use coercion or require compliance with the requests. *Bostick*, 501 U.S. at 435, 111 S. Ct. at 2386, 115 L. Ed. 2d at 398-99. Officer Moore was properly and legally performing his duties when he stopped to investigate the lone vehicle parked in the Fairview Market's parking lot after business hours.

In order to protect citizens from unlawful seizures while still effectively enforcing the criminal laws of our State, this Court must provide clear guidance so that law enforcement officers are able to determine when they must terminate an investigative encounter or articulate a reason for continuing. The majority opinion fails to give the useful instruction needed by our law enforcement officers and our trial courts.

I believe competent evidence supports the trial court's findings of fact, and the findings of fact support the conclusions of law. The trial court's holding that defendant voluntarily consented to the search of her purse should be affirmed. I respectfully dissent.

STATE OF NORTH CAROLINA v. PATRICIA DAWN ABSHIRE

No. 459A08

(Filed 18 June 2009)

Sexual Offenses— sex offenders—registration—temporary move

The State presented sufficient evidence that a convicted sex offender changed her address so as to trigger reporting requirements where defendant was living with her father at another address in the county when a social worker attempted to locate her, but she had maintained connections with the registered

address and stated that she thought of the registered address as home and intended to return. Provisions of the registration program demonstrate the legislature's clear intent that even a temporary "home address" must be registered so that law enforcement authorities and the general public know the whereabouts of sex offenders.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 192 N.C. App. ——, 666 S.E.2d 657 (2008), vacating a judgment entered 28 February 2007 by Judge Nathaniel J. Poovey in Superior Court, Caldwell County, following a jury verdict finding defendant guilty of failing to comply with the sex offender registration law. On 11 December 2008, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court 31 March 2009.

Roy Cooper, Attorney General, by J. Joy Strickland, Assistant Attorney General, for the State-appellant.

James N. Freeman, Jr. for defendant-appellee.

BRADY, Justice.

The sole issue before the Court is whether the State presented sufficient evidence that convicted sex offender Patricia Dawn Abshire (defendant) changed her address so as to trigger the reporting requirements of North Carolina's Sex Offender and Public Protection Registration Program (registration program). *See* N.C.G.S. §§ 14-208.7, -208.9, -208.11 (2005).[1] In response to the threat to public safety posed by the recidivist tendencies of convicted sex offenders, "North Carolina, like every other state in the nation, enacted a sex offender registration program to protect the public." *State v. Bryant*, 359 N.C. 554, 555, 614 S.E.2d 479, 480 (2005) (citations omitted); *see also Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008) (discussing recidivism rates among sex offenders). The registration program contained in Part 2 of Article 27A, Chapter 14 of our General Statutes requires certain sex offenders with "reportable conviction[s]" to submit a registration form listing personal information, including the sex offender's "home address," to the sheriff of

1. Certain amendments to the registration program found at Article 27A, Chapter 14 of our General Statutes became effective 1 December 2006, 1 June 2007, and 30 August 2007. We must analyze the case *sub judice* under the 2005 version of the statutes since defendant's offense occurred before these amendments became effective.

the county in which the "person resides" and to notify the sheriff of any subsequent change of address. N.C.G.S. §§ 14-208.7(a),(b), -208.9(a). In the case *sub judice*, we conclude that the State presented sufficient evidence that defendant changed her address and failed to comply with the requirements of the registration program.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's Status as a Convicted Sex Offender Prior to the Case *Sub Judice*

On 19 January 1999, the Caldwell County Grand Jury returned true bills of indictment charging defendant with four counts of rape of a child at least six years younger than defendant under N.C.G.S. § 14-27.7A(a) and four counts of taking indecent liberties with a child under N.C.G.S. § 14-202.1. The indictments describe four acts of vaginal intercourse occurring in June 1998 between defendant, who was twenty years of age at the time, and a thirteen year old boy. Pursuant to a plea agreement, on 27 March 2000, defendant pleaded guilty to four counts of taking indecent liberties with a child and the four counts of rape were dismissed.

As a result of her guilty pleas and corresponding convictions, defendant was obligated to register as a sex offender. According to the North Carolina Sex Offender and Public Protection Registry website, defendant first reported her home address to the sheriff of her county on 30 October 2001.[2] After her initial registration but before being indicted for the present charge, defendant reported thirteen changes of address under subsections 14-208.9(a) and 14-208.11(a)(2) of the registration program. Those subsections require under the threat of criminal liability that "[i]f a person required to register changes address, the person shall provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered." *Id.* § 14-208.9(a).

Defendant's Actions Leading to the Case *Sub Judice*

At defendant's trial for failing to comply with the sex offender registration program, the State presented evidence that tended to show the following: On 19 July 2006, defendant notified the Caldwell County Sheriff's Office of a change of address. She listed her new

2. Information regarding convicted sex offenders is available via the Internet. North Carolina Offender Registry, http://sexoffender.ncdoj.gov/ (last visited May 21, 2009).

address as 3410 Gragg Price Lane, Hudson, North Carolina, in Caldwell County, and showed her old address as 2155 White Pine Drive, number 9, Granite Falls, North Carolina, also in Caldwell County. In September 2006 officials at the school attended by defendant's two children became concerned about the number of times the children arrived late or missed the entire day. Consequently, in early September 2006, Gwen Laws, a social worker employed by the Caldwell County Schools, attempted to locate defendant at her Granite Falls address to discuss the children's tardiness. After failing to find defendant at that address, Laws searched the State-maintained website that informs the public of the addresses of convicted sex offenders. After learning that the address listed for defendant was 3410 Gragg Price Lane, Laws visited that address on 11 September 2006 and spoke with Ross Lee Price, who owned and resided at the property. Laws testified that when she inquired whether defendant lived there, Price said, "Hell no," and explained that although defendant was "in and out" of the residence and received United States Postal Service mail there, she had not "lived there in three weeks." Price told Laws that he was unsure where defendant was living at the time. After this futile attempt to locate defendant, Laws inquired of the Caldwell County Sheriff's Office to determine whether law enforcement knew of a different address for defendant.

Detective Aaron Barlowe of the Caldwell County Sheriff's Office learned of Laws's unsuccessful attempts to locate defendant in September 2006, and he began an investigation. At trial, Detective Barlowe testified that on 18 September 2006, he visited 3410 Gragg Price Lane and spoke with Price. Price told Detective Barlowe that defendant was in a dating relationship with his son at the time. Price informed Detective Barlowe that defendant "got mad a couple of weeks ago and went to go stay with her father." Price believed that defendant was planning on moving back to the residence, though he did not know when, and he indicated that defendant had been gone for two or three weeks, "but might have stayed a night" during that time. After speaking with Price, Detective Barlowe went to the residence of Robert and Ruth Abshire at 5739 Poovey Drive, Granite Falls, North Carolina. Mr. Abshire, defendant's father, indicated that defendant had been staying at his home for about two weeks. Based on his conversations with Price and defendant's father, Detective Barlowe obtained a warrant for defendant's arrest for violating the reporting requirements of the sex offender registration program.

Additionally on 18 September 2006, defendant filed a "Criminal Complaint and Request for Process" in Caldwell County against her brother. She alleged that on 13 September 2006, her brother began "punching" her "in the face" and elsewhere after she attempted to stop her brother from beating his ex-girlfriend. Defendant listed 5739 Poovey Drive, Granite Falls, North Carolina, as her address on the complaint. The State presented a copy of the complaint at trial as evidence that defendant had changed her address.

Pursuant to a warrant, defendant was arrested on 19 September 2006 for failure to register as a sex offender under N.C.G.S. § 14-208.11. After arrest, defendant submitted the following statement to law enforcement:

> About 10 days after I filed the breaking and entering report when my house was broken into and my daughter's computer was stolen I went to stay with my father at 5739 Poovey Drive. I decided that if I went to stay with my dad for a week or two, I could get my emotions together. I told Ross that I was going to stay with my dad so I could get my self emotionally stable and I would come back home. I was planning on going back home this past weekend but I was attacked by my brother and I decided to stay with my dad for a little bit longer. I am moving back into the house on Friday after her [sic] girls are out of school. I still received my mail at 3410 Gragg Price Lane[.] I would pick the mail up or Ross would bring me my mail about twice a week. I went back and stayed the night on the 9th and 14th of September. I was not planning n [sic] moving from the house but only staying for a week or two with my father.

At the time of her arrest defendant also gave Detective Barlowe a note from her father that stated: "To Whom it may Concern, Patricia has staye [sic] at my home for the past 5-6 weeks. During that time she would go to Ross's Houses [sic] and stay once every 7-10 day's [sic] [.]" The reference to Ross indicated the Price residence at 3410 Gragg Price Lane.

On 23 October 2006, a Caldwell County Grand Jury returned a true bill of indictment charging defendant with failing to comply with sex offender registration in violation of N.C.G.S. § 14-208.11. The indictment alleged defendant changed her address on or about 30 August to 4 September 2006, and the date of the offense was recorded as on or about 14 to 18 September 2006. Defendant was tried by a jury in Superior Court, Caldwell County, on 27 and 28 February 2007. At

the close of the State's evidence, defendant moved to dismiss the charge on grounds that the State failed to present sufficient evidence. The trial court denied defendant's motion, and the trial proceeded to defendant's evidence.

According to defendant's testimony, someone broke into the residence at 3410 Gragg Price Lane and stole her daughters' computer on 19 August 2006. Approximately ten days later she began staying at her father's residence on Poovey Drive "[o]ff and on over about a three week period." She testified that "almost everyday" she still visited Gragg Price Lane to care for her pets, wash clothes, or "hang out." Defendant testified that Price was "grouchy," so she tried to avoid him by visiting Gragg Price Lane during the day, although she stayed the night there on 9 September and 14 September 2006. Defendant stated that she maintained a private telephone line at Gragg Price Lane, never moved her belongings, and considered it her "home" during the time she stayed at her father's residence.

At the close of all the evidence, defendant again moved to dismiss the charge for insufficient evidence. The trial court denied the motion and instructed the jury on the charge. After deliberations, the jury returned a verdict of guilty. Defendant was sentenced to a minimum term of thirteen months to a maximum term of sixteen months. Defendant's sentence was then suspended, and she was placed on supervised probation for eighteen months. Defendant appealed.

On 16 September 2008, a divided panel at the Court of Appeals vacated defendant's conviction and held that the State failed to present sufficient evidence that defendant had changed her address. *State v. Abshire*, ––– N.C. App. –––, –––, 666 S.E.2d 657, 664-65 (2008). The dissenting judge concluded that there was sufficient evidence, *id.* at –––, 666 S.E.2d at 665 (Hunter, Robert C., J., dissenting), and the State appealed to this Court based on the dissent. On 6 October 2008, we allowed the State's motion for a temporary stay, and on 11 December 2008, we allowed the State's petitions for Writ of Supersedeas and for discretionary review as to additional issues.[3]

ANALYSIS

When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines

3. Because we reverse the Court of Appeals based on the issue presented as the basis for the dissenting opinion, it is unnecessary for us to consider the additional issue presented by the State of whether the Court of Appeals majority used an improper standard for ruling on defendant's motion to dismiss.

"whether the State presented 'substantial evidence' in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005); *see also State v. McNeil*, 359 N.C. 800, 803-04, 617 S.E.2d 271, 273-74 (2005) (citations omitted); *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004), *cert. denied*, 543 U.S. 1156 (2005). " ' "Substantial evidence" is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.' " *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274 (quoting *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (citations omitted)). In this determination, all evidence is considered " 'in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.' " *Id.* (quoting *Garcia*, 358 N.C. at 412-13, 597 S.E.2d at 746 (citation omitted)). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration," *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971), except "when it is consistent with the State's evidence, the defendant's evidence 'may be used to explain or clarify that offered by the State,' " *State v. Denny*, 361 N.C. 662, 665, 652 S.E.2d 212, 213 (2007) (quoting *Jones*, 280 N.C. at 66, 184 S.E.2d at 866 (citation omitted)). Additionally, a " ' "substantial evidence" inquiry examines the sufficiency of the evidence presented *but not its weight*,' " which is a matter for the jury. *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274 (emphasis added) (quoting *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (citation omitted)); *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation omitted). Thus, "if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274 (brackets, citations, and quotation marks omitted).

The crime of failing to notify the appropriate sheriff of a sex offender's change of address under N.C.G.S. § 14-208.11(a) is a strict liability offense. *See Bryant*, 359 N.C. at 562, 614 S.E.2d at 484. The crime contains three essential elements: (1) the defendant is a "person required . . . to register," N.C.G.S. § 14-208.11(a); (2) the defendant "change[s]" his or her "address," *id.* § 14-208.11(a)(2); and (3) the defendant "[f]ails to notify the last registering sheriff of [the] change of address," *id.*, "not later than the tenth day after the change," N.C.G.S. § 14-208.9(a). Here, defendant only challenges the second element and argues that she did not change her address.

The Definition of "Address" under the Registration Program

Before determining whether the State presented substantial evidence to show that defendant changed her address, we must ascertain the definition of "address" as used in subsections 14-208.9(a) and 14-208.11(a)(2) of the registration program. At the outset, we note that the statute describes a change of address as a discrete event and not as a nebulous process. The statute indicates that once "a person required to register changes address," the person must notify the appropriate sheriff of the change within ten days. *Id.* § 14-208.9(a). With this in mind, we turn to the definition of address.

The word "address" is not explicitly defined by statute. Section 14-208.6 contains numerous definitions of terms utilized in Article 27A, but there is no definition for the words "address" or "change of address." *Id.* § 14-208.6 (2005). " 'Nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning.' In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (citations omitted)). The noun "address" has the following ordinary meaning: "A description of the location of a person . . . . The location at which a particular organization or person may be found or reached . . . ." *The American Heritage Dictionary of the English Language* 20 (4th ed. 2000). Another dictionary defines the noun "address" as "the particulars of the place where someone lives." *The New Oxford American Dictionary* 18 (2d ed. 2005).

Before applying this definition, we are mindful that the word is set within the context of the registration program and this context may further clarify any ambiguity surrounding the word. During deliberations at trial, jurors sent a note asking the judge whether they could "see [a] copy of [the] law stating what constitutes a residence in regards to sex offenders." In response, the trial judge noted to counsel that the phrase "change of address" in subsection 14-208.11(a)(2) is "definitely ambiguous" on its face. The trial judge chose to instruct the jurors that they were to "use the ordinary meanings that these words have as commonly used in the English language." Our method of statutory construction dictates that:

> 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 a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

Diaz v. Div. of Soc. Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citations omitted). To whatever degree the meaning of "address" may be ambiguous, we refer to the purpose of the statute and the intent of the legislature in order to derive an appropriate interpretation.

"The best indicia of [the legislature's] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted), *quoted in Diaz*, 360 N.C. at 387, 628 S.E.2d at 3. Moreover, "[i]n discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible." *State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005) (citation omitted).

The registration program was designed to assist law enforcement agencies and the public in knowing the whereabouts of sex offenders and in locating them when necessary. The legislature "recognize[d] that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." N.C.G.S. § 14-208.5 (2005). Furthermore, this Court has recognized "the twin aims" of the registration program to be "public safety and protection." *Bryant*, 359 N.C. at 560, 614 S.E.2d at 483.

The Court of Appeals opined that a sex offender's "home address" is "a place where a registrant resides and where that registrant receives mail or other communication." *Abshire*, ––– N.C. App. at –––, 666 S.E.2d at 663 (majority). This interpretation, however, would thwart the intent of the legislature if a sex offender were allowed to actually live at a location other than where he or she was registered and not be required to notify the sheriff of that new address as long as he or she continued to receive United States Postal Service mail at the registered address. Such a result would enable sex offenders to elude accountability from law enforcement and would expose the public to an unacceptable level of risk.

We conclude that the legislature intended the definition of address under the registration program to carry an ordinary meaning of

describing or indicating the location where someone lives. As such, the word indicates what this Court has considered to be a person's residence. For instance, this Court noted in *Hall v. Wake County Board of Elections* that "[r]esidence simply indicates a person's actual place of abode, whether permanent or temporary." 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972); *see also Black's Law Dictionary* 1335 (8th ed. 2004) (defining "residence" as: "1. The act or fact of living in a given place for some time . . . . 2. The place where one actually lives . . . . *Residence* usu. just means bodily presence as an inhabitant in a given place . . . ."). Thus, a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary. Notably, a person's residence is distinguishable from a person's domicile. *See Hall*, 280 N.C. at 605, 187 S.E.2d at 55. Domicile is a legal term of art that "denotes one's permanent, established home," whereas a person's residence may be only a "temporary, although actual," "place of abode." *Id.*

Defining "address" in terms of indicating a person's residence is consistent with other provisions of the registration program. For instance, section 14-208.7 specifies the information collected on registration forms submitted by sex offenders. Among other details, the form requires a "home address." N.C.G.S. § 14-208.7(b)(1). The addition of the adjective "home" indicates that the address is a physical location, precluding the possibility of listing a postal box. Furthermore, section 14-208.7 pertains to sex offenders who come to North Carolina from out of state to study or work. *Id.* § 14-208.7(a1). These students and workers are required to register and provide a "home address" within North Carolina, as well as provide an address in the state from which they came. *Id.* § 14-208.7(a1), (b)(1). These provisions demonstrate the legislature's clear intent that even a *temporary* "home address" must be registered so that law enforcement authorities and the general public know the whereabouts of sex offenders in our state.

Additionally, the statutory provision requiring that a sex offender's registered information be verified annually, *id.* § 14-208.9A(1) (2005), simply requires that a sex offender's address be at a location where he or she can receive a "nonforwardable verification form" via the United States Postal Service. This form can be sent to even a temporary residence that is registered. Subsection 14-208.9A(1) uses the word "address" to refer to a mailing address, but considering the overarching purpose of the registration program and the inclusion of the adjective "home" with "address" in subsection 14-208.7(b)(1)

demonstrates that understanding "address" to mean a mailing address alone is insufficient for the registration program.

Finally, defining "address" as indicating a sex offender's residence is consistent with the distinction the legislature recognized between mere presence at a location and establishing a residence. Subsection 14-208.7(a) requires registration for sex offenders moving to North Carolina "within 10 days of *establishing residence*," while sex offenders who simply visit our State must register "whenever [they have] been *present* in the State for 15 days." *Id.* § 14-208.7(a) (emphasis added). Thus, reading the statutes *in pari materia* leads to the conclusion that mere physical presence at a location is not the same as establishing a residence. Determining that a place is a person's residence suggests that certain activities of life occur at the particular location. Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address. Adding any further nuance to the definition is unnecessary at this time.

Before applying these principles to the facts of this case, we note that defendant argues the rule of lenity compels us to rule in her favor. We disagree. The rule of lenity requires that we strictly construe ambiguous criminal statutes. *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007) (citations omitted). However, construing the word "address" in terms of indicating defendant's residence is not a liberal reading in favor of the State; rather, it is the only plausible reading that comports with the legislative purpose in enacting the registration program.

Sufficient Evidence Defendant Changed Her Address

Having interpreted the statutes to determine the meaning of the term "address," we now examine whether the State presented sufficient evidence that defendant changed her address to trigger the reporting requirement. In her statement to Detective Barlowe on 19 September 2006, defendant indicated that around the end of August 2006 she "went to stay with [her] father at 5739 Poovey Drive" and "decided that if [she] went to stay with [her] dad for a week or two, [she] could get [her] emotions together." From this statement, the jury could reasonably infer that defendant was indicating a change in her actual place of abode, even for just a temporary period, from Gragg Price Lane to Poovey Drive. Although defendant's statement also mentioned that she "stayed the night on the 9th and 14th of

September" at Gragg Price Lane and still received mail there, the jury could have reasonably concluded that those details were ancillary to defendant's actual place of abode on Poovey Drive. The note Detective Barlowe received from defendant's father upon defendant's arrest on 19 September 2006 stated defendant had stayed at her father's "home for the past 5-6 weeks," and this included spending the night there according to her father's testimony at trial. The jury could have reasonably inferred that spending the night at her father's house for this amount of time, or for even a shorter duration, indicated that defendant carried out the core necessities of daily living at Gragg Price Lane and that she had made her father's residence her own for that period of time.

Additionally, Gwen Laws, the social worker from the Caldwell County Schools, testified that on 11 September 2006, Price told her that, "Hell no," defendant did not live at Gragg Price Lane and had not "lived there in three weeks." Price told Laws that he did not know where defendant was living at the time. The jury could reasonably infer that had Gragg Price Lane been defendant's residence at the time, then Price, who owned and occupied the house, would have known defendant was residing there. Price also informed Detective Barlowe on 18 September 2006 that defendant had been away from Gragg Price Lane for a span of two to three weeks, except for possibly spending one night during that time. Finally, defendant held out her address to be 5739 Poovey Drive on 18 September 2006, when she filed a "Criminal Complaint and Request for Process" against her brother. Thus, defendant's own representation may have supported the inference jurors made that defendant's address changed to the Poovey Drive residence beginning around the end of August and continued, at least, through the filing of the complaint against her brother.

When this evidence is viewed in the light most favorable to the State, and when the State is afforded the benefit of every reasonable inference supported by that evidence, we conclude that the State presented sufficient evidence that defendant changed her address to withstand defendant's motion to dismiss.

For the foregoing reasons, we conclude that the trial court properly denied defendant's motions to dismiss, and we reverse the Court of Appeals.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

JON-PAUL CRAIG, BY HIS MOTHER AND NEXT FRIEND, KIMBERLY CRAIG v. NEW HANOVER COUNTY BOARD OF EDUCATION AND ANNETTE REGISTER, IN HER OFFICIAL AND INDIVIDUAL CAPACITY

No. 484PA07

(Filed 18 June 2009)

1. Appeal and Error— appealability—denial of summary judgment—governmental immunity

The denial of a summary judgment motion by defendant board of education was interlocutory but appealable because the board raised the complete defense of governmental immunity, which affects a substantial right. Such immunity shields a defendant entirely from having to answer for its conduct and is more than a mere affirmative defense.

2. Immunity— negligence and constitutional claims against school board—summary judgment

Summary judgment for defendant board of education was correctly denied on direct colorable constitutional claims which arose from an assault in a school where there was also a negligence claim, the facts alleged and the damages sought were the same for both claims, and the defendant raised governmental immunity. Sovereign immunity entirely precludes plaintiff's common law claim, so that plaintiff does not have an adequate state law remedy, and allowing sovereign immunity to defeat plaintiff's colorable constitutional claims would defeat the purpose of *Corum v. University of North Carolina*, 330 N.C. 761.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review the decision of a divided panel of the Court of Appeals, 185 N.C. App. 651, 648 S.E.2d 923 (2007), reversing an order denying summary judgment for defendant entered on 15 December 2006 by Judge Paul L. Jones in Superior Court, New Hanover County. Heard in the Supreme Court 9 September 2008.

Patterson Harkavy LLP, by Burton Craige for plaintiff-appellant.

Hogue Hill Jones Nash & Lynch, LLP, by David A. Nash, for defendant-appellee New Hanover County Board of Education.

Allison Schafer, Legal Counsel, for North Carolina School Boards Association, amicus curiae.

HUDSON, Justice.

This case requires us to determine whether plaintiff's common law negligence claim, which will ultimately be defeated by governmental immunity because of its exclusion from defendant Board of Education's insurance coverage, provides an adequate remedy at state law. We hold that it does not and that plaintiff may therefore bring his colorable claims directly under the North Carolina Constitution. We reverse the Court of Appeals.

PROCEDURAL BACKGROUND

Jon-Paul Craig[1] (plaintiff) filed this action on 20 September 2006 to recover monetary damages from the New Hanover County Board of Education (the Board) and Annette Register, Principal at Roland Grise Middle School, in her official and individual capacity. He alleged that the defendants failed to adequately protect him from a sexual assault, and enumerated four claims. The first was based on common law negligence. His other claims asserted that the Board deprived him of an education free from harm and psychological abuse, thereby violating three separate provisions of the North Carolina State Constitution: Article I, Section 15 (right to the privilege of education); Article I, Section 19 (no deprivation of a liberty interest or privilege but by the law of the land); and Article IX, Section 1 (schools and means of education shall be encouraged).

The Board moved for summary judgment on 22 November 2006 on all claims, asserting the absence of any genuine issue of material fact and raising other defenses including governmental immunity. By an order entered 15 December 2006, the trial court denied the Board's motion for summary judgment,[2] and the Board appealed to the Court of Appeals on 20 December 2006.

At the Court of Appeals, a unanimous panel held that the doctrine of sovereign immunity[3] defeats plaintiff's common law negligence claim because the Board does not carry insurance that would cover

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1. Jon-Paul brings this action by his mother and next friend, Kimberly Craig. For ease of reference, we refer to Jon-Paul as plaintiff.

2. The trial court granted defendant Register's motion to dismiss all claims against her. Plaintiff has not appealed the dismissal of claims against defendant Register.

3. The Board is a county agency. As such, the immunity it possesses is more precisely identified as governmental immunity, while sovereign immunity applies to the State and its agencies. *See Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). In application here, the distinction is immaterial.

these claims and, thus, has never waived its immunity for the alleged injury. *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 185 N.C. App. 651, 654-55, 648 S.E.2d 923, 925-26 (2007). Specifically, the Court of Appeals noted that the Board's excess liability insurance policy excluded coverage for any claims "arising out of or in connection with . . . sexual acts, sexual molestation, sexual harassment, sexual assault, or sexual misconduct of any kind; . . . [as well as] claims for negligent hiring, negligent retention, and/or negligent supervision." *Id.* at 654, 648 S.E.2d at 925. Thus, because the policy does not cover plaintiff's negligence claim, both statute and longstanding case law of this State establish that the Board has not waived immunity from suit. *See* N.C.G.S. § 115C-42 (2005) ("[S]uch immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort."); *Ripellino v. N.C. School Bds. Ass'n*, 158 N.C. App. 423, 428, 581 S.E.2d 88, 92 (2003) (holding that a school board's participation in the North Carolina School Boards Trust did not qualify as a purchase of liability insurance under the definition of N.C.G.S. § 115C-42), *cert. denied*, 358 N.C. 156, 592 S.E.2d 694-95 (2004).

However, the panel was divided regarding plaintiff's constitutional claims. While recognizing that direct claims under our State Constitution are allowed when a litigant possesses no adequate remedy at state law, the majority concluded that plaintiff's common law negligence claim is an adequate remedy at state law, and thus, the constitutional claims are barred. *Craig*, 185 N.C. App. at 655-57, 648 S.E.2d at 926-27. The dissenting opinion contended that plaintiff's negligence claim cannot be an "adequate" state remedy since governmental immunity completely defeats the claim. *Id.* at 657, 648 S.E.2d at 927 (Bryant, J., concurring in part, dissenting in part). By an order dated 6 March 2008, we granted certiorari to review the Court of Appeals decision only as to the issue raised in the dissenting opinion. *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 362 N.C. 234, 659 S.E.2d 439 (2008); *see* N.C. R. App. P. 21(a)(2).

FACTUAL BACKGROUND

Plaintiff, a mentally disabled student with below average communication and social skills, began attending Roland Grise Middle School in New Hanover County in the sixth grade. On 6 January 2004, when plaintiff was fourteen years old and in the eighth grade, an assistant principal from Roland Grise called his mother to inform her of "some sexual experimentation" that occurred in class between plaintiff and another boy. Plaintiff alleges that he did not consent to

the incident and that defendants are liable for failing to adequately protect him from sexual assault.

STANDARD OF REVIEW

Summary judgment is appropriate "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 a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2007). Furthermore, when considering a summary judgment motion, " 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James Wm. Moore, *Moore's Federal Practice* § 56.15[3], at 2337 (2d ed. 1971)). We review a trial court's order granting or denying summary judgment *de novo*. *See Builders Mut. Ins. Co. v. N. Main Constr.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment" for that of the lower tribunal. *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim . . . would be barred by an affirmative defense . . . ." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citing *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 21, 423 S.E.2d 444, 454 (1992)).

[1] Denial of a summary judgment motion is interlocutory and ordinarily cannot be immediately appealed. However, the appeal here is proper because the Board raises the complete defense of governmental immunity, and as such, denial of its summary judgment motion affects a substantial right. N.C.G.S. § 7A-27(d)(1) (2007); *see Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 433 (1980) (explaining that "interlocutory decrees are immediately appealable only when they affect some substantial right" (citing *Veazey v. City of Durham*, 231 N.C. 354, 362, 57 S.E.2d 377, 381 (1950)).

As noted by the United States Supreme Court, such immunity is more than a mere affirmative defense, as it shields a defendant entirely from having to answer for its conduct at all in a civil suit for damages. *See Mitchell v. Forsyth*, 472 U.S. 511, 525, 86 L. Ed. 2d 411, 424 (1985). Thus, unlike affirmative defenses explicitly listed in our

Rules of Civil Procedure, *see* N.C.G.S. § 1A-1, Rule 8(c) (2007), the denial of summary judgment on grounds of sovereign immunity is immediately appealable, though interlocutory, because it represents a substantial right, as "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526, 86 L. Ed. 2d at 425.

ANALYSIS

[2] Plaintiff argues that his common law negligence claim is not an adequate remedy at state law because the doctrine of governmental immunity prevails against it. Consequently, he asserts that per this Court's decision in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992), he should be allowed to bring claims directly under our State Constitution that will not be susceptible to an immunity defense. We agree.

The practical effect of the Court of Appeals' holding otherwise would be to allow the doctrine of sovereign immunity to "stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights," exactly contrary to our prior holding in *Corum*. *Id.* at 785-86, 413 S.E.2d at 291. Indeed, the application of sovereign immunity to plaintiff's common law negligence claim is integral to our assessment here of the "adequacy" of plaintiff's state law remedy. Allowing sovereign immunity to defeat plaintiff's colorable constitutional claim here would defeat the purpose of the holding of *Corum*.

This Court could hardly have been clearer in its holding in *Corum*: "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.* at 782, 413 S.E.2d at 289. In outlining the rationale for allowing such claims to proceed in the alternative, this Court further explained:

> The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action . . . . The fundamental purpose for [the] adoption [of the Declaration of Rights] was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. The very purpose of the Declaration of Rights is to ensure

> that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State.

Id. at 782-83, 413 S.E.2d at 289-90 (citation omitted). Nevertheless, this Court also addressed the inherent tension for the judicial branch in safeguarding against the encroachment of citizens' constitutional rights while also respecting the doctrine of sovereign immunity:

> The doctrine of sovereign immunity has been modified, but never abolished. It has been said that the present day doctrine seems to rest on a respect for the positions of two coequal branches of government—the legislature and the judiciary. Thus, courts have deferred to the legislature the determination of those instances in which the sovereign waives its traditional immunity.
>
> However, in determining the rights of citizens under the Declaration of Rights of our Constitution, it is the judiciary's responsibility to guard and protect those rights. The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights. *It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.*
>
> It is also to be noted that individual rights protected under the Declaration of Rights from violation by the State are constitutional rights. Such constitutional rights are a part of the supreme law of the State. On the other hand, the doctrine of sovereign immunity is not a constitutional right; it is a common law theory or defense established by this Court . . . . *Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail.*

Id. at 785-86, 413 S.E.2d at 291-92 (emphasis added) (internal citation omitted). The Court of Appeals' holding here constitutes precisely the type of "fanciful gesture" that this Court cautioned against in *Corum*.

Here, plaintiff's remedy cannot be said to be adequate by any realistic measure. Indeed, to be considered adequate in redressing a

constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim. Under the facts averred by plaintiff here,[4] the doctrine of sovereign immunity precludes such opportunity for his common law negligence claim because the defendant Board of Education's excess liability insurance policy excluded coverage for the negligent acts alleged. Plaintiff's common law cause of action for negligence does not provide an adequate remedy at state law when governmental immunity stands as an absolute bar to such a claim. But as we held in *Corum*, plaintiff may move forward in the alternative, bringing his colorable claims directly under our State Constitution based on the same facts that formed the basis for his common law negligence claim.

This holding does not predetermine the likelihood that plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case. Rather, it simply ensures that an adequate remedy must provide the possibility of relief under the circumstances. Here, the language of the excess liability insurance policy and corresponding applicability of sovereign immunity, make relief impossible on plaintiff's common law negligence claim, regardless of his ability to prove his case. Further, the facts presented here are distinguishable from a case in which a plaintiff has lost his ability to pursue a common law claim due to expiration of the statute of limitations, for example. Sovereign immunity entirely precludes this plaintiff from moving forward with his common law claim; without being permitted to pursue his direct colorable constitutional claims, he will be left with no remedy for his alleged constitutional injuries.

In *Corum*, state law did not provide for the type of remedy sought by the plaintiff; as such, this Court did not consider the relevance of sovereign immunity in its initial determination that he had no adequate remedy at state law. Nevertheless, as outlined above, this Court did clearly establish the principle that sovereign immunity could not operate to bar direct constitutional claims. Here, although plaintiff does have a negligence claim under the common law, such claim is automatically precluded by sovereign immunity due to the language of the excess liability insurance policy excluding coverage for negli-

4. In the original complaint, plaintiff specifically averred: "The constitutional claim for damages is plead [sic] as an alternative remedy, should the court find that sovereign immunity or governmental immunity in any of its various forms exists and, if it does exist, which the plaintiffs deny, then, in that event, plaintiffs have no adequate remedy at law and assert the constitutional violations pursuant to the laws of North Carolina."

gent acts. If plaintiff is not allowed to proceed in the alternative with his direct colorable constitutional claim, sovereign immunity will have operated to bar the redress of the violation of his constitutional rights, contrary to the explicit holding of *Corum*.

In addition to *Corum*, our holding here is likewise consistent with the spirit of our reasoning in *Sale v. State Highway & Public Works Commission*, 242 N.C. 612, 89 S.E.2d 290 (1955), and *Midgett v. North Carolina State Highway Commission*, 260 N.C. 241, 132 S.E.2d 599 (1963), *overruled on other grounds by Lea Co. v. North Carolina Board of Transportation*, 308 N.C. 603, 616, 304 S.E.2d 164, 174 (1983). In *Sale*, the plaintiffs sued the State Highway Commission after buildings that it had contracted with the plaintiffs to remove and reconstruct at a different site were destroyed by fire during the process. Although the plaintiffs had no statutory claim, this Court essentially allowed the plaintiff's negligence claim to proceed under the common law as an allegation of the State agency's violation of his constitutional rights. 242 N.C. at 620-22, 89 S.E.2d at 297-98. The State agency defendant in *Sale* contended that, based on the facts alleged in the plaintiff's complaint, it could not be sued under statute, in contract, or in tort, this last due to immunity at common law. Likewise, defendant Board of Education here argues that it is entitled to summary judgment because its sovereign immunity bars the claim on the facts alleged by plaintiff. The Court in *Sale*, when faced with a plaintiff who would otherwise receive no compensation for a constitutional wrong, recognized the significance of such a "violation of the fundamental law of this State," *id.* at 620, 89 S.E.2d at 297, and fashioned a remedy at common law to ensure an opportunity for the plaintiff to have the merits of his case heard and his injury redressed if successful on those merits.

Finally, in *Midgett*, the plaintiffs alleged a taking by the State Highway Commission after the agency constructed a highway, allegedly altering the natural flow of water and causing recurring flooding on the plaintiffs' private property. 260 N.C. at 248, 132 S.E.2d at 606. Under those circumstances, a statutory remedy to recover damages against the State Highway Commission existed and was ordinarily exclusive when available. Nevertheless, after finding that the plaintiffs' damages did not accrue until after the time for the statutory cause of action had expired, this Court allowed the plaintiffs to proceed with a constitutional claim for just compensation. *Id.* at 249-50, 132 S.E.2d at 607-08.

Thus, the type of remedy sought by the plaintiff in *Midgett* was precisely the same under either the statute or the constitutional claim asserted. Once again, when faced with a plaintiff who had suffered a colorable constitutional injury that could not be redressed through other means, this Court allowed the plaintiff to proceed with his direct constitutional claim because the state law remedy did not apply to the facts alleged by the plaintiff. *Id.* at 251, 132 S.E.2d at 608-09. Here, as in *Midgett*, the facts plaintiff alleges and the damages he seeks are also the same under either his common law negligence claim or his direct colorable constitutional claim. Moreover, although the timing of plaintiff's injury is not the issue, as it was in *Midgett*, the particular fact situation "would make a recovery by the plaintiff in the instant case impossible." *Id.*

In sum, we hold that plaintiff's common law negligence claim is not an "adequate remedy at state law" because it is entirely precluded by the application of the doctrine of sovereign immunity. To hold otherwise would be contrary to our opinion in *Corum* and inconsistent with the spirit of our long-standing emphasis on ensuring redress for every constitutional injury. Moreover, our constitutional rights should not be determined by the specific language of the liability insurance policies carried by the boards of education in each county. Allowing sovereign immunity to bar this type of constitutional claim would lead to inconsistent results across this State, as persons in some counties would find themselves in plaintiff's position, with no remedy at all for this type of injury, while others would be compensated. Instead, individuals may seek to redress all constitutional violations, in keeping with the "fundamental purpose" of the Declaration of Rights to "ensure that the violation of [constitutional] rights is *never* permitted by anyone who might be invested under the Constitution with the powers of the State." *Corum*, 330 N.C. at 782-83, 413 S.E.2d at 289-90 (emphasis added).

Accordingly, we reverse the Court of Appeals and affirm the trial court's denial of defendant's motion for summary judgment on plaintiff's direct colorable constitutional claims.

REVERSED.

IN RE K.J.L.

[363 N.C. 343 (2009)]

IN THE MATTER OF K.J.L.

No. 37A09

(Filed 18 June 2009)

Child Abuse and Neglect; Termination of Parental Rights—summons-related defect—subject matter jurisdiction—personal jurisdiction—waiver of defenses

The Court of Appeals erred by vacating a neglect and dependency adjudication order, and a later termination of parental rights (TPR) order, based on its conclusion that it did not have subject matter jurisdiction since there was no signature from an appropriate member of the clerk's office on the summons in the neglect and dependency proceeding, because: (1) summons-related defects implicate personal jurisdiction and not subject matter jurisdiction since the purpose of the summons is to obtain jurisdiction over the parties to an action and not over the subject matter; (2) the parents' appearance at the neglect and dependency hearing without objection to jurisdiction waived any defenses implicating personal jurisdiction; and (3) any defenses based on the failure to issue a summons to the minor or to serve the summons on the guardian ad litem (GAL) were waived since the GAL appeared at the TPR hearing without objecting to the court's jurisdiction.

Justice TIMMONS-GOODSON concurring in the result only.

Justice MARTIN and Justice BRADY join in the concurring opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 194 N.C. App. ——, 670 S.E.2d 269 (2008), vacating an order terminating parental rights entered on 15 January 2008 by Judge Mary F. Covington in District Court, Davidson County. Heard in the Supreme Court on 6 May 2009.

Charles E. Frye, III for petitioner-appellant Davidson County Department of Social Services, and Laura B. Beck, Attorney Advocate, for appellant Guardian ad Litem.

Robert W. Ewing for respondent-appellee mother.

NEWBY, Justice.

This case presents the question of whether a trial court lacks subject matter jurisdiction over an action when the summons in the case has not been signed by a statutorily designated member of the clerk of court's office and thus has not been legally issued. Because we hold that the lack of a proper summons implicates personal jurisdiction rather than subject matter jurisdiction, we reverse the decision of the Court of Appeals.

On 28 March 2006, the Davidson County Department of Social Services ("DSS") filed a juvenile petition alleging that the juvenile K.J.L. was neglected and dependent. The Office of the Clerk of Superior Court for Davidson County issued a summons in the matter pursuant to N.C.G.S. § 7B-406(a), which provides in pertinent part: "Immediately after a petition has been filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall issue a summons to the parent, guardian, custodian, or caretaker requiring them to appear for a hearing at the time and place stated in the summons." N.C.G.S. § 7B-406(a) (2007). The summons was deficient, however, in that it was not "dated and signed by the clerk, assistant clerk, or deputy clerk of the court in the county in which the action [was] commenced." *Id.* § 1A-1, Rule 4(b) (2007). The deputy clerk responsible for the summons later stated in an affidavit "[t]hat due to an oversight, [she] inadvertently failed to sign each" copy of the summons. Nonetheless, copies of the summons were served on both of K.J.L.'s parents on 30 March 2006, and both parents were present in open court when the matter was called for hearing. Without raising any objection to the court's jurisdiction, both parents knowingly stipulated that K.J.L. was a neglected juvenile. The trial court entered an order to that effect on 8 September 2006.

On 12 April 2007, DSS filed a petition for termination of the parental rights of K.J.L.'s parents. A properly signed summons was issued in the termination of parental rights ("TPR") proceeding, and copies were served on both parents. K.J.L.'s mother ("respondent") appeared at the TPR hearing without objecting to the court's jurisdiction, as did K.J.L.'s guardian ad litem ("GAL"). K.J.L.'s father failed to respond to the TPR petition and did not appear at the hearing. By order filed on 15 January 2008, the trial court terminated both parents' parental rights. Respondent appealed.

The Court of Appeals majority concluded that the lack of a signature from an appropriate member of the clerk's office on the sum-

mons in the neglect and dependency proceeding meant no summons was "issued" in that case for purposes of Rule of Civil Procedure 4(a), which provides: "A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so." *Id.* § 1A-1, Rule 4(a) (2007). The Court of Appeals majority further held that the absence of a legally issued summons deprived the trial court of the subject matter jurisdiction necessary to enter its initial order adjudicating K.J.L. a neglected juvenile. *In re K.J.L.*, —— N.C. App. ——, ——, 670 S.E.2d 269, 271 (2008). The court thus vacated the adjudication order and went on to vacate the TPR order as well "because the adjudication order was essential to the trial court's subject matter jurisdiction in the proceeding to terminate respondent's parental rights." *Id.* at ——, 670 S.E.2d at 271 (citing, *inter alia*, N.C.G.S. § 7B-1110(a) (2007)). The Court of Appeals majority also vacated the TPR order on alternative grounds, holding that the trial court lacked subject matter jurisdiction over the TPR proceeding because "no summons was issued to the juvenile and no summons was served upon or accepted by the guardian ad litem for the juvenile." *Id.* at ——, 670 S.E.2d at 272. The dissenting judge did not challenge the majority's holding that, due to the lack of a proper signature, no summons was legally issued in the neglect and dependency proceeding. *Id.* at ——, 670 S.E.2d at 274 (Hunter, Robert C., J., dissenting). The dissent also did not dispute that the summons in the TPR proceeding was not properly issued and served. *Id.* at ——, 670 S.E.2d at 279. However, the dissent would have resolved both issues by concluding that defects in the issuance and service of summons affect personal jurisdiction and can be waived by general appearance. *Id.* at ——, ——, 670 S.E.2d at 274, 279. We now review the Court of Appeals' decision on the basis of the dissenting opinion.

It is clear that the summons in the neglect and dependency proceeding was not signed in compliance with Rule of Civil Procedure 4(b). The summons was thus not "issued" as that term is used in Rule 4(a), and consequently the issuance requirement of N.C.G.S. § 7B-406(a) was not satisfied. We must determine whether the failure to legally issue a summons implicates the court's jurisdiction over the subject matter of an action or merely affects jurisdiction over the parties thereto. The allegations of a complaint determine a court's jurisdiction over the subject matter of the action. *Peoples v. Norwood*, 94 N.C. 144, 149, 94 N.C. 167, 172 (1886). In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute. N.C.G.S. §§ 7B-200, -1101 (2007). The existence of subject matter jurisdiction is a matter of law

and " ' " cannot be conferred upon a court by consent." ' " *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *In re Custody of Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967)). Consequently, a court's lack of subject matter jurisdiction is not waivable and can be raised at any time. N.C.G.S. § 1A-1, Rule 12(h)(3) (2007). Conversely, a court's jurisdiction over a person is generally achieved through the issuance and service of a summons. *Peoples*, 94 N.C. at 149, 94 N.C. at 172. Deficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner. N.C.G.S. § 1A-1, Rule 12(h)(1) (2007). Generally, such deficiencies can be cured. Even without a summons, a court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction. *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) ("Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent." (citation omitted)).

This Court has held that "the absence of the clerk's signature on the summons [is] a defect of a formal character which [is] waived by a general appearance." *Hooker v. Forbes*, 202 N.C. 364, 368, 162 S.E. 903, 905 (1932). We have recently reiterated this position, holding that summons-related deficiencies similar to those at issue here "implicate personal jurisdiction and thus can be waived by the parties." *In re J.T. (I)*, 363 N.C. 1, 4, 672 S.E.2d 17, 19 (2009) (citing N.C.G.S. § 1A-1, Rule 12(h)(1); *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d 355, 359 (1956)).

These holdings are elaborations on basic principles long recognized by this Court: the summons is not the vehicle by which a court obtains subject matter jurisdiction over a case, and failure to follow the preferred procedures with respect to the summons does not deprive the court of subject matter jurisdiction.

> The purpose of the summons is to bring the parties into, and give the [c]ourt jurisdiction of *them*, and of the pleadings, to give jurisdiction of the *subject matter* of litigation and the parties in that connection, and this is orderly and generally necessary; but when the parties are voluntarily before the [c]ourt, and . . . a judgment is entered in favor of one party and against another, such judgment is valid, although not granted according to the orderly course of procedure.

Peoples, 94 N.C. at 149, 94 N.C. at 172 (citations omitted). Because the summons affects jurisdiction over the person rather than the subject matter, this Court has held that a general appearance by a civil defendant "waive[s] any defect in *or nonexistence of* a summons." *Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E.2d 592, 593 (1955) (emphasis added) (citations omitted); *see also Hatch v. Alamance Ry. Co.*, 183 N.C. 617, 628, 112 S.E. 529, 534 (1922) (Clark, C.J., dissenting) ("[A]ppearance in an action dispenses with the necessity of process. Indeed, there are numerous cases that although there has been no summons at all issued, a general appearance, by filing an answer or otherwise, makes service of summons at all unnecessary." (citations omitted)). In the instant case, the failure to issue a summons in the neglect and dependency action did not affect the trial court's subject matter jurisdiction, and the parents' appearance at the neglect and dependency hearing without objection to jurisdiction waived any defenses implicating personal jurisdiction.

In the recent case *In re J.T. (I)*, a TPR summons had been issued but failed to name any of the three juveniles in that case as respondent, and no summons had been served on the juveniles or their GAL. We held these deficiencies implicated personal jurisdiction, not subject matter jurisdiction. 363 N.C. at 4, 672 S.E.2d at 19. In our decision, we quoted the following: " '[T]he issuance and service of process is the means by which the court obtains jurisdiction, and thus where *no* summons is issued, the court acquires jurisdiction over neither the parties nor the subject matter of the action.' " *Id.* at 4, 672 S.E.2d at 18 (quoting *In re Poole*, 151 N.C. App. 472, 475, 568 S.E.2d 200, 202 (2002) (Timmons-Goodson, J., dissenting) (citations omitted), *rev'd per curiam for reasons stated in dissenting opinion*, 357 N.C. 151, 579 S.E.2d 248 (2003)). Understood in context, this language was used to emphasize that a summons had in fact been issued in *In re J.T. (I)*, as had been the case in *In re Poole*. *Id.*; *In re Poole*, 151 N.C. App. at 475, 568 S.E.2d at 202. Read literally and in isolation, however, this language could be interpreted to mean the failure to issue a summons defeats subject matter jurisdiction. We disavow such an interpretation. The summons relates to subject matter jurisdiction, albeit only insofar as it apprises the necessary parties that the trial court's subject matter jurisdiction has been invoked and that the court intends to exercise jurisdiction over the case. Thus, although the summons itself does not establish subject matter jurisdiction, it can be used as some proof of invocation of the trial court's subject matter jurisdiction. This invocation is accomplished when a

proper controversy has been brought before the court. *See Peoples*, 94 N.C. at 149, 94 N.C. at 172.

Although the preceding analysis provides grounds for deciding both issues in this case, we now briefly address the alternate basis for the Court of Appeals' holding that the trial court lacked subject matter jurisdiction over the TPR action. Because "no summons was issued to the juvenile and no summons was served upon or accepted by the guardian ad litem for the juvenile," the majority below concluded that the trial court did not have the subject matter jurisdiction necessary to terminate respondent's parental rights. *In re K.J.L.*, ––– N.C. App. at –––, 670 S.E.2d at 272 (majority). This issue is directly controlled by our decision in *In re J.T. (I)*, in which the challenge to subject matter jurisdiction was based on findings that "no summons named any of the three juveniles as respondent and that no summons was ever served on the juveniles or their GAL." 363 N.C. at 4, 672 S.E.2d at 19. We concluded that "[t]hese errors are examples of insufficiency of process and insufficiency of service of process, respectively, both of which are defenses that implicate personal jurisdiction and thus can be waived by the parties." *Id.* (citing N.C.G.S. § 1A-1, Rule 12(h)(1); *Harmon*, 245 N.C. at 86, 95 S.E.2d at 359). Here, because K.J.L.'s GAL appeared at the TPR hearing without objecting to the court's jurisdiction, any defenses based on the failure to issue a summons to K.J.L. or to serve the summons on the GAL were waived, and the trial court's exercise of jurisdiction was proper. 363 N.C. at 4-5, 672 S.E.2d at 19 (citing *Harmon*, 245 N.C. at 86, 95 S.E.2d at 359).

Because the purpose of the summons is to obtain jurisdiction over the parties to an action and not over the subject matter, summons-related defects implicate personal jurisdiction and not subject matter jurisdiction. Any deficiencies in the issuance and service of the summonses in the neglect and TPR proceedings at issue in this case did not affect the trial court's subject matter jurisdiction, and any defenses implicating personal jurisdiction were waived by the parties. The decision of the Court of Appeals is therefore reversed and this case is remanded to that court for consideration of the parties' remaining assignments of error.

REVERSED AND REMANDED.

Justice TIMMONS-GOODSON concurring in the result only.

I concur in the result only and agree that the trial court had subject matter jurisdiction over the termination of parental rights proceeding. I write separately because I conclude the trial court's jurisdiction over the termination proceeding was not dependent upon the underlying abuse, neglect, or dependency adjudication.

Termination of parental rights proceedings are independent from underlying abuse, neglect, and dependency proceedings and have separate jurisdictional requirements. *Compare* N.C.G.S. § 7B-200 (stating that "[t]he court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent"), *with* N.C.G.S. § 7B-1101 (stating that "[t]he court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights"); *see also In re R.T.W.*, 359 N.C. 539, 553, 614 S.E.2d 489, 497 (2005) ("Each termination order relies upon an independent finding that clear, cogent, and convincing evidence supports at least one of the grounds for termination under N.C.G.S. § 7B-1111. Section 7B-1113 affords parents the opportunity to challenge termination orders on appeal. Simply put, a termination order rests on its own merits."), *superseded by statute on other grounds*, Act of Aug. 23, 2005, ch. 398, sec. 12, 2005 N.C. Sess. Laws 1455, 1460-61, *as recognized in In re T.R.P.*, 360 N.C. 588, 592, 636 S.E.2d 787, 791 (2006). Indeed, the trial court may entertain a petition for termination of parental rights even when there is no involvement by DSS and thus no underlying abuse, neglect, and dependency action whatsoever. *See* N.C.G.S. § 7B-1103(a)(1) (2007) (allowing a parent to file a petition to terminate the parental rights of the other parent).

Section 7B-1101, which governs subject matter jurisdiction in termination of parental rights cases, states in pertinent part:

> The court shall have *exclusive original jurisdiction* to hear and determine any petition or motion relating to termination of parental rights to *any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion.*

Id. Pursuant to the broad language of N.C.G.S. § 7B-1101, the trial court has exclusive subject matter jurisdiction to determine any petition or motion for termination of parental rights of any juvenile resid-

ing in or merely "found in" the district at the time of filing. *Id.*; *see, e.g.*, *In re D.D.J.*, 177 N.C. App. 441, 443, 628 S.E.2d 808, 810 (2006) (stating that, when the children were living in South Carolina at the time of the filing of the petition for termination, they were not "residing in" or "found in" North Carolina, and the trial court therefore lacked subject matter jurisdiction over the termination proceeding); *In re Leonard*, 77 N.C. App. 439, 440, 335 S.E.2d 73, 73-74 (1985) (holding that when the juvenile was in Ohio with his mother when the petition to terminate parental rights was filed, the juvenile was neither "residing in" nor "found in" the district at the time of filing, and the petition failed for lack of subject matter jurisdiction). Moreover, section 7B-1101 vests the trial court with exclusive subject matter jurisdiction to determine any petition or motion for termination of parental rights of any juvenile in the legal *or* physical custody of DSS at the time of the filing. *See* N.C.G.S. § 7B-1101.

As noted by the majority, respondent stipulated that K.J.L. was a neglected juvenile, and the trial court entered an order to that effect accordingly. Respondent did not appeal from the order adjudicating K.J.L. neglected. DSS filed its petition for termination of parental rights on 12 April 2007, a little over a year after taking custody of K.J.L. There was no contention that K.J.L. did not reside or could not be found in the district. The petition was properly verified. *See In re T.R.P.*, 360 N.C. at 593, 636 S.E.2d at 792 ("A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition."). A proper summons was issued for the termination proceeding, and copies were served on both parents. Respondent appeared at the hearing, as did the guardian ad litem for the juvenile. Further, as the majority correctly determines, the failure to issue a summons to the juvenile for the termination proceeding did not implicate the trial court's subject matter jurisdiction. *See In re J.T. (I)*, 363 N.C. 1, 4, 672 S.E.2d 17, 18-19 (2009). Thus, under N.C.G.S. § 7B-1101, the trial court had exclusive original jurisdiction to hear and determine the petition to terminate respondent's parental rights.

The Court of Appeals nonetheless determined that the termination of parental rights order had to be vacated "because the adjudication order was essential to the trial court's subject matter jurisdiction in the proceeding to terminate respondent's parental rights." *In re K.J.L.*, —— N.C. App. ——, 670 S.E.2d 269, 271 (2008). The Court of Appeals cited N.C.G.S. § 7B-1110(a) in support of this proposition. Section 7B-1110(a) does not address adjudication orders, however;

rather, N.C.G.S. § 7B-1110 addresses termination of parental rights proceedings and requires the trial court to determine that one or more of the grounds for termination exists. *See* N.C.G.S. § 7B-1110(a) (2007) ("After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest.").

Here, in compliance with its duty under N.C.G.S. § 7B-1110(a), the trial court made independent findings, separate from the underlying neglect and dependency adjudication order, that grounds existed for termination of parental rights. Specifically, the trial court found that respondent had: (1) neglected the juvenile within the meaning of N.C.G.S. § 7B-101 and that there was a probability of continuation of such neglect (ground for termination pursuant to N.C.G.S. § 7B-1111(a)(1)); and (2) willfully failed to pay a reasonable portion of the cost of care for six months preceding the petition (ground for termination pursuant to N.C.G.S. § 7B-1111(a)(3)). The Court of Appeals, then, clearly erred in determining that the underlying adjudication order was "essential to the trial court's subject matter jurisdiction in the proceeding to terminate respondent's parental rights" pursuant to N.C.G.S. § 7B-1110(a).

Respondent argues the trial court lacked jurisdiction to enter the termination order because DSS was not authorized to file the termination action pursuant to N.C.G.S. § 7B-1103(a). Section 7B-1103 addresses standing to file a petition or motion to terminate parental rights. *See* N.C.G.S. § 7B-1103(a) (2007). Included in the list of those who may file for termination orders is "[a]ny county department of social services . . . to whom custody of the juvenile has been given by a court of competent jurisdiction." *Id.* § 7B-1103(a)(3) (2007). Respondent argues that because the underlying juvenile petition was not properly "issued" pursuant to Rule 4 of the Rules of Civil Procedure, the trial court did not acquire subject matter jurisdiction and could not adjudicate the juvenile as neglected. Thus, contends respondent, DSS was not granted custody "by a court of competent jurisdiction" and did not have standing to bring the subsequent termination proceeding.

However, the plain language of N.C.G.S. § 7B-1103(a) only requires that DSS be granted "custody . . . by a court of competent jurisdiction." *Id.* The Court of Appeals has previously held, and this Court has affirmed, that N.C.G.S. § 7B-1103(a) does not limit custody granted to DSS pursuant only to a dispositional order entered under N.C.G.S. § 7B-905, but that DSS has standing to file a termination peti-

tion pursuant to a nonsecure custody order issued pursuant to N.C.G.S. § 7B-506 as well. *See In re T.M.*, 182 N.C. App. 566, 571, 643 S.E.2d 471, 475, *aff'd per curiam*, 361 N.C. 683, 651 S.E.2d 884 (2007). This Court has also noted that "DSS's custody [need not] be legally unassailable" in order to have standing to file a petition for termination of parental rights. *See In re R.T.W.*, 359 N.C. at 551, 614 S.E.2d at 497.

Here, at the time DSS filed its termination petition on 12 April 2007, DSS had custody of the juvenile pursuant to a permanency planning order entered 9 April 2007. The trial court in its permanency planning order made independent findings and determined that it was in the best interests of the juvenile to be in the legal and physical custody of DSS. Thus, DSS had proper standing to file the petition for termination of respondent's parental rights. *See In re R.T.W.*, 359 N.C. at 551, 614 S.E.2d at 497 (determining that DSS had standing to seek termination of the respondent's parental rights when DSS had custody of the juvenile pursuant to a court order, although the validity of the underlying court order was under review).

Thus I agree that the trial court had subject matter jurisdiction over the termination proceeding and I therefore concur in the result.

Justice MARTIN and Justice BRADY join in this separate opinion.

STATE OF NORTH CAROLINA v. GERALDINE LEWIS RAMOS

No. 535A08

(Filed 18 June 2009)

Criminal Law— instructions—willfulness—omission

The Court of Appeals did not err by granting defendant a new trial in a prosecution for damaging a computer system at her workplace where the trial court omitted willfulness from the jury instructions.

Chief Justice PARKER concurs in the result only.

Justice NEWBY dissenting.

Justices EDMUNDS and BRADY join 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, 193 N.C. App. ——, 668 S.E.2d 357 (2008), finding prejudicial error in a trial that resulted in a judgment entered on 14 December 2006 by Judge Narley L. Cashwell in Superior Court, Wake County, and ordering a new trial for defendant. Heard in the Supreme Court 30 March 2009.

Roy Cooper, *Attorney General*, *by Catherine F. Jordan*, *Assistant Attorney General*, *for the State-appellant.*

Peter Wood for defendant-appellee.

HUDSON, Justice.

In this case, we consider whether the trial court prejudiced defendant Geraldine Lewis Ramos when it omitted the element of willfulness from jury instructions. Defendant was convicted of damaging a computer system at her workplace in violation of N.C.G.S. § 14-455, after being fired from her position at the Latin American Resource Center ("LARC") in Raleigh. Because we conclude that the jury could reasonably have reached a different result but for this omission, we hold that the error was prejudicial, and we affirm the decision of the Court of Appeals granting defendant a new trial.

Defendant pleaded guilty to a misdemeanor violation of section 14-455 in District Court, Wake County. On 3 November 2005, she was sentenced to a term of forty-five days, suspended subject to supervised probation for twelve months. Defendant then appealed to superior court, where on 14 December 2006, a jury convicted her on the same charge. Judge Narley L. Cashwell sentenced defendant to a forty-five day term, but suspended the sentence subject to eighteen months of supervised probation.

Defendant appealed, and, in a divided opinion filed on 18 November 2008, the Court of Appeals ordered a new trial after concluding that there was a reasonable possibility that the verdict might have been different if the jury had been properly instructed. *State v. Ramos*, —— N.C. App. ——, ——, 668 S.E.2d 357, 359 (2008). The entire panel agreed that the trial court failed to instruct on the element of willfulness, that the terms "willfully" and "without authorization" in the statute are not interchangeable, and that the proper standard of review is whether the instruction error prejudiced defendant. *Id.* at ——, 668 S.E.2d at 362-63. However, the dissenter would find no prejudice because the evidence "unequivocally show[s] defendant's actions in duplicating and removing the files was willful." *Id.* at ——,

668 S.E.2d at 366 (Tyson, J., concurring in part and dissenting in part). This Court allowed the State's motion for temporary stay and its petition for writ of supersedeas.

The evidence tended to show that defendant had worked as a community outreach coordinator at LARC since May 2005, supervised by Aura Camacho-Maas. One of defendant's duties was writing grant proposals. In August 2005 Camacho-Maas informed defendant that she was being terminated after failing to timely complete two proposals. Camacho-Maas testified that defendant was enraged and crying and threatened to "destroy [Camacho-Maas] in the agency." Defendant also refused to return her office key until she was paid. After terminating defendant, Camacho-Maas escorted defendant from LARC's office and instructed the receptionist not to allow her back onto the premises. Shortly thereafter, Camacho-Maas found defendant and the receptionist removing defendant's personal items from defendant's LARC office, but said nothing. Later the same day, Camacho-Maas saw defendant and the receptionist again leaving defendant's former office, and she became concerned. When Camacho-Maas checked defendant's office computer, she discovered that certain important teacher apprenticeship program ("TAP") files were missing from LARC's server. Camacho-Maas testified that she knew the files had been on the server earlier that day before defendant's termination and that only LARC employees could access the files. Camacho-Maas called the police, who investigated and confirmed that many LARC files had been deleted or overwritten.

On 16 August 2005, defendant returned to LARC, and Camacho-Maas called police to the office. Defendant admitted that she had copied certain files onto her flash drive. At trial, defendant testified that she had told Camacho-Maas that she was going to delete various curriculum and grant proposal files and that Camacho-Maas had said she didn't care whether defendant did so or not because defendant's work was not good. Defendant denied having deleted any TAP files.

In pertinent part, section 14-455(a) states that "[i]t is unlawful to *willfully and* without authorization alter, damage, or destroy a computer, computer program, computer system, computer network, or any part thereof." N.C.G.S. § 14-455(a) (2007) (emphasis added). Defendant requested an instruction that included the term "willfully" and its legal definition, but the trial court denied the request and instructed the jury as follows:

> For you to find the defendant guilty of this offense, the State must prove two things:
>
> First, that the defendant damaged a computer system or computer network or any part thereof by deleting a file or files from the computer system or computer network.
>
> Second, that the defendant did so without authorization. A person is without authorization when although the person has the consent or permission of owner [sic] to access a computer system or computer network the person does so in a manner which exceeds the consent or permission.
>
> If you find from the evidence beyond a reasonable doubt that on or about August the 15th, 2005 the defendant, without authorization, damaged a computer system or computer network, it would appeal [sic] your duty to return a verdict of guilty.

"[A] trial court must instruct the jury on every essential element of an offense . . . ." *State v. Hunt*, 339 N.C. 622, 649, 457 S.E.2d 276, 292 (1995). Section 14-455 requires that the alteration or damage to a computer be done "willfully." "Willful" is defined as "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (per curiam) (citations omitted). "Willfully" means "something more than an intention to commit the offense." *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940). Willfulness is an essential element which the fact-finder must determine, often by inference. *Arnold*, 264 N.C. at 349, 141 S.E.2d at 474.

As noted in both the majority opinion and the dissent at the Court of Appeals, failure to instruct on willfulness is subject to harmless error review. *Ramos*, ––– N.C. App. at –––, –––, 668 S.E.2d at 362, 364; *see Arnold*, 264 N.C. at 349, 141 S.E.2d at 474; *State v. Rose*, 53 N.C. App. 608, 611, 281 S.E.2d 404, 406 (1981); *State v. Maxwell*, 47 N.C. App. 658, 660, 267 S.E.2d 582, 584, *appeal dismissed and disc. review denied*, 301 N.C. 102, 273 S.E.2d 307 (1980). In such cases, we consider whether "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2007). For example, in *Rose*, the Court of Appeals held that there could be no prejudice in convicting a defendant of felonious escape, an offense which includes the element of

willfulness, when "*nothing* in the record in any way indicates that defendant's escape was anything other than 'willful.' " *Rose*, 53 N.C. App. at 611, 281 S.E.2d at 406 (emphasis added).

Here, defendant testified that she believed Camacho-Maas had authorized her to delete certain computer files which she had created at work. Defendant testified that Camacho-Maas told her that she could delete these files because "the work was not good, and it was [sic] no consequence." Defendant further testified that Camacho-Maas came into defendant's office while she was deleting these very files and "didn't say anything, but [Camacho-Maas] knew what I was doing." Defendant also testified that she intentionally deleted only a few curriculum- and grant-related files that she considered personal and repeatedly stated that she did not delete any TAP files. Defendant also testified that, because the TAP files were located on LARC's server, she did not believe she could access them while Camacho-Maas had them open and did not think it was possible for her to have deleted the TAP files after her termination.

This is not a case with "nothing in the record" to support a conclusion of anything other than willfulness. *Rose*, 53 N.C. App. at 611, 281 S.E.2d at 406. Evaluating the credibility of defendant's testimony in light of the other evidence was properly for the jury and the trial court's instructional error prevented the jury from considering the willfulness of defendant's actions. Based on defendant's testimony, we conclude that there was a reasonable possibility that the jury could have found that defendant believed she had Camacho-Maas' permission to delete all of the files that she intentionally deleted and that any deletion of the TAP files was accidental, not willful. Thus, the trial court's failure to instruct on willfulness was not harmless. The Court of Appeals majority correctly granted defendant a new trial and we affirm.

AFFIRMED.

Chief Justice PARKER concurs in the result only.

Justice NEWBY dissenting.

The issue in this appeal is whether the evidence presented at trial could have supported a jury finding that there was reasonable doubt that defendant willfully deleted Teacher Apprenticeship Program ("TAP") files from her employer's computer network. Be-

cause the evidence weighs overwhelmingly in favor of finding that defendant deleted the TAP files knowingly and with unlawful intent, the only reasonable conclusion is that defendant acted willfully in deleting the TAP files. I would reverse the decision of the Court of Appeals majority and respectfully dissent.

Because there was no dispute among the Court of Appeals panel that the trial court erred in failing to instruct the jury that the State was required to prove defendant deleted the TAP files willfully, this Court must determine whether the lack of such an instruction was prejudicial to defendant. "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. *The burden of showing such prejudice under this subsection is upon the defendant.*" N.C.G.S. § 15A-1443(a) (2007) (emphasis added). To show prejudice in the instant case, defendant must demonstrate on appeal that the totality of the evidence presented at trial admits a reasonable possibility that, had the trial court instructed the jury on willfulness, the jury would have found defendant not guilty of damaging a computer or computer network in violation of N.C.G.S. § 14-455(a).

Section 14-455(a) provides in pertinent part: "It is unlawful to willfully and without authorization alter, damage, or destroy a computer, computer program, computer system, computer network, or any part thereof." *Id.* § 14-455(a) (2007). One definition of "willful" as it is used in criminal statutes is "the wrongful doing of an act without justification or excuse." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (per curiam) (citation omitted). More simply stated, "the word willful means not only designedly, but also with a 'bad purpose.' " *State v. Clifton*, 152 N.C. 765, 766-67, 152 N.C. 800, 802, 67 S.E. 751, 752 (1910) (citations omitted). To show she was prejudiced by the lack of a jury instruction on willfulness, defendant must demonstrate a reasonable possibility that the jury would have found that the State failed to prove at least one of the components of willfulness beyond a reasonable doubt.

The majority seems to assert the jury could have found reasonable doubt with respect to the "bad purpose" component in defendant's testimony that she believed she was authorized to delete files from Latin American Resource Center ("LARC") computers. While it is true defendant presented evidence that she believed she had permission to delete some files from LARC's network, it is undisputed

that defendant was not authorized to delete TAP files in particular, and defendant never testified that she even *thought* she was authorized to delete TAP files. Defendant testified that, after her termination from LARC, defendant said to Aura Camacho-Maas, "[S]ince my work is no good I guess you won't mind if I take my work off computer [sic]," and that Camacho-Maas responded, "[T]his was no consequence to her, that the work was not good, and it was no consequence." This testimony shows defendant may have been authorized to remove her own work product from LARC's network, but it does not reflect any belief by defendant that she was authorized to delete the TAP files that are the basis of her conviction.

The majority also argues the jury could have found reasonable doubt regarding the "designedly" component of willfulness based on a theory that defendant's deletion of TAP files was accidental. At no point, however, did defendant explicitly testify that any deletion of TAP files was done by accident or that she did not intend to delete TAP files. Indeed, defendant testified that she did not delete the TAP files at all and that she was not even able to access those files at the time of her termination, stating:

> I deleted part of the grant which was the grant that I had written. I think that was about three, three files, but it was not the TAP file.
>
> TAP file was in the server. It was a server and, in order for, to go into the server. She had already worked in the server, so I could not to go into the TAP file.
>
> I would have go into the server. Server couldn't be but one person going into it at the time, so I don't know. [sic]

Moreover, in attempting to carry her burden on appeal of showing a reasonable possibility of a different result but for the instructional error, defendant addresses the "designedly" component of willfulness by stating simply, "Defendant may have deleted some files accidentally." Defendant fails to expound on this argument, instead supporting it with only a single reference to her trial testimony: asked whether she deleted a certain file, defendant responded, "I'm not sure whether I deleted that file or not." A contextual reading of this testimony, however, reveals that defendant was not responding to a question about the TAP files at issue here, but rather a file captioned "Organizational Information" that provided details about LARC itself. It would be unreasonable for a jury to infer from this minimal testi-

mony that defendant deleted the TAP files accidentally, especially given the opposing testimony presented by the State.

In determining whether defendant has borne her burden of showing a reasonable likelihood of acquittal had the willfulness instruction been given, our lodestar must be reasonableness *under the circumstances*. For a finding of prejudice to be made under N.C.G.S. § 15A-1443(a), the possibility of a different outcome but for the error in question must be "reasonable." N.C.G.S. § 15A-1443(a). Thus, a mere scintilla of evidence tending to support defendant's claim that she did not act willfully does not establish prejudice per se. We must consider and balance the totality of the evidence presented at trial. The majority's weighing of the evidence, however, focuses exclusively on inferences that might favor defendant and fails to address the overwhelming evidence presented by the State to prove that defendant deleted the TAP files knowingly and with unlawful intent.

The State's evidence tended to show that when defendant was terminated on 15 August 2005, she "became enraged" and "[h]er words and her body language were . . . very violent." Defendant stated she was going to "destroy [Camacho-Maas] in the agency." Defendant also refused to surrender her keys to the LARC offices before receiving her last paycheck. Camacho-Maas explained that defendant would be paid at the end of the month as usual. Defendant returned to the LARC offices the next day, and Camacho-Maas, having noticed by then that the TAP files had been deleted from LARC's server, called the police. Defendant admitted to the police that she had copied files from LARC's server onto a flash drive and removed them from the LARC computer. Detective James Neville of the Raleigh Police Department's cybercrimes unit testified that he found approximately 304 LARC files on defendant's flash drive, about 80% of which were TAP files that had been "either deleted or deleted and overwritten" on LARC's server. Neville also found a letter on defendant's flash drive stating, "When I am paid in full you may have what I downloaded." Defendant acknowledged that letter at trial and also admitted that she had told Detective B.R. Williams that "she would give Miss Camacho-Maas' files back when she got her paycheck."

In short, the evidence demonstrates beyond doubt that defendant acted knowingly and with unlawful intent. Hundreds of the files found on defendant's flash drive, constituting the vast majority of the LARC files that defendant copied, were TAP files, a fact that weighs heavily against finding that defendant accessed and deleted TAP files by accident. Defendant's attempt to use her copies of the erased TAP

files as a bargaining chip in seeking her paycheck likewise shows that defendant was well aware that she deleted those files from LARC's server. Defendant knew her copies of the TAP files had value to LARC because she knew those files were missing from LARC's server. Defendant's effort to use the TAP files to extract her paycheck also strongly demonstrates her bad purpose in copying the TAP files and then deleting them from LARC's server. Meanwhile, as discussed above, defendant presented no evidence that she thought she was authorized to delete TAP files and never testified that any deletion of TAP files was done by accident.

Considering the totality of the evidence, which weighs prohibitively against finding defendant acted accidentally or without a bad purpose in deleting the TAP files, defendant has failed to demonstrate a reasonable possibility that a properly instructed jury would have found reasonable doubt as to the willfulness element of N.C.G.S. § 14-455(a). Therefore, under N.C.G.S. § 15A-1443(a), defendant was not prejudiced by the lack of an instruction on willfulness, and her conviction should be left undisturbed. I respectfully dissent.

Justices EDMUNDS and BRADY join in this dissenting opinion.

WILLIAM LAWSON BROWN, III v. MARK P. ELLIS

No. 389PA07

(Filed 18 June 2009)

Jurisdiction— nonresident defendant—telephone and e-mail communications—long-arm statute

Plaintiff's complaint alleged sufficient facts to authorize the exercise of personal jurisdiction over the nonresident defendant pursuant to N.C.G.S. § 1-75.4(4)(a) in an action for alienation of affection and criminal conversation, although the complaint did not specifically state that plaintiff's wife was physically located in North Carolina at the time she received telephonic and e-mail communications from defendant, where plaintiff alleged that he resided in Guilford County with his wife and daughter; defendant initiated frequent and inappropriate telephone and e-mail conversations with plaintiff's wife on an almost daily basis; defendant and plaintiff's wife discussed their sexual and romantic rela-

tionship in the presence of plaintiff and his minor child; and defendant's alienation of his wife's affections occurred within the jurisdiction of North Carolina.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 184 N.C. App. 547, 646 S.E.2d 408 (2007), vacating a judgment dated 2 February 2005 entered by Judge Melzer A. Morgan Jr. in Superior Court, Guilford County. Heard in the Supreme Court 31 March 2009.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson; and Nix and Cecil, by Lee M. Cecil, for plaintiff-appellant.

Forman Rossabi Black, P.A., by T. Keith Black and William F. Patterson, Jr., for defendant-appellee.

PER CURIAM.

The issue on appeal is whether plaintiff alleged sufficient facts in his complaint to support the trial court's determination that personal jurisdiction over defendant exists under North Carolina's long-arm statute. We conclude the allegations set forth in the complaint permit the exercise of personal jurisdiction over defendant pursuant to N.C.G.S. § 1- 75.4(4)(a), and we therefore reverse and remand this case to the North Carolina Court of Appeals.

Plaintiff filed his verified complaint in Superior Court, Guilford County, alleging causes of action against defendant for alienation of affection and criminal conversation. In his complaint, plaintiff alleged he resided in Guilford County, North Carolina, with his wife and daughter, and that defendant resided in Orange County, California. According to the complaint, plaintiff's wife and defendant were both employed by the same parent company and worked together on numerous occasions. Plaintiff alleged defendant willfully alienated the affections of plaintiff's wife by, among other actions, "initiating frequent and inappropriate, and unnecessary telephone and e-mail conversations with [plaintiff's wife] on an almost daily basis." The telephone conversations between defendant and plaintiff's wife "often occurred in the presence of plaintiff and his minor child" and "involved discussions of defendant's sexual and romantic relationship with plaintiff's spouse." Plaintiff alleged that "through numerous telephone calls and e-mails to plaintiff's spouse, [defendant] has arranged to meet, and has met with plaintiff's spouse on

numerous occasions outside the State of North Carolina, under the pretense of business-related travel."

The complaint further alleged that plaintiff's wife and defendant committed adultery during these business trips, which further alienated and destroyed the marital relationship between plaintiff and his wife. In support of his complaint, plaintiff submitted an affidavit alleging that "the majority of defendant's conduct which constitutes an alienation of affections occurred within the jurisdiction of North Carolina" and that "[e]vidence as to the frequent electronic and telephonic contact between defendant and plaintiff's spouse can be established through records and witnesses located in the State of North Carolina."

Defendant moved for dismissal pursuant to Civil Procedure Rule 12(b)(2) on the ground that no personal jurisdiction existed. Defendant submitted an affidavit in support of his motion to dismiss stating he had "never set foot in the State of North Carolina." Defendant averred that he communicated with plaintiff's wife via telephone and electronic mail, but characterized these conversations as "work related" with "the normal pleasantries associated with a friendly working relationship."

Upon reviewing plaintiff's verified complaint, as well as the affidavits filed by plaintiff and defendant, the trial court denied defendant's motion to dismiss, finding that personal jurisdiction over defendant existed and that the exercise of personal jurisdiction did not violate due process. Defendant did not immediately appeal the denial of his motion to dismiss.

The case continued to trial. Upon hearing the evidence, the jury determined that defendant was liable to plaintiff for alienation of affections and awarded plaintiff compensatory and punitive damages. Defendant appealed to the Court of Appeals, which concluded that North Carolina could not exercise personal jurisdiction over defendant because, according to the Court of Appeals, there was "no evidence that defendant solicited plaintiff's wife while she was in North Carolina." *Brown v. Ellis*, 184 N.C. App. 547, 549, 646 S.E.2d 408, 411 (2007). In light of its disposition of the case, the Court of Appeals declined to reach the additional issues presented on appeal by defendant, including his constitutional argument that exercise of personal jurisdiction over him would violate due process of law. *Id.* at 550, 646 S.E.2d at 411. This Court allowed plaintiff's petition for discretionary review to review the decision.

To ascertain whether North Carolina may assert personal jurisdiction over a nonresident defendant, we employ a two-step analysis. Jurisdiction over the action must first be authorized by N.C.G.S. § 1-75.4. *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006) (citing *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977)). "Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Id.* In the instant case, the Court of Appeals determined the trial court erred in concluding that jurisdiction was authorized pursuant to N.C.G.S. § 1-75.4. In light of this determination, consideration of the second step in the analysis—that of due process—was unnecessary, and the Court of Appeals declined to address the issue.

Personal jurisdiction may properly be asserted under our long-arm statute

> in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury . . . [s]olicitation or services activities were carried on within this State by or on behalf of the defendant.

N.C.G.S. § 1-75.4(4)(a) (2007).

In the instant case, defendant argues the complaint failed to allege that plaintiff's wife was in North Carolina at the time she received defendant's telephone calls and e-mail. The Court of Appeals agreed with defendant, concluding there was "no evidence that defendant solicited plaintiff's wife while she was in North Carolina." *Brown*, 184 N.C. App. at 549, 646 S.E.2d at 411. We believe this reading of plaintiff's complaint to be overly strict. Plaintiff alleged that he resided in Guilford County with his wife and daughter and that defendant "initiat[ed] frequent and inappropriate, and unnecessary telephone and e-mail conversations with [plaintiff's wife] on an almost daily basis." According to the complaint, defendant and plaintiff's wife discussed their "sexual and romantic relationship" in the presence of plaintiff and his minor child. In his supporting affidavit, plaintiff specifically averred that defendant's alienation of his wife's affections "occurred within the jurisdiction of North Carolina." Although the complaint does not specifically state that plaintiff's wife was physically located in North Carolina during the telephonic and e-mail communications, that fact is nevertheless

apparent from the complaint. In his own affidavit, defendant never denied that he telephoned or e-mailed plaintiff's spouse in North Carolina; rather, he merely characterized the conversations as work related. We conclude plaintiff's complaint alleges sufficient facts to authorize the exercise of personal jurisdiction over defendant pursuant to N.C.G.S. § 1-75.4(4)(a). We therefore reverse the Court of Appeals and remand this case to that court for consideration of defendant's remaining issues.

REVERSED AND REMANDED.

JERRY ELLISON, EXECUTOR OF THE ESTATE OF KATE H. ELLISON, PLAINTIFF v. GAMBILL OIL COMPANY, INC., J. GWYN GAMBILL, INCORPORATED, AND JIM GAMBILL; GUNVANTPURI B. GOSAI AND B&B MINI MART, INC.; AND ARLIS TESTER D/B/A TESTERS GARAGE AND MUFFLER SHOP AND/OR TESTERS SHELL & MUFFLER SHOP, DEFENDANTS; J. GWYN GAMBILL, INCORPORATED, THIRD PARTY PLAINTIFF v. JEFF BARRETT D/B/A BARRETT PETROLEUM EQUIPMENT, THIRD PARTY DEFENDANT RUDRAM ENTERPRISES, INC., CROSS-PLAINTIFF-INTERVENOR v. J. GWYN GAMBILL, INCORPORATED, JIM GAMBILL, AND JEFF BARRETT D/B/A BARRETT PETROLEUM EQUIPMENT

No. 541A07

(Filed 18 June 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 186 N.C. App. 167, 650 S.E.2d 819 (2007), reversing both a judgment entered 31 August 2005, and an order denying a motion for judgment notwithstanding the verdict or a new trial entered 10 November 2005, by Judge Charles Lamm in Superior Court, Watauga County, and remanding for a new trial. Heard in the Supreme Court 17 November 2008. On 11 December 2008, this Court *ex mero motu* withdrew its previous order, dated 10 April 2008, and allowed plaintiff's petition for discretionary review as to additional issues.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Warren A. Hutton and Forrest A. Ferrell, for plaintiff-appellant.

The Reeves Law Firm, PLLC, by Jimmy D. Reeves and John B. "Jak" Reeves; and Walker & DiVenere, by Tamara C. DiVenere, for defendant-appellees J. Gwyn Gambill, Incorporated and Jim Gambill.

di Santi Watson Capua & Wilson, by Frank C. Wilson, III, for defendant-appellees Gunvantpuri B. Gosai and B&B Mini Mart, Inc.

PER CURIAM.

The decision of the Court of Appeals is affirmed. Discretionary review was improvidently allowed as to the additional issues.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

JORGE RODRIGUEZ-CARIAS, EMPLOYEE v. NELSON'S AUTO SALVAGE & TOWING SERVICE, EMPLOYER

No. 231PA08

(Filed 18 June 2009)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 189 N.C. App. 404, 659 S.E.2d 97 (2008), affirming an opinion and award filed on 17 January 2007 by the North Carolina Industrial Commission. Heard in the Supreme Court 4 May 2009.

Scudder & Hedrick, PLLC, by Alice Tejada, for plaintiff-appellee.

Bourlon & Davis, P.A., by Thomas E. Davis, for defendant-appellant.

PER CURIAM.

Justice HUDSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g., Barham v. Hawk*, 360 N.C. 358, 625 S.E.2d 778 (2006).

AFFIRMED.

JANE P. HELM v. APPALACHIAN STATE UNIVERSITY AND KENNETH E. PEACOCK, IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF APPALACHIAN STATE UNIVERSITY

No. 30A09

(Filed 18 June 2009)

Public Officers and Employees; Colleges and Universities—whistleblower action—protected activity—sufficiency of complaint

The decision of the Court of Appeals affirming the dismissal of the complaint of a former state university employee for retaliatory discharge under the Whistleblower Act is reversed for the reasons stated in the Court of Appeals dissenting opinion that plaintiff's allegations were sufficient to support her claim that she was engaged in a protected activity where she alleged that she was asked to resign because she refused the university chancellor's request to issue a check from the university endowment fund for an option to purchase realty that she knew the university had insufficient funds to exercise and because she reported her objection to the transaction to a university attorney.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 194 N.C. App. ——, 670 S.E.2d 571 (2008), affirming an order dismissing plaintiff's complaint entered on 28 August 2007 by Judge Mark E. Powell in Superior Court, Watauga County. Heard in the Supreme Court 5 May 2009.

Patterson Harkavy LLP, by Burton Craige and Jessica E. Leaven, for plaintiff-appellant.

Roy Cooper, Attorney General, by Kimberly D. Potter, Assistant Attorney General, for defendant-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA v. WALTER ANTHONY ALSTON, JR.

No. 558A08

(Filed 18 June 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 193 N.C. App. ——, 668 S.E.2d 383 (2008), finding no error in a judgment entered 3 August 2007 by Judge R. Stuart Albright in Superior Court, Guilford County. Heard in the Supreme Court 4 May 2009.

Roy Cooper, Attorney General, by Kathryn Jones Cooper, Special Deputy Attorney General, for the State.

Duncan B. McCormick for defendant-appellant.

PER CURIAM.

AFFIRMED.

IN RE S.N., X.Z.

[363 N.C. 368 (2009)]

IN THE MATTER OF S.N., X.Z.

No. 568A08

(Filed 18 June 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 194 N.C. App. ——, 669 S.E.2d 55 (2008), affirming orders terminating parental rights entered on 14 March 2008 by Judge Lawrence McSwain in District Court, Guilford County. The case was calendared for argument in the Supreme Court on 6 May 2009, but was determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(f)(1).

Mercedes O. Chut for petitioner-appellee Guilford County Department of Social Services.

Susan J. Hall for respondent-appellant mother.

PER CURIAM.

AFFIRMED.

CASTANEDA v. INTERNATIONAL LEG WEAR GRP.

[363 N.C. 369 (2009)]

SONIA EDITH CASTANEDA, EMPLOYEE v. INTERNATIONAL LEG WEAR GROUP, EMPLOYER, THE HARTFORD, CARRIER

No. 7A09

(Filed 18 June 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 194 N.C. App. ——, 668 S.E.2d 909 (2008), affirming an opinion and award filed 10 January 2008 by the North Carolina Industrial Commission. Heard in the Supreme Court 4 May 2009.

Randy D. Duncan for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for defendant-appellants.

PER CURIAM.

AFFIRMED.

IN RE J.Y., N.Y.

[363 N.C. 370 (2009)]

IN THE MATTER OF J.Y., N.Y.

No. 22A09

(Filed 18 June 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 194 N.C. App. ——, 671 S.E.2d 595 (2008), affirming an order dismissing a petition to terminate parental rights entered on 6 May 2008 by Judge John W. Dickson in District Court, Cumberland County. The case was calendared for argument in the Supreme Court on 6 May 2009, but was determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(f)(1).

Elizabeth Kennedy-Gurnee, Staff Attorney, for petitioner-appellant Cumberland County Department of Social Services.

Beth A. Hall, Attorney Advocate, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellee mother.

PER CURIAM.

For the reasons stated in *In re K.J.L.*, 363 N.C. ——, —— S.E.2d ——, slip op. (June 18, 2009) (No. 37A09), we reverse the Court of Appeals decision and remand this case to that court for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

DARVELLA JONES v. HARRELSON AND SMITH CONTRACTORS, LLC, a North Carolina Corporation, and RODNEY S. TURNER d/b/a RODNEY S. TURNER HOUSEMOVERS

No. 36A07-2

(Filed 18 June 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 194 N.C. App. ——, 670 S.E.2d 242 (2008), affirming in part, reversing in part, and remanding a judgment entered on 10 May 2005 by Judge Jerry Braswell in Superior Court, Pamlico County, following this Court's opinion reported at 362 N.C. 226, 657 S.E.2d 352 (2008) (per curiam), reversing a decision of the Court of Appeals dismissing plaintiff's appeal, 180 N.C. App. 478, 638 S.E.2d 222 (2006), and remanding this case to that court for reconsideration. Heard in the Supreme Court 4 May 2009.

Ellis & Winters, by J. Donald Cowan, Jr.; and Smith Moore Leatherwood LLP, by Sidney S. Eagles, Jr., for plaintiff-appellee.

Hopf & Higley, P.A., by Donald S. Higley, II, for defendant-appellant Harrelson and Smith Contractors, LLC.

PER CURIAM.

AFFIRMED.

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

A. Perlin Dev. Co. v. Ty-Par Realty Case below: 193 N.C. App. 450	No. 520P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1500)	Denied 06/17/09
Azar v. Presbyterian Hosp. Case below: 191 N.C. App. 367	No. 110P09	1. Plt's PWC to Review Decision of COA (COA08-40) 2. Plt's Motion to Strike Response of Defs	1. Denied 06/17/09 2. Dismissed as Moot 06/17/09
Batts v. Batts Case below: 195 N.C. App. 459	No. 237P06-2	Plts' PDR Under N.C.G.S. § 7A-31 (COA08-522)	Denied
Christmas v. Cabarrus Cty. Case below: 192 N.C. App. 227	No. 442P08	Defs' (Cabarrus Cty., Cabarrus Cty. DSS, Cook, Polk, Moose, Ratliff, Williams, Hart, Fox, and Belk) PDR Under N.C.G.S. § 7A-31 (COA07-1301)	Denied 06/17/09 **Martin, J., Recused**
City of Wilson Redevelopment Comm'n v. Boykin Case below: 193 N.C. App. 20	No. 504P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-268)	Denied 06/17/09
Collins v. Citation Foundry Case below: 195 N.C. App. 459	No. 129P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-786)	Denied 06/17/09
Crawford v. Mintz Case below: 195 N.C. App. 713	No. 047P08-2	Def's PDR Under N.C.G.S. § 7A-31 (COA07-141-2)	Denied 06/17/09
Dixon v. Hill Case below: 194 N.C. App. 820	No. 667P05-2	1. Def Thomas Hill's PDR Under N.C.G.S. § 7A-31 (COA08-186) 2. Plt's Motion to Dismiss PDR	1. Denied 06/17/09 2. Dismissed as Moot 06/17/09
Early v. County of Durham DSS Case below: 193 N.C. App. 334	No. 521P08	Respondent's PDR Under N.C.G.S. § 7A-31 (COA08-96)	Denied 06/17/09

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

Eason v. Cleveland Draft House, LLC Case below: 195 N.C. App. 785	No. 140P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-684)	Denied 06/17/09
Elkins v. Electronic Mtge. Sys. Case below: 194 N.C. App. 820	No. 065P09	Petitioner's (John Elkins PDR Under N.C.G.S. § 7A-31 (COA08-376)	Denied 06/17/09
Estate of Redden v. Redden Case below: 179 N.C. App. 113	No. 062P09	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1202)	Denied 06/17/09
Estes v. Comstock Homebuilding Cos. Case below: 195 N.C. App. 536	No. 149P09	Defs' PDR Under N.C.G.S. § 7A-31 (COA08-730)	Denied 06/17/09
Evergreen Constr. Co v. City of Kinston Case below: 194 N.C. App. 371	No. 033P09	Respondents' PDR Under N.C.G.S. § 7A-31 (COA08-390)	Denied 06/17/09
Gabice v. Harbor Case below: 196 N.C. App. —— (21 April 2009)	No. 180P09	1. Plt's Motion for "Notice of Appeal" (COA08-634) 2. Plt's Motion in Allowance Permitting Case to be Appealed to the NC Supreme Court	1. Dismissed *Ex Mero Motu* 06/17/09 2. Dismissed *Ex Mero Motu* 06/17/09
Harris v. Stewart Case below: 193 N.C. App. 142	No. 496P08	Def-Appellants' (Stewarts) PDR Under N.C.G.S. § 7A-31 (COA07-1174)	Denied 06/17/09
In re C.L.B., A.B.B., D.K.B. Case below: 193 N.C. App. 246	No. 487P08	1. Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA08-647) 2. Respodent's (Father) PDR Under N.C.G.S. § 7A-31	1. Denied 06/17/09 2. Denied 06/17/09

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

In re Follum v. N.C. State Univ. Case below: 195 N.C. App. 785	No. 171P09	1. Petitioner's (Follum-) NOA Based Upon a Constitutional Question (COA08-608) 2. Petitioner's (Follum-) PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 06/17/09 2. Denied 06/17/09
In re Papathanassiou Case below: 195 N.C. App. 278	No. 142P09	1. Respondent's (Andrew Papathanassiou) PDR Under N.C.G.S. § 7A-31 (COA08-95) 2. Consent Motion to Withdraw as Counsel	1. Denied 06/17/09 2. Allowed 06/17/09
Johann v. Johann Case below: 196 N.C. App. —— (7 April 2009)	No. 192P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-671)	Denied 06/17/09
Malloy v. Cooper Case below: 196 N.C. App. 747	No. 595P01-3	Petitioner-Movant's (Humane Society of the U.S., Robert Reder, Lauren Bartfield, and Cynthia Bailey) PDR Under N.C.G.S. § 7A-31 (COA08-892)	Denied 06/17/09 **Hudson, J., Recused**
Martin v. N.C. Dep't of Health & Human Servs. Case below: 194 N.C. App. 716	No. 072P09	Respondent's (NCDHHS) PDR Under N.C.G.S. § 7A-31 (COA08-259)	Denied 06/17/09
Matthews v. Davis Case below: 191 N.C. App. 545	No. 457P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-946)	Denied 06/17/09
Muchmore v. Trask Case below: 192 N.C. App. 635	No. 479P08	1. Plt's Motion for Temporary Stay (COA07-995) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed 10/24/08 362 N.C. 682 2. Allowed 06/17/09 3. Allowed 06/17/09
N.C. Farm Bureau Mut. Ins. Co. v. Sematoski Case below: 195 N.C. App. 304	No. 097P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-553)	Denied 06/17/09

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

Pellom v. Pellom Case below: 194 N.C. App. 57	No. 005P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-113)	Denied 06/17/09
Rodriguez-Carias v. Nelson's Auto Salvage & Towing Serv. Case below: 189 N.C. App. 404	No. 231PA08	Plt's Motion to Dismiss Appeal (COA07-570)	Dismissed as Moot 06/17/09 **Hudson, J. Recused**
Smith v. Barbour Case below: 195 N.C. App. 244	No. 100P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1083)	Denied 06/17/09
State v. Adu Case below: 195 N.C. App. 269	No. 105P09	1. Def's NOA Based Upon a Constitutional Question (COA08-582) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/17/09 3. Denied 06/17/09
State v. Blackburn Case below: 195 N.C. App. 785	No. 160P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-914)	Denied 06/17/09
State v. Brewington Case below: 195 N.C. App. 317	No. 108P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-501)	Denied 06/17/09
State v. Bryant Case below: 196 N.C. App. —— (7 April 2009)	No. 194P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-962)	Denied 06/17/09
State v. Bryson Case below: 195 N.C. App. 325	No. 107P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-625)	Denied 06/17/09
State v. Buie Case below: 194 N.C. App. 725	No. 066P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA07-1522) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/17/09 2. Dismissed as Moot 06/17/09

State v. Coleman Case below: 194 N.C. App. 373	No. 035P09	1. Def-Appellant's NOA (Constitutional Question) (COA08-136) 2. State's Motion to Dismiss Appeal 3. Def-Appellant's PDR	1. —— 2. Allowed 06/17/09 3. Denied 06/17/09
State v. Cortes-Serrano Case below: 195 N.C. App. 644	No. 162P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-591)	Denied 06/17/09
State v. Dean Case below: 196 N.C. App. —— (7 April 2009)	No. 177P09	1. Def's NOA Based Upon a Constitutional Question (COA08-344) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/17/09 3. Denied 06/17/09
State v. Dix Case below: 194 N.C. App. 151	No. 551P08	1. Def's Motion for Temporary Stay (COA07-1440) 2. Def's Petition for Writ of Supersedeas 3. Def's NOA Based Upon a Constitutional Question 4. State's Motion to Dismiss Appeal 5. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 12/18/08 Stay dissolved 06/17/09 2. Denied 06/17/09 3. —— 4. Allowed 06/17/09 5. Denied 06/17/09
State v. Durham Case below: 195 N.C. App. 461	No. 130P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-464)	Denied 06/17/09
State v. Fields Case below: 195 N.C. App. 740	No. 139P09	1. State's Motion for Temporary Stay (COA08-627) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 04/02/09 363 N.C. 258 Stay dissolved 06/17/09 2. Denied 06/17/09 3. Denied 06/17/09

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

State v. Fleming Case below: 192 N.C. App. 276	No. 049P09	Def's PWC to Review Decision of COA (COA07-1299)	Denied 06/17/09
State v. Freeman Case below: 195 N.C. App. 461	No. 124P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-445)	Denied 06/17/09
State v. Gaddy Case below: 196 N.C. App. —— (7 April 2009)	No. 199P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-971)	Denied 06/17/09
State v. Gatling Case below: 194 N.C. App. 373	No. 017P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-607)	Denied 06/17/09
State v. Grant Case below: 194 N.C. App. 373	No. 040P09	Df's PDR Under N.C.G.S. § 7A-31 (COA08-292)	Denied 06/17/09
State v. Haith Case below: 193 N.C. App. 610	No. 529P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-236)	Denied 06/17/09
State v. Hall Case below: 194 N.C. App. 42	No. 014P09	1. Def's NOA Based Upon a Constitutional Question (COA07-1412) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/17/09 3. Denied 06/17/09
State v. Herrera Case below: 195 N.C. App. 181	No. 106P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-491)	Denied 06/17/09
State v. Hilton Case below: 194 N.C. App. 821	No. 069P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-321)	Denied 06/17/09

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

State v. Johnson Case below: 196 N.C. App. —— (7 April 2009)	No. 182A09	1. Def's NOA Based Upon a Constitutional Question (COA08-604) 2. State's Motion to Dismiss Appeal	1.—— 2. Allowed 06/17/09
State v. Kelly Case below: 175 N.C. App. 421	No. 199P06-2	1. Def's NOA (COA05-486) 2. Def's Motion for Petition for Discretionary Review 3. Def's Alternative PWC	1. Dismissed *Ex Mero Motu* 06/17/09 2. Dismissed 06/17/09 3. Dismissed 06/17/09
State v. Kotecki Case below: 196 N.C. App. —— (5 May 2009)	No. 237P09	Def's Motion for Temporary Stay (COA08-1070)	Allowed 06/10/09
State v. Kuegel Case below: 195 N.C. App. 310	No. 070P09	1. Def's Motion for Temporary Stay (COA08-587) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 02/13/09 363 N.C. 134 Stay dissolved 06/17/09 2. Denied 06/17/09 3. Denied 06/17/09
State v. Land Case below: 195 N.C. App. 786	No. 176P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-407)	Denied 06/17/09
State v. Lawson Case below: 194 N.C. App. 267	No. 025P09	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1507)	Denied 06/17/09
State v. Lewis Case below: 194 N.C. App. 374	No. 043A09	Def's NOA Based Upon a Constitutional Question (COA08-661)	Dismissed *Ex Mero Motu* 06/17/09
State v. McDonald Case below: 196 N.C. App. —— (5 May 2009)	No. 231P09	1. Def's NOA Based Upon a Constitutional Question (COA08-948) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 06/17/09 2. Denied 06/17/09

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

State v. Moore Case below: 194 N.C. App. 754	No. 060A09	1. Def's NOA (Dissent) (COA08-345) 2. Def's NOA Based Upon a Constitutional Question 3. Def's PDR as to Additional Isues 4. State's Motion to Dismiss Appeal (Constitutional Question)	1. —— 2. —— 3. Denied 06/17/09 4. Allowed 06/17/09
State v. Moore Case below: 195 N.C. App. 598	No. 152P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-616)	Denied 06/17/09
State v. Moore Case below: 195 N.C. App. 461	No. 132P09	1. Def's NOA Based Upon a Constitutional Question (COA08-800) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed as Moot 06/17/09 2. Denied 06/17/09
State v. Morris Case below: 194 N.C. App. 374	No. 027P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-389)	Denied 06/17/09
State v. Peele Case below: 196 N.C. App. —— (5 May 2009)	No. 206P09	State's Motion for Temporary Stay (COA08-713)	Allowed 05/20/09
State v. Pone Case below: 195 N.C. App. 786	No. 165P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-656)	Denied 06/17/09
State v. Revels Case below: 195 N.C. App. 546	No. 146P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-346)	Denied 06/17/09
State v. Richardson Case below: 195 N.C. App. 786	No. 175P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-788)	Denied 06/17/09

State v. Rinehart Case below: 195 N.C. App. 774	No. 166P09	1. Def's NOA Based Upon a Constitutional Question (COA08-1209) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/17/09 3. Denied 06/17/09
State v. Rorer Case below: 189 N.C. App. 789	No. 284P08	Def's PWC to Review Decision of COA (COA07-1214)	Denied 06/17/09
State v. Smith Case below: Sampson County Superior Court	No. 333P08	Def's Pre-Trial PWC (06-CRS-53148, 06-CRS-53284)	Denied 06/17/09
State v. Smith Case below: 192 N.C. App. 690	No. 486P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-21)	Denied 06/17/09
State v. Spencer Case below: 192 N.C. App. 143	No. 444P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1191)	Denied 06/17/09
State v. Tanner Case below: 193 N.C. App. 150	No. 474P08	State's Motion for Temporary Stay (COA08-251)	Allowed 10/20/08
State v. Webb Case below: 193 N.C. App. 754	No. 546P08	1. Def's NOA Based Upon a Constitutional Question (COA08-186) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/17/09 3. Denied 06/17/09
Stojanik v. R.E.A.C.H. of Jackson Cty., Inc. Case below: 193 N.C. App. 585	No. 539P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-534)	Denied 06/17/09

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

Stone v. State Case below: 191 N.C. App. 402	No. 309P07-2	1. Defs' (State of N.C., Easley & McCoy) NOA Based Upon a Constitutional Question (COA07-718) 2. Defs' (State of N.C., Easley & McCoy) PDR Under N.C.G.S. § 7A-31 3. Plts' PDR Under N.C.G.S. § 7A-31 4. Plts' NOA Based Upon a Constitutional Question	1. Dismissed *Ex Mero Motu* 06/17/09 2. Denied 06/17/09 3. Denied 06/17/09 4. Dismissed *Ex Mero Motu* 06/17/09
Tabor v. Kaufman Case below: 196 N.C. App. —— (5 May 2009)	No. 234P09	1. Def's (Kaufman) Motion for Temporary Stay (COA08-1249) 2. Def's (Kaufman) Petition for Writ of Supersedeas 3. Def's (Kaufman) PDR Under N.C.G.S. § 7A-31	1. Denied 06/09/09 2. Denied 06/09/09 3. Denied 06/09/09
Teague v. Bayer AG Case below: 195 N.C. App. 18	No. 087P09	Def's (DSM Copolymer, Inc.) PDR Under N.C.G.S. § 7A-31 (COA07-1108)	Denied 06/17/09
Wiles v. City of Concord Zoning Bd. of Adjust. Case below: 195 N.C. App. 598	No. 150P09	Petitioners' (Wiles) PDR Under N.C.G.S. § 7A-31 (COA08-717)	Denied 06/17/09

PETITIONS TO REHEAR

Crocker v. Roethling Case below: 363 N.C. 140	No. 374PA07-2	Defs' Petition for Rehearing	Denied 06/17/09
In re A.S. Case below: 363 N.C. 254	No. 310A08-2	Respondent's (Mother) Petition for Rehearing	Denied 06/17/09

STATE OF NORTH CAROLINA v. GEORGE THOMAS WILKERSON

No. 170A07

(Filed 28 August 2009)

1. Constitutional Law— substantive due process—alleged false testimony by State's witness—consideration or sentence reduction for testimony

The trial court did not violate defendant's Fourteenth Amendment right to substantive due process in a double first-degree murder case by failing to correct alleged false testimony given by a State's witness when she stated that she had not been promised any additional consideration or sentence reduction from the prosecutor in exchange for her testimony against defendant because: (1) the witness accurately testified that she had no assurance of an additional reduction in her sentence when the prosecutor's agreement to inform federal authorities of the witness's truthful testimony did not, and could not, guarantee that her sentence would be reduced, nor could the communication of the information to the federal prosecutor directly result in the filing of a motion to reduce her sentence; and (2) to the extent that her testimony may have led jurors mistakenly to believe that she could not receive a benefit from her testimony against defendant, any misunderstanding was corrected by her subsequent admission during cross-examination that she hoped her sentence would be further reduced.

2. Constitutional Law— effective assistance of counsel—failure to object

Defendant was not denied effective assistance of counsel in a double first-degree murder case based on defense counsel's failure to object to or correct a State witness's alleged false testimony and later by affirmatively stating during closing argument that the prosecutor had not entered into a deal with the witness because: (1) the record indicated that defense counsel extensively cross-examined the witness about her federal charges and the benefits she had received in federal court for her cooperation; and (2) there was no quid pro quo between the State and the witness, and any ambiguity created by the witness's direct testimony was corrected on cross-examination.

3. Evidence— detective—opinion testimony—whether evidence implicated another perpetrator

The trial court did not commit plain error in a double first-degree murder case by permitting a detective to give alleged improper opinion testimony as to whether any evidence implicated another individual in the murders because: (1) the detective's testimony that she had no evidence implicating the individual was not necessarily an opinion when the statement described the results of her investigation and her interpretation of those results; (2) the detective's exclusion of the pertinent individual did not ipso facto implicate defendant when, as here, multiple perpetrators acted in concert and one suspect's involvement does not necessarily vitiate the culpability of another; and (3) assuming *arguendo* that the detective's testimony was an otherwise inadmissible opinion, it was properly admitted under the circumstances in this case to explain or rebut evidence elicited by the defendant which, if unexplained, was likely to mislead the jury.

4. Evidence— opinion testimony—personal knowledge—reason for actions

The trial court did not err in a double first-degree murder case by overruling defendant's objection when defendant's girlfriend testified that the reason she removed contraband from her apartment the morning after the murders was because she believed defendant had killed someone, even though defendant contends it was impermissible opinion testimony, because: (1) this information explaining why the witness acted as she did was within the witness's personal knowledge and was admissible to clarify evidence elicited by defense counsel on cross-examination; and (2) the witness's explanation of her motivation was not an opinion as to defendant's guilt.

5. Evidence— cross-examination—defendant was ringleader—plain error analysis

The trial court did not commit plain error in a double first-degree murder case by permitting an eyewitness to testify during cross-examination that he knew in his heart who shot the two victims and that defendant was the ringleader, even though defense counsel attempted to establish the eyewitness did not know defendant was at the mobile home since he did not actually see the faces of the two men who committed the murders, because: (1) even though the transcript demonstrated the witness was hos-

tile toward defendant and resisted defense counsel's attempts to control cross-examination, defense counsel effectively established that the witness was unable to see the face of either assailant and impeached the witness by confronting him with a prior inconsistent statement to police in which the witness failed to name defendant as a possible perpetrator of the crimes, thus, diminishing the force of the witness's nonresponsive statements; and (2) the trial court's failure to strike this evidence *ex mero motu* was not plain error in light of the other evidence of guilt presented by the State.

6. Constitutional Law— effective assistance of counsel—failure to move to strike testimony—failure to show prejudice

Defendant was not denied effective assistance of counsel in a double first-degree murder case based on defense counsel's failure to move to strike an eyewitness's volunteered statements that he knew in his heart who shot the two victims and that defendant was the ringleader because: (1) defense counsel elicited the witness's concession that he did not see the face of either perpetrator and also impeached the witness with a prior inconsistent statement to investigators in which the witness did not identify defendant as a participant, thus significantly undercutting the impact of the witness's opinion as to the assailant's identity; (2) other evidence established that defendant armed himself, went to one victim's home to avenge a perceived wrong, and later told his girlfriend that "it was easy. . . . just like in a damn movie"; and (3) it cannot be said that the eyewitness's alleged inadmissible testimony probably resulted in the jury returning a different verdict than it would have reached had the evidence not been admitted.

7. Evidence— testimony—defendant purchased drugs and guns on day of murders

The trial court did not err in a double first-degree murder case by permitting a witness to testify that defendant purchased drugs and guns from her husband on the day of the murders because: (1) although the evidence supporting the witness's assumption that her husband sold drugs to defendant was not based upon personal knowledge or perception and her inference that a drug deal occurred was a supposition based largely on guesswork and speculation, in light of the other evidence against defendant and the relative insignificance of this evidence of one purported drug sale, the error was not prejudicial; (2) in regard to the witness's testimony that her husband sold one or more

firearms to defendant, although she did not witness a complete transaction in that she did not see money change hands, N.C.G.S. § 8C-1, Rule 701 permits a lay witness to testify to an inference that is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue, and her natural inference that a sale took place was supported by her perceptions; (3) even if the witness's testimony that her husband sold the weapons to defendant was improper, any error in its admission was not prejudicial since the gravamen of her testimony was that defendant obtained from her husband weapons with which to kill "some people" who had stolen from him, and whether defendant obtained the weapons through a sale was immaterial; and (4) there was no reasonable possibility that had the error in question not been committed, a different result would have been reached at trial.

8. Evidence— hearsay—excited utterance exception—defendant threatened to kill victim

The trial court did not err in a double first-degree murder case by permitting a victim's brother to testify over defendant's objection, under the excited utterance exception to the hearsay rule, that the victim told him defendant had threatened them both in a telephone call because: (1) the brother's testimony established that receiving the call surprised the victim, who became visibly upset during the call and immediately afterwards related to his brother that defendant had made the call and had threatened to kill the victim; and (2) the victim believed defendant wrongfully accused him of stealing cocaine and was disturbed enough to telephone a friend and ask for transportation, and the victim's statements represented a spontaneous reaction to an event that was sufficiently startling to suspend his reflective thoughts.

9. Evidence— 911 call—plain error analysis

The trial court did not err or commit plain error in a double first-degree murder case by admitting the entire tape recording of the call to 911 by the victim's brother just before the shooting requesting police officers to come to his house, including the statement that "more than likely they'll rob us," because: (1) the statement was relevant to explain to the dispatcher why the brother felt threatened by defendant and why he called 911; (2) the brother related in the 911 call the threatening defendant caller's own statement concerning his motive, and in context,

the statement may be understood as a threat to take thirty dollars from the brother and the victim at gunpoint or, in other words, as a threat to commit armed robbery; (3) the brother's comment that it was more than likely they were going to commit a robbery merely clarified and restated this evidence, to which defendant did not object; and (4) the probative value of the disputed evidence was not substantially outweighed by the danger of unfair prejudice.

10. Evidence— hearsay—cell phone number—failure to show prejudice

The trial court did not err in a double first-degree murder case by admitting the police report created at the time of the arrest of the man who sold defendant weapons, for the purpose of establishing the man's cellular telephone number which was provided by the man upon his arrest and was the same number defendant dialed while hiding under the tractor-trailer on Highway 220 immediately after the pertinent shooting, because: (1) defendant conceded that the primary document, the arrest report, was an admissible business record; (2) although the telephone number contained in the report memorialized an assertion made by the man at the time of his arrest and was therefore hearsay, in light of the entire case presented by the State, defendant has not established that there was a reasonable possibility that had the error in question not been committed, a different result would have been reached by the jury given other substantial evidence presented by the State that established defendant's intent to shoot the victim, his purchase and possession of the murder weapons, his presence in the mobile home at the time of the shooting, his attempt to cover up his actions, and his inculpatory statements made while awaiting trial; (3) the State offered other evidence from which jurors could conclude defendant called the man after the murders; and (4) although defendant argued that admission of this hearsay violated his Sixth Amendment right to confront the man, defendant waived this argument by failing to object on this basis at trial.

11. Evidence— testimony—victim's reputation for peacefulness—harmless error

The trial court committed harmless error in a double first-degree murder case by admitting over defendant's objection a witness's testimony as to the reputation of one of the victims for peacefulness because: (1) defendant acknowledged in his brief

that all admissible evidence indicated the victim did not provoke the attack, and, in fact, no evidence indicated that any aspect of the victim's character played any role in the pertinent events; (2) any prejudicial effect arising from the admission of this inadmissible character evidence was de minimis when there was no reasonable possibility that a different result would have been reached at trial had the disputed testimony been excluded; and (3) after reviewing the witness's testimony in context and considering the entirety of the State's evidence, this disputed testimony did not encourage jurors to convict defendant out of sympathy for the victim.

12. Criminal Law— prosecutor's argument—reasonable inference drawn from evidence—acting in concert

The trial court did not err in a double first-degree murder case by failing to intervene *ex mero motu* during the prosecutor's closing arguments, including when the prosecutor told the jury the reason a man advised defendant's girlfriend that defendant and a coparticipant had shot someone was that defendant had given the man this information in a telephone call following the shootings, when the prosecutor said that the man knew to clean out the girlfriend's apartment because of defendant's supposed call to the man, and also when the prosecutor told jurors that the coparticipant would also be tried for involvement in the killings while discussing the theory of acting in concert, because: (1) the prosecutor's argument that the man knew about the murders because defendant told him about them is a reasonable inference that can be drawn from evidence introduced through telephone records and the testimony of a detective indicating that defendant's cellular telephone was used to make several calls to the man's cellular telephone around the time the murders were committed, and the prosecutor's argument that the man thus knew to advise the girlfriend to clean out her apartment may be inferred from the same evidence; and (2) the prosecutor's argument that defendant and a coparticipant would be equally guilty was an accurate statement of law applicable to the State's theory of the case, which was that defendant and the coparticipant acted in concert to commit the murders.

13. Criminal Law— prosecutor's argument—personal belief—credibility

The trial court did not err in a double first-degree murder case by failing to intervene *ex mero motu* when the prosecutor

allegedly expressed personal opinions during closing arguments in the guilt-innocence phase of defendant's trial by vouching for the credibility of two witnesses, or by arguing his personal belief in defendant's guilt under the theory of acting in concert, because: (1) as to the first witness, the prosecutor did not personally vouch for her veracity but instead provided jurors reason to believe the witness by arguing that her testimony was truthful because it was corroborated; (2) as to defendant's girlfriend, the prosecutor pointed out that her testimony was consistent with the evidence; the prosecutor conceded weaknesses by acknowledging that the girlfriend was not a likeable person and that some of the girlfriend's statements such as her statements about another man's footwear, did not fit the State's theory of the case; and while the prosecutor's passing comment that he believed the girlfriend was telling the truth violated section 15A-1230(a), the comment was made while admitting weaknesses in her testimony; and (3) as to the prosecutor's argument that defendant and a coparticipant were equally culpable for the murders of the two victims, our Supreme Court already concluded that the prosecutor correctly explained the legal theory of acting in concert.

14. Criminal Law— motion for new trial—cumulative effect of errors

Although defendant contends the cumulative effect of the errors in a double first-degree murder case were sufficiently prejudicial to require a new trial, including the admission of hearsay in the form of a man's cell phone number, the admission of a witness's opinion testimony concerning a victim's reputation for peacefulness, the admission of a witness's assumption that her husband sold drugs to defendant in their back bedroom, and the prosecutor's personal vouching for a witness's veracity, a review of the record revealed that after comparing the overwhelming evidence of defendant's guilt with the evidence improperly admitted, taken together, these errors did not deprive defendant of his due process right to a fair trial.

15. Burglary and Unlawful Breaking or Entering; Homicide—first-degree burglary—felony murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of felony murder and first-degree burglary, even though defendant contends that the State failed to present sufficient evidence that he possessed the felonious intent that is

an essential element of first-degree burglary when he broke and entered into the pertinent residence, because: (1) the State's evidence showed that defendant threatened to kill a victim over thirty dollars worth of cocaine that defendant believed the victim had stolen; defendant acknowledged to a detective that he was inside the mobile home at the time of the murders and that he searched the victims' pockets; investigators found the victim's wallet next to his body on the couch and a twenty dollar bill on the gravel driveway outside the home; and although a detective did not mention the twenty dollar bill to defendant, during a statement to a detective made two days later, defendant volunteered that the money was not his, explaining that a coparticipant probably dropped the bill when running from the home; and (2) although defendant interpreted other evidence introduced in this case to support his arguments either that the murders were committed solely for the purpose of preserving the perpetrators' reputations as drug dealers or that the perpetrators had abandoned their intent to rob the victim by the time they broke into the mobile home, any contradictions or conflicts in the evidence are resolved in favor of the State when ruling on a motion to dismiss, and evidence unfavorable to the State is not considered.

16. Confessions and Incriminating Statements— *Miranda* warnings—motion to suppress—post-arrest statements—knowing and voluntary waiver

The trial court did not commit prejudicial error when it denied defendant's motion to suppress his post-arrest statements to investigators even though defendant was only given the Miranda warnings prior to his first interview by officers but was not re-Mirandized prior to other inverviews conducted by officers over a four-hour period, or when it found that defendant knowingly and voluntarily waived his rights under *Miranda*, because: (1) the trial court found that no evidence in the record indicated that defendant stated that he was under the influence of an impairing substance while being questioned; (2) there was no evidence in the record that defendant ever requested to terminate the interview, nor did defendant request counsel at any time during any of the interviews; (3) although defendant occasionally trailed off in the middle of his sentences, he did not exhibit any confusion or slur his words during the interviews; (4) the trial court's finding of fact was largely based on the interviewing detectives' testimony that defendant appeared to be

impaired but was able to respond to questioning coherently and logically, and this testimony, combined with other similar evidence, fully supported the trial court's finding of fact that defendant comprehended his rights at the time that he executed the waiver; and (5) the evidence showed that the police employed a nonconfrontational interview method, and there was no evidence of the type of coercive police activities required to render a confession involuntary.

17. Search and Seizure— motion to suppress—results of search of cellular telephone

The trial court did not err in a double first-degree murder case by denying defendant's motion to suppress the results of the search of his cellular telephone, because the seizure was pursuant to defendant's lawful arrest.

18. Sentencing— death penalty—proportionality

Sentences of death imposed in a double first-degree murder case were not disproportionate where: (1) the jury found the aggravating circumstances under N.C.G.S. § 15A-2000(e)(5) that each murder was committed while defendant was engaged in the commission of first-degree burglary and under N.C.G.S. § 15A-2000(e)(11) that each murder was part of a course of conduct in which defendant engaged and that included the commission by defendant of other crimes of violence against other persons; (2) our Supreme Court has never found a sentence of death disproportionate in a case where a defendant was convicted of murdering more than one victim; (3) the murders occurred inside the home of one of the victims, and a murder in one's home is particularly shocking, not only because a life was senselessly taken, but because it was taken at an especially private place where a person has a right to feel secure; (4) defendant was convicted of first-degree murders both under the felony murder rule and on the basis of malice, premeditation, and deliberation; and (5) these murders involved the use of at least two semiautomatic assault rifles and a pistol against young, unarmed victims, resulting in multiple close range gunshot wounds to each victim's head or neck.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing a sentence of death entered by Judge V. Bradford Long on 20 December 2006 in Superior Court, Randolph County, upon

jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 15 December 2008.

Roy Cooper, *Attorney General*, *by John H. Watters*, *Special Deputy Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender; and Thomas K. Maher for defendant-appellant.*

EDMUNDS, Justice.

Defendant George Thomas Wilkerson was indicted for the first-degree murder of Casey Dinoff and for the first-degree murder of Christopher VonCannon. Defendant was also indicted for one count of first-degree burglary. He was tried by jury and on 15 December 2006, was convicted of both counts of first-degree murder on the basis of malice, premeditation, and deliberation and also under the felony murder rule. In addition, defendant was convicted of first-degree burglary, but because the burglary was the felony underlying the felony murder convictions, it merged with the felony murders for sentencing purposes. Following a capital sentencing proceeding, the jury recommended a sentence of death.

Defendant appealed his capital convictions to this Court. We conclude that defendant's trial and capital sentencing proceeding were free from prejudicial error and that defendant's sentence of death is not disproportionate.

Defendant, who sold drugs illegally, lived with his girlfriend Kimberly Kingrey in her apartment in Asheboro, North Carolina. Defendant's source of illicit prescription drugs was William Davis (hereinafter, Mr. Davis), while his source of marijuana and cocaine was Josh Allred. In addition, defendant purchased firearms from Mr. Davis. Defendant's friend Logan Malanowski sold drugs for defendant and delivered them to defendant's buyers. Defendant's friend Joe Ferguson also sold drugs, and Malanowski and Ferguson often stayed with defendant and Kingrey in her apartment.

Victim Casey Dinoff and his brother Corey Wyatt lived with their parents in a mobile home at 6975 Adams Farm Road in Randleman, North Carolina. Adams Farm Road is a two-lane road that runs parallel to North Carolina Highway 220, a four-lane divided highway. A gravel driveway that could be barred by a cattle gate ran from Adams Farm Road to the mobile home. Nighttime illumination was provided

by a porch light near the home's front door and a street lamp in the yard facing the driveway.

The parents of Dinoff and Wyatt were long-distance truck drivers who were away from home on 10 January 2005. That morning, Dinoff called Malanowski to purchase Oxycontin. Malanowski drove Kingrey's silver Ford Taurus to the mobile home to make the delivery, arriving between 2:00 and 3:00 p.m. Malanowski was high and had forgotten to bring the Oxycontin, so he unsuccessfully attempted to sell Dinoff and Wyatt a silver nine millimeter handgun with a laser sight instead. Between 4:00 and 5:00 p.m., Dinoff left with Malanowski to retrieve the Oxycontin from Kingrey's apartment. Malanowski returned about forty-five minutes later, dropping Dinoff off with the Oxycontin. Dinoff and Wyatt began ingesting the Oxycontin and smoking marijuana.

That same afternoon, defendant, who was carrying a black Heckler & Koch pistol whose serial number had been filed off, purchased an AK-type rifle and at least one SKS rifle from Mr. Davis. Mr. Davis had modified the AK-type rifle by adding an automatic trigger mechanism. However, the modification was unsuccessful and the weapon never fired more than eight rounds before jamming. Mr. Davis had also added a folding stock to the SKS. During the transaction, defendant and Malanowski posed with the firearms and defendant, who appeared inebriated, high on drugs, or both, said in a joking manner that he was going to kill some people who had stolen from him. Malanowski agreed that he and defendant planned to kill somebody because "people can't be stealing from us."

During the evening of 10 January 2005, defendant, Malanowski, Ferguson, and Allred consumed drugs at a party in Kingrey's apartment. Defendant was using cocaine and smoking marijuana; Ferguson ingested a large quantity of prescription drugs; and Kingrey used cocaine, smoked marijuana, and took Xanax and Clonopin. At about 8:00 or 9:00 p.m., defendant became frustrated and anxious because he could not find his cocaine. After he and Malanowski searched the apartment for the missing drugs, defendant began to make threatening telephone calls to Dinoff, accusing him of stealing the cocaine, which was worth thirty dollars. Defendant claimed that the cocaine had been laid out in Kingrey's apartment to "test" Dinoff, and he threatened to shoot Dinoff unless he received thirty dollars. Defendant continued to call and threaten Dinoff during the course of the evening.

At least three rifles and two handguns were in Kingrey's apartment at the time of the party. Kingrey described one handgun as black and having no serial number, while the other was silver with a laser sight. Kingrey saw defendant "playing" with the firearms during the party, and after Kingrey went to bed, she heard someone shooting a firearm from the porch. She came out of her bedroom and, believing that defendant had fired the shot, told him to leave and take the guns with him.

Before defendant departed, Kingrey overheard him speaking on the phone, threatening loudly that he was "coming to get" the person to whom he was speaking. Defendant, wearing a black leather jacket, black T-shirt, and black corduroy pants, drove away in Kingrey's silver Ford Taurus. After defendant left, Kingrey noticed that one of the rifles and both handguns were no longer in the apartment. Defendant's favorite grey striped stocking cap was also missing from the apartment after that night. A surveillance video camera at a Quik-Chek in Asheboro, North Carolina, recorded defendant wearing such a hat at 12:12 a.m.

In response to defendant's repeated threats to shoot Dinoff, between 8:00 and 10:00 p.m. Dinoff and Wyatt began calling their friends, including Jason Sharpe and Christopher VonCannon, asking that someone drive to their home and pick them up. Wyatt also called 911. However, when one of Dinoff's friends arrived with his wife, Dinoff sent them away after deciding that he and Wyatt could remain at home.

Randolph County Sheriff's Deputy Todd Blakely responded to Wyatt's 911 call and arrived at the residence around 11:00 p.m. Dinoff and Wyatt met Deputy Blakely at the driveway's cattle gate and explained that defendant had repeatedly threatened to shoot Dinoff over a dispute involving thirty dollars. Deputy Blakely advised Dinoff and Wyatt to swear out a warrant at the magistrate's office, then drove approximately one and one-half miles back down Adams Farm Road to the nearest exit and parked where any vehicle approaching Dinoff and Wyatt's residence would have to pass him. After waiting for twenty to twenty-five uneventful minutes, Deputy Blakely cleared the call and went about his other duties.

Sharpe drove with VonCannon out to the Adams Farm residence around midnight and parked at the cattle gate, where Wyatt met them. Wyatt explained that he and Dinoff had recently received another phone call in which Malanowski said that the missing drugs

had been found and that they were coming to share a quarter bag of marijuana with Dinoff and Wyatt as a "peace offering." Wyatt, Sharpe, and VonCannon began to walk back up the gravel driveway. The porch light was on and a street lamp in the yard lit the driveway.

As they approached the mobile home, they saw two men standing on the porch. The first man, who was wearing a black leather coat and a cap, held a handgun. The second man was wearing a grey sweatshirt with the hood up and carrying a rifle. Wyatt yelled out Logan Malanowski's name. The first man looked up, then kicked open the front door and went inside. Sharpe observed this individual silhouetted against the light in the home and saw that he was carrying a rifle at his side. Wyatt also saw this man enter the home, then immediately afterward heard gunfire and saw flashes of light through the home's windows. Sharpe also heard gunfire. Both Sharpe and Wyatt testified that they saw one man enter the house and heard two types of gunshots.

The second man stepped off the porch and walked toward Wyatt, VonCannon, and Sharpe. Sharpe observed this man standing in the yard in the light of the street lamp, looking at Wyatt, VonCannon, and him. Although Wyatt briefly saw the face of the second man from a distance, he was unable to identify him. However, VonCannon called out either "Logan" or "Joe" and approached the second man, while Wyatt stood in the driveway as Sharpe ran to unlock his car. Sharpe then returned for Wyatt, and the two ran to Sharpe's car. The last time either Wyatt or Sharpe saw VonCannon alive, he was standing in the front yard talking to the second man. Wyatt last saw Dinoff alive in Dinoff's bedroom in the mobile home.

Sharpe drove to the nearest pay telephone, where Wyatt called 911. When reporting the shooting, Wyatt identified defendant, Malanowski, and Ferguson as the perpetrators. Although Sharpe had not seen the face of either man at the scene, he encouraged Wyatt to identify defendant because of defendant's repeated threats in the preceding hours to kill Dinoff.

At about 1:00 a.m., a telephone call from defendant awoke Kingrey. Defendant, who was screaming and difficult to understand, instructed Kingrey to report her car stolen. At that time, Kingrey saw that Ferguson was asleep on her couch. Kingrey placed a 911 call to report that her car was not where she parked it, but added that she did not want to press charges. Shortly thereafter, Kingrey received a call from Allred, who told her that he was coming to her apartment

and to pack up everything illegal because police were on their way to "kick [her] door in." In response to Allred's phone call, Kingrey wrapped in a sheet the two rifles defendant had left in her apartment and threw them into the bushes behind her house. However, when Allred arrived, he helped Kingrey retrieve the rifles from the bushes and pack up the drug paraphernalia. Allred told Kingrey he had driven by Adams Farm Road, where he saw an ambulance at Dinoff's home and Kingrey's Taurus parked on the roadside. Before leaving, Kingrey and Allred shook and slapped Ferguson in an attempt to awaken him, but "he didn't budge." Allred then drove Kingrey to the sheriff's office, stopping on the way to dispose of the contraband at a friend's house.

Deputy Blakely and Randolph County Sheriff's Deputies Williams and Creason were dispatched to the Adams Farm Road residence in response to the shooting. They arrived at approximately 1:08 a.m. and discovered that telephone wires into the home had been cut. Inside the home, they found Dinoff lying on a couch and VonCannon lying on the floor at the entrance to the kitchen. Both were dead. Dinoff had suffered a close range gunshot wound to the left side of his face, a second close range gunshot wound slightly to the left of his nose, a gunshot wound to the front of his right shoulder, two gunshot wounds to his left forearm, and a reentry wound to his chest. A bullet recovered from his body had been fired by the AK-style rifle. A black leather wallet lay on the couch next to Dinoff's right hip. One spent nine millimeter pistol casing and three spent Wolf brand 7.62x39 caliber rifle casings were found in the same room. VonCannon had suffered two gunshot wounds to his neck. A bullet recovered from his body had been fired from the nine millimeter handgun later recovered with the rifles. One spent Winchester brand nine millimeter caliber pistol casing was found in the kitchen. Two additional spent 7.62x39 caliber rifle casings were also found in the area.

In the south bedroom of the mobile home, crime scene specialist Kelly Cummings observed two bullet holes in a closet door and two spent 7.62x39 caliber rifle casings. In the hallway outside the north bedroom, Cummings located a spent 7.62x39 caliber rifle casing and observed a hole in the bedroom door from a bullet that had passed through the striker plate. Inside the north bedroom, Cummings observed two bullet holes in the mattress and located an additional spent 7.62x39 caliber rifle casing. Cummings also found multiple live 7.62x39 caliber rounds throughout the home.

Outside, officers found a twenty dollar bill lying in the center of the driveway. At the tree line across Adams Farm Road and northeast of the crime scene, officers located a 7.62 millimeter caliber SKS-style rifle with a scope and a black aftermarket folding pistol grip stock, and a 7.62 millimeter caliber AK-type rifle with a wood butt stock and black pistol grip. The rifles were concealed together under pine needles and leaves. Nearby, officers also recovered several torn sets of latex gloves and a loaded Heckler & Koch nine millimeter semiautomatic pistol, model USP. The pistol's serial number had been filed off.

Defendant was apprehended at approximately 1:00 a.m. on 11 January 2005 by Randolph County Sheriff's Deputy Joe LaRue. Deputy LaRue was driving northbound on North Carolina Highway 220 in response to the 911 shooting call when he observed an eighteen wheel tractor-trailer with its parking lights on parked on the shoulder of the northbound lane. As he approached, Deputy LaRue saw a person he later identified as defendant hiding in the truck's tandem tires. He shone his high beam lights and spotlight on the wheels and ordered defendant to lie on the ground.

After being taken into custody, defendant told Deputy LaRue that he had been walking to his father's house along Highway 220 and hid under the tractor-trailer after hearing gunshots. When Officer LaRue patted defendant down, he found a set of car keys. Defendant explained that the keys belonged to his girlfriend, whose silver Ford Taurus had broken down and was parked across the road on the shoulder of southbound Highway 220.

Malanowski was apprehended in Randleman, North Carolina, at 8:00 a.m. on 11 January 2005 at a pay telephone in a Lowe's Foods store. A search incident to Malanowski's arrest yielded a pair of wire cutters in one of his pockets.

After defendant's arrest, he gave a series of statements to Detective Aundrea Azelton. When the detective began the interview by attempting to administer defendant's *Miranda* warnings, defendant responded that he understood his rights and said, "No, I don't need a lawyer. Yeah, I'll talk to you." Defendant then signed a printed waiver of his *Miranda* rights. In his first statement, given at 2:54 a.m., defendant denied any involvement in the murders. He related that he left Kingrey's apartment in her car and drove to see his father, who lived near Adams Farm Road. However, he experienced car trouble and, although he turned around to return to Kingrey's, the car broke down on Highway 220. Defendant said he then "heard five blasts,

maybe more, but a series of explosions, one after another." He said that "[i]t sounded like land mines or grenades" and "[w]hen I looked over toward the wooded area, I saw flashes of light." Defendant explained that he saw a mobile home through the woods and that the porch light was on. According to defendant, two white men ran out of the home and drove away. Defendant hid to avoid being injured by shrapnel, believing that he was safest between the truck's tires. While giving this statement, defendant received a call on his cellular telephone from Mr. Davis. Defendant told Mr. Davis that he was at the sheriff's office and was being questioned. Detective Azelton did not want defendant to receive information from outside the interview room, so she seized the phone at the conclusion of defendant's first statement.

Detective Azelton then confronted defendant with information her colleagues had received from Kingrey, telling defendant that Kingrey said he left the apartment with someone else in the car. Defendant responded by giving a second statement in which he said that he had driven Malanowski to Dinoff and Wyatt's residence to sell marijuana. Defendant explained that Malanowski paid him twenty dollars to take him there, but that he made Malanowski walk to the house alone when Kingrey's car broke down. Defendant said he did not think Malanowski had a gun, adding that Sharpe was probably the shooter and may have kidnapped Malanowski. Defendant told Detective Azelton that

> Jason[] [Sharpe's] favorite thing to do is, or his MO, Modus Operandi, is he will cut someone's phone lines, kick the door in and go in shooting. . . . Logan said he wanted to go up to Casey[] [Dinoff's] house and get him back. He said he wanted to go kill him. Logan had a handgun with him, a nine millimeter. . . . It must have been him and Jason that did the shooting.

Defendant added that he had fired Malanowski's pistol two days earlier. When a Randolph County Sheriff's detective later collected gunshot residue from defendant, he said the residue on his hands was from that previous incident.

Defendant then changed his statement again, saying that he had driven both Malanowski and Ferguson to the mobile home because they told him they intended to share a bag of marijuana with Dinoff, whom they had falsely accused of stealing Ferguson's cocaine. According to defendant, Malanowski and Ferguson went up to the mobile home while he stayed in the car.

At that point, Detective Azelton took a break to sort out the names defendant had given her and to consult with other investigators. Based upon additional information received from Kingrey, Detective Azelton returned and confronted defendant, telling him it was unlikely Ferguson left Kingrey's apartment. In response, defendant gave another statement. In this statement defendant said that he and Malanowski went to Dinoff's house intending to scare Dinoff. Because Kingrey's car broke down, they walked through the wooded area to the front door. Defendant said that Malanowski carried a nine millimeter handgun and an AK-type rifle. According to defendant, Malanowski cut the telephone lines, then went to the front porch and kicked in the door. Malanowski entered the house and started shooting, and defendant ran away to his car. Defendant stated that Ferguson and Kingrey were not present and Malanowski was the only shooter. Defendant signed this statement and Detective Azelton took it to the other investigators.

Lieutenant Davis and Detective Julian returned to the interview room with Detective Azelton and, when Lieutenant Davis asked defendant what had happened, defendant admitted that he went to the front door of the mobile home with Malanowski but ran away when the shooting started. However, when Lieutenant Davis and Detective Julian left the room, defendant told Detective Azelton that he went inside the mobile home and searched the pockets of Dinoff and VonCannon while Malanowski held them at gunpoint with the SKS rifle. Defendant said that Malanowski "unloaded the rifle" into Dinoff because Dinoff did not have any money. Defendant said that VonCannon asked to go home, but Malanowski "shot him right in the face" after stating that there could be "no witnesses." Defendant further revised his statement, saying that Malanowski carried two rifles and a handgun. Defendant added that Malanowski wore gloves but he did not. Defendant offered to show Detective Azelton where Malanowski had left the weapons. The weapons and several pairs of torn latex gloves were recovered in the area defendant identified.

While removing defendant's handcuffs before interviewing him, Detective Azelton observed a narrow rubber ring encircling defendant's wrist. After the interview, she noticed the ring was missing. Detective Azelton replaced defendant's handcuffs and, while patting him down, located the ring in defendant's coat pocket. She seized the ring, which later was found to be consistent with a torn latex glove recovered with the firearms.

Two days later, on 13 January 2005, Detective Azelton encountered defendant at the jail. Although defendant had said nothing to her earlier about the twenty dollar bill found in Dinoff's driveway, defendant volunteered that the money was not his. Defendant added that "he had told us that it was his, but what he meant was that the twenty dollars was probably the money [Malanowski] was supposed to pay him for taking him up there. He said that [Malanowski] probably dropped it as he was running from the house." Later that same day, defendant made a written request to speak with Detective Azelton. In his request, defendant stated that if he was allowed to meet with Kingrey first, he would tell investigators "everything" and "the statement I told earlier is a complete and total lie. [T]here were three people, not two." However, when Detective Azelton and Lieutenant Davis met with defendant in person, he declined to talk to them in the absence of Kingrey.

Defendant made another request to speak with Lieutenant Davis. On 15 January 2005, defendant told the lieutenant that he had consumed cocaine the Friday before the shooting and LSD the Saturday before the shooting and had difficulty distinguishing what really happened. He said that he and Malanowski drove to the mobile home, with Ferguson following, and that Malanowski told defendant to wait in the car, then left with some guns. Defendant told Lieutenant Davis that his next memory was being in a police car.

While in custody after his arrest, defendant made a series of recorded telephone calls to Kingrey and Ferguson. During a call made at 8:54 p.m. on 13 January 2005, defendant apologized to Ferguson "for all the trouble" he had caused him, told Ferguson that he wished Ferguson, or somebody, had stopped him from going out that night, agreed that Ferguson was so high he "couldn't move," and encouraged Ferguson to make a statement incriminating Sharpe. In another call made on 19 January 2005 at 7:53 p.m., defendant told Kingrey that he and Malanowski were "in this together." He also stated:

> I looked everybody in the eye, that's what scares me . . . is that I had damn—I had a lot more heart than I thought I did. . . . And do you know what scares me even more?
>
> K. Kingrey: What?
>
> G. Wilkerson: That it was easy. There was no second thoughts, no f—-ing hesitation, no nothing. It was just like in a damn movie.

During this same conversation, defendant told Kingrey, "If the car would have started, I would have got away clean." Later, in a conversation with Kingrey on 28 January 2005, defendant said he was going to "tell them that Joe [Ferguson] was the third person," but was dissuaded when Kingrey responded that Ferguson was going to be a State's witness who would testify on her behalf.

At trial, Ferguson testified for the State that he had purchased the SKS rifle from Mr. Davis at the same time defendant purchased the AK-style rifle. Defendant did not present evidence but sought to establish through cross-examination that he was not involved in the shootings and that Ferguson, Malanowski, and possibly Allred were the perpetrators.

Additional facts will be set forth as necessary for the discussion of specific issues.

GUILT-INNOCENCE PHASE

[1] Defendant raises eighteen issues. In his first argument, defendant contends that the State violated his Fourteenth Amendment right to substantive due process by failing to correct false testimony given by its witness Kimberly Davis. She is the wife of William Davis, who allegedly provided drugs to defendant for resale and sold firearms to him. Mrs. Davis testified that, shortly before the murders, defendant and Malanowski came to her home to purchase at least one SKS rifle and an AK-type rifle from her husband. She saw defendant and Malanowski "posing" with the firearms that were sold and testified that defendant "said he was going to go and kill some people because they had stolen from him" and that defendant and Malanowski were "going back and forth about yeah, we're going to go kill somebody, people can't be stealing from us." Mrs. Davis identified State's exhibit number one as the Heckler & Koch pistol defendant was carrying when he arrived at her house, State's exhibit number two as an SKS rifle that her husband sold to defendant and Malanowski, and State's exhibit number three as an AK-type rifle similar to the one that her husband sold to the two men. Both the SKS rifle and the AK-type rifle were recovered across Adams Farm Road, not far from the scene of the shootings. Thus, Mrs. Davis' testimony supported the State's theory that the murders of Dinoff and VonCannon were premeditated revenge killings carried out, at least in part, by defendant.

Prior to defendant's trial, Mrs. Davis was convicted in federal court of maintaining a dwelling for the sale of controlled substances

and possession of a firearm in furtherance of a drug trafficking crime. Mrs. Davis elected to become a cooperating witness and assisted federal authorities in prosecuting her husband and two of his associates for multiple gun and drug crimes. As a result of her substantial assistance, Mrs. Davis' federal sentence was reduced to thirty-five months' imprisonment.

At the time of defendant's trial, Mrs. Davis was serving her federal sentence. Defendant contends that Mrs. Davis gave false testimony when she stated that she had not been promised any additional consideration or sentence reduction from the state prosecutor in exchange for her testimony against defendant. In particular, defendant states that a letter of understanding sent by the state prosecutor to Mrs. Davis' defense attorney establishes that Mrs. Davis expected to receive an additional sentence reduction in exchange for her testimony against defendant. Defendant argues that the State was obligated to correct her false testimony.

As to Mrs. Davis' trial testimony, she denied during her direct examination that she had been promised any reduction in her federal sentence:

> Q. Okay. Now Ms. Davis, you said you were in federal custody. Are you testifying here today under the promise of any consideration?
>
> A. No.
>
> Q. Okay. Have you already been sentenced in federal court?
>
> A. Yes, I have.
>
> Q. Have you been told that your attorney would be made aware of your cooperation?
>
> A. Yes.
>
> Q. Okay. Anything been promised to you specifically about your federal sentence?
>
> A. No.

The letter in question, which was not made available to the jury but is part of the record, was sent by the state prosecutor to Mrs. Davis' defense attorney in her federal case. The letter provides:

> This letter pertains to your client Kimberly Davis and her testimony in the capital murder cases against George Wilkerson. . . . This letter will set forth the agreement we have regarding Ms.

> Davis' testimony. I will provide a copy of this letter to Wilkerson's defense attorneys.
>
> At this point I do expect to call Ms. Davis as a State witness. In exchange for her complete and honest testimony I will commit to making the Federal Court aware of her cooperation and the value in prosecuting Wilkerson. I will do this in any manner required of me, including a letter, deposition, or testimony. I understand that my disclosure may form the basis of a motion to reduce Ms. Davis' federal sentence she is currently serving, and may result in a sentence reduction if the judge rules in her favor.
>
> Ms. Davis should understand that if she is not completely forthright or I find she testifies untruthfully, I will also notify the Federal prosecutors of this fact as well. I reserve the right to subject Ms. Davis to a polygraph if I believe it to be necessary.
>
> I have dismissed the state charges brought against Ms. Davis. This dismissal is because she was prosecuted federally for these offenses. (I have also dismissed the state charges against the other defendants in the matter who were prosecuted federally.) These dismissals are not contingent upon Ms. Davis' cooperation in the Wilkerson case. The dismissals were taken because after talking with [Assistant United States Attorney] Kearns Davis, I believe your client was sentenced appropriately and see no need for subsequent state prosecution. AUSA Davis is of the opinion that your client was truthful and that her cooperation was material and very helpful in the prosecution of the other defendants prosecuted federally.
>
> This letter details the full and complete nature of my agreement and expressed intent regarding Kimberly Davis. If you believe that something else was promised or implied and is not stated in this letter or is stated incorrectly, you must notify me in writing immediately so that we can clear it up. Wilkerson's attorneys have a right to know the full extent of any agreement between the State and Ms. Davis before she testifies. To my knowledge this letter states that completely and accurately. Please let me know if you believe otherwise.

A copy of this letter was contemporaneously provided by the State's prosecutor to defendant's attorney.

When the State obtains a conviction through the use of evidence that its representatives know to be false, the conviction violates

the Due Process Clause of the Fourteenth Amendment. *Napue v. Illinois*, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 1221 (1959); *accord State v. Boykin*, 298 N.C. 687, 693-94, 259 S.E.2d 883, 887-88 (1979), *cert. denied*, 446 U.S. 911, 64 L. Ed. 2d 264 (1980). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269, 3 L. Ed. 2d at 1221. If the false evidence is material in the sense that there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury," the defendant is entitled to a new trial. *United States v. Agurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 349-50 (1976); *accord State v. Sanders*, 327 N.C. 319, 336, 395 S.E.2d 412, 424 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991). Evidence that affects the jury's ability to assess a witness' credibility may be material. *See, e.g.*, *Napue*, 360 U.S. at 269, 3 L. Ed. 2d at 1221 (explaining that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence").

A state prosecutor has no authority to file a motion in federal court seeking the reduction of a federal sentence imposed upon anyone convicted of a federal crime. *See* Fed. R. Crim. P. 35(b)(1). At most, a state prosecutor may notify federal authorities that a federal defendant has cooperated in a state prosecution, with the understanding that the notification may lead a federal prosecutor to move in federal court for a reduction in the defendant's federal sentence on the basis of the defendant's "substantial assistance" in the state prosecution. *Id.* A federal prosecutor's decision whether to make such a motion is discretionary. *Wade v. United States*, 504 U.S. 181, 185, 118 L. Ed. 2d 524, 531 (1992) (holding, in part, that a federal prosecutor has "a power, not a duty, to file a motion when a defendant has substantially assisted"). If the federal prosecutor makes the motion, the decision whether to allow it and reduce a defendant's sentence lies with the United States trial court. 18 U.S.C.A. § 5K1.1 (Thomson/West 2007) (Federal Sentencing Guidelines).

Accordingly, the state prosecutor's agreement to inform federal authorities of Mrs. Davis' truthful testimony did not, and could not, guarantee that Mrs. Davis' sentence would be reduced, nor could the communication of the information to the federal prosecutor directly result in the filing of a motion to reduce Mrs. Davis' sentence. She accurately testified that she had no assurance of an additional reduction in her sentence. There was no quid pro quo and no inaccuracy in her testimony for the prosecutor to correct.

To the extent that Mrs. Davis' testimony may have led jurors mistakenly to believe that she could not receive a benefit from her testimony against defendant, any misunderstanding was corrected by her subsequent admission during cross-examination that she hoped her sentence would be further reduced.

Q. Okay. And I know by your earlier answers, you're saying nothing's been promised to you in this case, correct?

A. Correct.

Q. As far as your coming in here and taking the stand and cooperating, is that correct?

A. That is.

Q. But by testifying in this case you are hoping to get even more hope [sic] on your federal sentence, aren't you?

A. Yes.

Q. Okay. You're not just in here because you're a good citizen, correct? You want something in exchange.

A. Yes.

Q. Okay. And you're hoping to get your thirty-five (35) month jail sentence reduced even further, is that correct?

A. Yes.

Q. And you're hoping that you may even get your jail sentence reduced to the point that you get out of jail?

A. I don't think that's possible.

Q. Is that what you're hoping?

A. I guess it's always good to hope.

Because this exchange accurately explained Mrs. Davis' motive for testifying and her interest in defendant's prosecution, jurors had ample evidence with which to assess her credibility. In addition, the State's closing argument acknowledged the possibility of an additional reduction when the prosecutor stated: "There's no deal with her other than she came in here to tell the truth, and the deal was if she tells the truth then the federal authorities can do whatever they do." Accordingly, the State did not obtain defendant's conviction

through the use of false testimony, nor did the State permit false testimony to go uncorrected. These assignments of error are overruled.

[2] Defendant's next two arguments are related to his *Napue* claim. Defendant's second contention is that he was denied effective assistance of counsel when defense counsel failed to object to or correct Mrs. Davis' false testimony and later affirmatively misstated during closing argument that the prosecutor had not entered into a "deal" with Mrs. Davis. Third, defendant argues that the trial court erred by failing to intervene *ex mero motu* when the prosecutor told the jury during closing argument that Mrs. Davis did not testify pursuant to a "deal." The record indicates that defense counsel extensively cross-examined Mrs. Davis about her federal charges and the benefits she had received in federal court for her cooperation. As detailed above, there was no quid pro quo between the State and Mrs. Davis, and any ambiguity created by Mrs. Davis' direct testimony was corrected on cross-examination. Accordingly, defendant's second and third assignments are overruled.

[3] Fourth, defendant argues that the trial court committed plain error by permitting Detective Azelton to give improper opinion testimony as to whether any evidence implicated Joe Ferguson in the murders. The testimony in question was elicited by the prosecutor during redirect examination of Detective Azelton after defense counsel attempted during cross-examination to establish that Kingrey, who corroborated Ferguson's alibi, had changed her story about Ferguson's whereabouts on the night of the murders. Specifically, Kingrey testified on direct examination that she found Ferguson asleep in her apartment when defendant woke her with a telephone call instructing her to report that her car had been stolen. On cross-examination, she testified that Ferguson was wearing tennis shoes before she went to bed but was wearing boots when defendant's call awakened her about an hour later. She added that, during the following week, Ferguson cleaned those boots every day, focusing on a dark spot that Kingrey thought might be blood. She confirmed under cross-examination that she had not been able to awaken Ferguson after defendant called. When defense counsel asked Kingrey if she later entered into a sexual relationship with Ferguson, Kingrey denied it. Defense counsel did not ask Kingrey if she had ever changed her story relating to Ferguson's behavior the night of the shootings.

Detective Azelton testified thereafter about her investigation of the murders. Defense counsel cross-examined her as to Kingrey's truthfulness. While under cross-examination, Detective Azelton

acknowledged that Kingrey admitted being untruthful to police in aspects of her first statements. However, Detective Azelton further testified under cross-examination that Kingrey had consistently related that Ferguson was asleep in her apartment at the time of defendant's telephone call. Detective Azelton concluded from Kingrey's statements that "[i]f Joe [Ferguson] was at [Kingrey's] apartment and he was asleep, then he wasn't with [defendant]" at the time of the murders.

While being cross-examined, Detective Azelton also denied that Kingrey had told her either that Ferguson had changed from tennis shoes to work boots that night or that Ferguson was obsessed with scrubbing a spot out of the work boots. Detective Azelton added that Ferguson arrived at the police station the morning after the murders wearing tennis shoes and in a photograph of Ferguson taken the morning after the murders, he can be seen wearing tennis shoes.

Thereafter, during redirect examination of Detective Azelton, the prosecutor asked about her investigation of Ferguson's possible involvement in the murders.

> Q. . . . [Defense counsel] asked you a lot of questions about Joe Ferguson. As the lead investigator in this case, what is the sum total of the evidence that you have implicating Joe Ferguson in the murders of Casey Dinoff and Chris VonCannon?
>
> A. None.
>
> . . . .
>
> Q. Is there any reason if you had any evidence against Joe Ferguson why you wouldn't have charged him with first-degree murder?
>
> A. None whatsoever.

Defendant argues that the trial court committed plain error by admitting Detective Azelton's lay opinion that she had no evidence implicating Ferguson. Defendant contends that Ferguson's possible involvement was the "crucial question to be resolved by the jury from the evidence." *Jones v. Bailey*, 246 N.C. 599, 601-02, 99 S.E.2d 768, 770 (1957) (indicating that a witness could not express an opinion as to an opinion or conclusions that "invaded the province of the jury").

Initially, we note that Detective Azelton's testimony that she had no evidence implicating Ferguson is not necessarily an opinion. The

statement describes the results of her investigation and her interpretation of those results. *See generally* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 175, at 3 (6th ed. 2004) (recognizing that "[t]here is no precise definition of either 'facts' or 'opinions,' and no precise line is drawn between them"). Nor is it obvious that her testimony about Ferguson invaded the province of the jury to determine the ultimate issue of defendant's guilt. When, as here, multiple perpetrators act in concert, one suspect's involvement does not necessarily vitiate the culpability of another. *State v. Thomas*, 325 N.C. 583, 595, 386 S.E.2d 555, 561 (1989). Detective Azelton's exclusion of Ferguson did not ipso facto implicate defendant. Therefore, we conclude that Detective Azelton's statement that she did not possess evidence against Ferguson was not equivalent to a statement that she believed defendant was guilty.

Moreover, assuming *arguendo* that Detective Azelton's testimony was an otherwise inadmissible opinion, it was properly admitted under the circumstances presented here. We have observed that "the law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself" in circumstances in which evidence, otherwise unexplained, is likely to mislead the jury. *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981) (reasoning that the defendant's testimony that he had volunteered to take a lie detector test, if "unexplained, could well lead the jury to believe that the State had refused to give [the] defendant such a test, or that [the] defendant had taken the test with favorable results"). "Such evidence is admissible to dispel favorable inferences arising from [the] defendant's cross-examination of a witness." *State v. Johnston*, 344 N.C. 596, 605-06, 476 S.E.2d 289, 294 (1996). Defendant's cross-examination of Detective Azelton elicited the possibilities that Kingrey was untruthful, that Ferguson shot the victims, and that Detective Azelton failed properly to evaluate Ferguson as a suspect. In so doing, defendant opened the door to redirect examination establishing both that Azelton had considered these possibilities and the reason she excluded them. The trial court did not commit plain error in allowing this testimony. This assignment of error is overruled.

[4] Fifth, defendant argues that the trial court erred by overruling his objection when Kingrey testified that the reason she removed contraband from her apartment the morning after the murders was because she believed defendant had killed someone. Defendant argues the testimony was inadmissible because Kingrey did not per-

sonally know that defendant killed someone and, as a result, the testimony was an impermissible opinion as to his guilt.

As detailed above, Kingrey's testimony on direct examination established that defendant, Malanowski, and Ferguson ingested drugs at a party in Kingrey's apartment on the night of the murders and that when defendant left in Kingrey's car, he took at least one rifle and two handguns with him. Before he departed driving Kingrey's car, defendant made a phone call, during which Kingrey heard defendant loudly say that he was "coming to get" the person he had called. At about 1:00 a.m., an obviously upset defendant called Kingrey from his cell phone and told Kingrey to report her car stolen. Shortly thereafter, Josh Allred, who supplied defendant with cocaine and marijuana for resale, called Kingrey to say that he was coming to the apartment. Kingrey wrapped the two remaining rifles in a sheet and threw them into bushes behind her apartment. When Allred arrived, he helped Kingrey retrieve the rifles and pack up the drug paraphernalia. Allred then drove Kingrey to the sheriff's department, stopping to dispose of the contraband on the way.

Defense counsel's cross-examination questions of Kingrey appeared to implicate Allred by emphasizing his knowledge of the murders and his role in cleaning up Kingrey's apartment. After acknowledging that Allred had been charged as an accessory and that he always carried a gun, Kingrey confirmed that Allred telephoned to tell her to pack up everything illegal because police were on their way to "kick [her] door in" and that Allred asked for the guns as soon as he arrived. Kingrey also confirmed that Allred told her that he had been to Adams Farm Road where he saw an ambulance at Dinoff's home, that Kingrey's Taurus had been parked on the roadside, and that someone had been shot.

Defense counsel further elicited that defendant did not tell Kingrey to hide the rifles. This line of questioning included the following exchange:

> Q. And he [Allred] told you you needed to quote, pack your shit, didn't he?
>
> A. Yes, he did.
>
> Q. By that, what did he mean you needed to pack?
>
> A. Anything that was illegal.
>
> . . . .

Q. And is that why you took the guns and wrapped them in the blanket and put them in the bushes?

A. No, sir. They were already in the bushes when I had done that. He asked me to go outside and get them back out of the bushes and bring them in so he could take them.

Q. All right. Why did you put the guns in a blanket and go outside and put them in a bush then?

A. I was scared. I didn't want them in my house.

Q. All right. What were you scared of?

A. I heard [defendant] acting erratically on the telephone and I knew something had gone wrong.

On redirect examination, the prosecutor asked Kingrey to explain her testimony:

Q. [Defense counsel] asked you a bunch of questions about why you cleaned the apartment out, why you did those things. He never asked you the ultimate question. Why were you doing those things? What did you think George [defendant] had done?

A. Uh—

[Defense Counsel]: We'll object as to what she thought he had done.

[Prosecutor]: I think the door's been opened by the extensive questioning on that.

[Defense Counsel]: Not on that issue.

The Court: Overruled. Ask the question again, please.

Q. [Prosecutor:] What did you think George [defendant] had done when you were cleaning out the apartment?

A. I thought that he probably had killed somebody because he left with guns and he was on drugs that really altered his perception.

Generally, "[a]ll relevant evidence is admissible." N.C.G.S. § 8C-1, Rule 402 (2007). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." *Id.* Rule 403 (2007). Even though a defendant may

open the door to otherwise inadmissible testimony, as explained above, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." *Id.* Rule 602 (2007).

A witness is testifying from personal knowledge when she describes her own state of mind and explains the thoughts motivating her own behavior. Kingrey's redirect testimony explained why she removed the guns and drugs from her apartment. This testimony showed that she, acting alone, made the decision to hide the guns because she knew defendant had left the apartment with firearms and under the influence of drugs and, as a result of what she had seen and heard, feared that he had shot someone. This information explaining why she acted as she did was within Kingrey's personal knowledge and was admissible to clarify evidence elicited by defense counsel on cross-examination. Kingrey's explanation of her motivation was not an opinion as to defendant's guilt. These assignments of error are overruled.

[5] Sixth, defendant argues that the trial court committed plain error when it permitted eyewitness Jason Sharpe to testify during cross-examination that he knew in his heart who shot Dinoff and VonCannon and that defendant "was the ringleader of everything." Defendant argues that this testimony was inadmissible because Sharpe was unable to identify either of the two individuals he saw at Dinoff's home during the murders, and therefore, Sharpe did not have personal knowledge that defendant was the shooter. Defendant argues that, as a result, this testimony was an impermissible opinion as to defendant's guilt. Defendant did not move to strike Sharpe's testimony at trial.

Sharpe's direct examination testimony established that he was standing in Dinoff's driveway at the time of the murders. Sharpe had driven to the mobile home with VonCannon to pick up Dinoff and Wyatt, whom they believed to be "in fear of their lives" after receiving threats from defendant. Sharpe knew defendant was angry because defendant believed Dinoff had stolen drugs from him earlier that day.

Wyatt met Sharpe and VonCannon at the entrance to Dinoff's driveway, where Wyatt told Sharpe that, although defendant and Malanowski had made threats, "one of them called back" to say they found the missing drugs. According to Wyatt, defendant and Malanowski were on their way to Dinoff's home to "make up" by

sharing a quarter bag of marijuana with Dinoff and Wyatt. Sharpe testified that he thought this "sudden" change in defendant's and Malanowski's moods was "weird."

Sharpe walked toward the mobile home and, as he approached, heard a loud noise, like the sound of a door being kicked in, and saw a person standing in the doorway, holding a rifle in one hand. Sharpe heard VonCannon shout at a second person who was standing off to the left side of the home. Then Sharpe noticed that the first person had gone inside the home. Gunfire ensued, and Sharpe described hearing two distinct types of gunshots. He then drove Wyatt to a service station where Wyatt called 911.

During cross-examination, defense counsel attempted to establish that Sharpe did not know defendant was at the mobile home because he did not actually see the faces of the two men who committed the murders. Although Sharpe twice conceded that he could not testify that he saw defendant's face, in answering subsequent questions Sharpe volunteered that he believed both that the murders were not random and that they were committed by defendant because defendant had threatened Dinoff and Wyatt. Additional cross-examination clarified that Sharpe knew the threats were made by a "clique group" that included Malanowski and Ferguson, as well as defendant. When defense counsel asked Sharpe to confirm again that he could not identify the shooter, Sharpe responded: "I didn't see his face. But I know in my heart one hundred percent without a doubt that I know the person that shot them." Defense counsel did not move to strike Sharpe's response.

Thereafter, during recross-examination, defense counsel attempted to establish that Sharpe's initial statement to police included Malanowski and Ferguson as possible perpetrators, but not defendant. When confronted with his previous statement, Sharpe responded in part: "I don't know why I wouldn't have mentioned George Wilkerson's [defendant's] name. I mean because pretty much, he was the ringleader of everything. . . . [Defendant] was the main one person that I do believe had the main thing to do with it." Again, counsel did not move to strike Sharpe's response.

Defendant argues that because Sharpe was not able to identify either intruder he saw at Dinoff's home, he lacked personal knowledge that defendant was the shooter, and therefore, his testimony was an impermissible opinion as to defendant's guilt. The State responds that if the disputed testimony was improper, the error was

invited because the testimony was elicited by defense counsel during cross-examination. N.C.G.S. § 15A-1443(c) (2007) ("A defendant is not prejudiced . . . by error resulting from his own conduct."). For the reasons stated below, we conclude that defense counsel did not invite Sharpe's nonresponsive outburst but that admission of the testimony did not amount to plain error.

A witness' testimony is nonresponsive if it exceeds the scope of the question or fails to answer the question. *See State v. Peele*, 281 N.C. 253, 258-59, 188 S.E.2d 326, 330-31 (1972). Here, defense counsel asked Sharpe two narrow questions: (1) "[Y]ou didn't see the person as so [sic] you can identify who it is, did you?" and (2) "You never mentioned George Wilkerson, did you? . . . Would you like to look at your statement?" Sharpe's responses that he knew in his heart who killed Dinoff and VonCannon and that defendant was "the ringleader of everything" were neither within the scope of defense counsel's questions nor given in response to a question. Thus, these answers were nonresponsive. Moreover, these answers were not based upon Sharpe's personal knowledge, as required by N.C.G.S. § 8C-1, Rule 602. Therefore, Sharpe's answers were improper and inadmissible.

Nevertheless, even if a cross-examination answer is nonresponsive, a defendant must move to strike the answer or the objection is waived. *State v. Chatman*, 308 N.C. 169, 177-78, 301 S.E.2d 71, 76-77 (1983). Because defendant did not make such a motion, we review admission of this evidence for plain error. N.C. R. App. P. 10(c)(4); *State v. Mitchell*, 328 N.C. 705, 711, 403 S.E.2d 287, 290 (1991).

Plain error is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). "We find plain error 'only in exceptional cases where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006) (citation and internal quotation marks omitted).

The transcript demonstrates that Sharpe was hostile toward defendant and resisted defense counsel's attempts to control cross-examination. Even so, defense counsel effectively established that Sharpe was unable to see the face of either assailant and impeached Sharpe by confronting him with a prior inconsistent statement to

police in which Sharpe failed to name defendant as a possible perpetrator of the crimes. Thus, defense counsel elicited information that diminished the force of Sharpe's nonresponsive statements. In light of other evidence presented by the State, we do not believe the trial court committed plain error by not striking this evidence *ex mero motu*. These assignments of error are overruled.

[6] Seventh, defendant argues that defense counsel's assistance was rendered ineffective by his failure to move to strike Sharpe's volunteered statements. To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) defense counsel's "performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *accord State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Counsel's performance is defective when it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693. A defendant is prejudiced by deficient performance when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed. 2d at 698; *see also Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

As detailed above, defense counsel elicited Sharpe's concession that he did not see the face of either perpetrator. Counsel also impeached Sharpe with a prior inconsistent statement to investigators in which Sharpe did not identify defendant as a participant. In so doing, counsel significantly undercut the impact of Sharpe's opinion as to the assailant's identity. Other evidence, recited in detail above, established that defendant armed himself, went to Dinoff's home to avenge a perceived wrong, and later told his girlfriend that "it was easy. . . . just like in a damn movie." On this record, we cannot say that Sharpe's inadmissible testimony probably resulted in the jury returning a different verdict than it would have reached had the evidence not been admitted. Because defendant was not prejudiced, his counsel was not ineffective in failing to strike Sharpe's inadmissible testimony. This assignment of error is overruled.

[7] Eighth, defendant argues that the trial court erred by permitting Mrs. Davis to testify that defendant purchased drugs and guns from her husband on the day of the murders. Defendant asserts that the testimony was inadmissible because Mrs. Davis did not actually witness the purported sales and could not testify from personal knowl-

edge that the sales took place. Mrs. Davis' testimony was admitted over defendant's objection.

Mrs. Davis testified that Mr. Davis had robbed two pharmacies and sold the stolen prescription drugs from their home. The drugs were kept in the back bedroom and all sales were made in that room as well. According to Mrs. Davis, her friend Marcos Cruz brought defendant to her house either on the day of the murders or the day before. Defendant spoke with Mr. Davis, and the two then went into the back bedroom together. Mrs. Davis understood that Cruz had brought defendant to the house for the purpose of buying drugs and concluded that the reason her husband took defendant into the back bedroom was to sell defendant prescription drugs.

On the day of the murders, defendant telephoned Mr. Davis. After speaking with defendant, Mr. Davis left the house and later returned with three SKS rifles that he placed on the dining room table, along with an AK-style rifle. Defendant thereafter arrived with Malanowski and the two began joking, posing with the guns to determine who looked better with which weapon. Mrs. Davis heard defendant say that he was going to kill some people because they had stolen from him, though he appeared inebriated and spoke in a joking manner. The entire transaction lasted between twenty and thirty minutes, during which time Mrs. Davis was sitting in an adjoining room. Mrs. Davis testified that after defendant left, the AK-style rifle and at least one SKS rifle were gone and her husband then had more than one thousand dollars in cash. Based upon what she had heard and seen, Mrs. Davis testified that defendant bought and paid for the AK-47. Defendant objected to Mrs. Davis' testimony that defendant purchased drugs and guns from her husband.

As discussed above, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C.G.S. § 8C-1, Rule 602. However, " 'personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception.' " *Id.* cmt. (quoting advisory committee's note). In addition, a witness who is not testifying as an expert may testify to an opinion or inference that is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.G.S. § 8C-1, Rule 701 (2007).

As to the alleged drug transaction, although N.C.G.S. § 8C-1, Rule 701 allows a lay witness to offer an opinion rationally based upon her

perceptions, in this instance Mrs. Davis' perception was simply that her husband sold drugs out of the back bedroom and that he went into the back bedroom with defendant. She did not hear defendant ask for drugs or see any drugs. Because the evidence supporting Mrs. Davis' assumption that her husband sold drugs to defendant is not based upon personal knowledge or perception, and because her inference that a drug deal occurred is a supposition based largely on guesswork and speculation, we conclude that the trial court erred in overruling defendant's objection to this testimony.

Even so, evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial. *State v. Alston*, 307 N.C. 321, 339-40, 298 S.E.2d 631, 644 (1983); *see also State v. Hickey*, 317 N.C. 457, 473, 346 S.E.2d 646, 657 (1986) (stating that "erroneous admission of hearsay is not always so prejudicial as to require a new trial"). A defendant is prejudiced by evidentiary error "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2007). "The burden of showing . . . prejudice under [subsection 15A-1443(a)] is upon the defendant." *Id.*; *accord State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981). In light of the other evidence against defendant and the relative insignificance of this evidence of one purported drug sale, we further conclude that the error was not prejudicial.

Turning next to Mrs. Davis' testimony that her husband sold one or more firearms to defendant, although she did not witness a complete transaction in that she did not see money change hands, Rule 701 permits a lay witness to testify to an inference that is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.G.S. § 8C-1, Rule 701. When Mrs. Davis testified that she observed that her husband had procured firearms after speaking with defendant; that when defendant and Malanowski arrived, Mr. Davis showed the weapons to defendant; that she heard defendant explain his need for a firearm; that she noticed that weapons were missing from the house after defendant departed; and that afterwards she saw that her husband had a substantial amount of cash, we conclude that Mrs. Davis' natural inference that a sale took place is supported by her perceptions and is admissible under Rule 701. *See generally* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 175, at 2-4 (6th ed. 2004).

Moreover, even if Mrs. Davis' testimony that her husband sold the weapons to defendant was improper, any error in its admission was not prejudicial. The gravamen of her testimony was that defendant obtained from her husband weapons with which to kill "some people" who had stolen from him. Whether or not defendant obtained them through a sale is immaterial. Accordingly, there is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a). These assignments of error are overruled.

[8] Defendant's ninth argument is that the trial court erred by permitting Wyatt to testify over defendant's objection that Dinoff told him defendant had threatened them both in a telephone call. Defendant argues that Dinoff's statement to Wyatt was inadmissible hearsay and that the State failed to establish a foundation for admission of the statement under the excited utterance exception in section 8C-1, Rule 803(2).

Wyatt testified that on the day of the murders, Dinoff called Malanowski to purchase some Oxycontin. When Malanowski arrived, he had forgotten the drugs and instead unsuccessfully attempted to sell Wyatt and Dinoff a handgun. Dinoff left with Malanowski and the two returned forty-five minutes later with the Oxycontin. After Malanowski dropped Dinoff off, Wyatt and Dinoff began smoking marijuana and taking Oxycontin.

Shortly after Malanowski left, Dinoff received a telephone call. Wyatt testified that Dinoff was visibly upset by the call. Dinoff told Wyatt that defendant had accused him of stealing cocaine worth thirty dollars when he went with Malanowski to get the Oxycontin. Dinoff told Wyatt that defendant said the cocaine had been "laid out" to "test" him. According to Wyatt, Dinoff said defendant threatened to kill him. Thereafter, Dinoff continued to receive additional calls from a person purportedly making the same accusations and threats. As a result of receiving the threats, Wyatt and Dinoff telephoned friends to come and pick them both up. Wyatt also called 911. Defendant objected to Wyatt's testimony about the conversation between defendant and Dinoff, arguing that Dinoff's description of the contents of the calls was inadmissible hearsay and that the State did not lay a proper foundation for its admission under the excited utterance exception.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove

the truth of the matter asserted." *Id.* § 8C-1, Rule 801(c) (2007). Although hearsay is generally not admissible, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. *Id.* Rule 803(2) (2007). Whether a statement is an excited utterance is determined by the state of mind of the speaker. *State v. Smith*, 315 N.C. 76, 86-87, 337 S.E.2d 833, 841 (1985). To fall within the exception, the proponent must establish that there was "(1) a sufficiently startling experience suspending [the declarant's] reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *Id.* at 86, 337 S.E.2d at 841.

Wyatt's testimony established that receiving the call surprised Dinoff, who became visibly upset during the call and immediately afterwards related to Wyatt that defendant had made the call and had threatened to kill Dinoff. Dinoff believed defendant wrongfully accused him of stealing cocaine and was disturbed enough to telephone a friend and ask for transportation. Dinoff's statements represented a spontaneous reaction to an event that was sufficiently startling to suspend his reflective thoughts. Accordingly, we conclude that Wyatt's testimony laid a sufficient foundation for admission of Dinoff's statements as excited utterances. These assignments of error are overruled.

[9] Tenth, defendant argues that the trial court committed plain error by admitting the entire tape recording of Wyatt's call to 911 just before the shooting. During the call, Wyatt told the 911 dispatcher that:

> some people have just called and threatened my life and my family and stuff and told me that my brother stole something from them. And that—they said that if they come up here and they don't get their money and stuff, that they're gonna shoot us. . . . And I need—I need like someone to patrol my area, like, down my road and stuff.

After providing his name, address, and telephone number, Wyatt continued:

> It's a guy named George, and there's a—there's another guy—The other two guys, I know their full names. It's Logan Malanowski and Joe Ferguson. And they're driving a silver Ford Taurus.
>
> . . . .

911: Do you think they're on their way?

C. Wyatt: He told me that they'd be here in 15 minutes, and we need a car up here. And we're possibly—we're possibly gonna leave. But more than likely they'll rob us.

. . . .

911: Do you think they'll have weapons?

C. Wyatt: Yeah. He told—they got guns. I know they got guns. They got guns with little laser pointers on them. They got .09 millimeters.

. . . .

911: . . . And they stated they would kill you?

C. Wyatt: They told me that if—you know, if they did not get thirty bucks, that they were going to shoot anyone who came across them.

Defendant argues that the trial court should not have admitted Wyatt's statement that "more than likely they'll rob us" because Wyatt was speculating about defendant's intention. Defendant contends that the prejudicial effect of this statement substantially outweighed any probative value it may have had. The trial court overruled defendant's initial request to redact the statement. Because defendant did not renew this objection when the tape was played and the transcript published to the jury, defendant correctly asserts only that admission of the statement constitutes plain error.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2007). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." *Id.* Rule 403. " 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (quoting N.C.G.S. § 8C-1, Rule 403 cmt.).

Here, Wyatt's statement was relevant to explain to the dispatcher why he felt threatened by defendant and why he called 911. Defendant argues that the statement was nevertheless unfairly prejudicial because armed robbery was the predicate felony supporting

the charges of burglary and first-degree murder. Defendant contends that Wyatt's statement in the 911 call encouraged jurors to conclude that defendant intended to commit armed robbery when in fact, Wyatt was only speculating. According to defendant, admission of the statement deprived him of a fair trial. However, Wyatt related in the 911 call the threatening caller's own statement concerning his motive: "They told me that if—you know, if they did not get thirty bucks, that they were going to shoot anyone who came across them." In context, this statement may be understood as a threat to take thirty dollars from Wyatt and Dinoff at gunpoint or, in other words, as a threat to commit armed robbery. Wyatt's comment that it was more than likely they were going to commit a robbery merely clarifies and restates this evidence, to which defendant did not object. For the reasons stated above, we conclude that the probative value of the disputed evidence was not substantially outweighed by the danger of unfair prejudice. Admission of the statement was not error, plain or otherwise. This assignment of error is overruled.

[10] Defendant's eleventh argument is that the trial court erred by admitting the police report created at the time of Mr. Davis' arrest. The report was admitted for the purpose of establishing Mr. Davis' cellular telephone number. At defendant's trial, the State showed that the cell phone number, which was provided by Mr. Davis upon his arrest, was the same number defendant dialed while hiding under the tractor-trailer on Highway 220 immediately after the shooting. The State called as a witness the cell phone report's record creator, Randolph County Sheriff's Department Captain Barry Bunting, and moved to admit the police report as a business record. Defendant objected, conceding that the report was an admissible business record but arguing that the information contained within that business record was information constituting inadmissible hearsay. The trial court overruled defendant's objection and admitted the report as substantive evidence. In so doing, the court concluded that the reliability of Mr. Davis' statements to police was a question of weight, not admissibility, and that "the reliability of that information is subject to cross examination . . . of [the arresting officer] by defendant's counsel." On appeal, defendant also argues that admission of this hearsay evidence violated his Sixth Amendment right to confront witnesses against him, namely Mr. Davis.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c). Here,

as at trial, defendant concedes that the primary document, Mr. Davis' arrest report, is an admissible business record. However, defendant contends the telephone number contained in the report memorializes an assertion made by Mr. Davis at the time of his arrest and is therefore hearsay. The State does not argue that the phone number meets any statutory hearsay exception, nor do we see any applicable exception. Hearsay statements that do not meet a statutory exception are presumptively unreliable and inadmissible. *Id.* Rule 802 (2007). Accordingly, the trial court erred by admitting the portion of Mr. Davis' arrest report that contained his cell phone number.

As explained previously, evidentiary error does not necessitate a new trial unless the error was prejudicial. *Alston*, 307 N.C. at 339-40, 298 S.E.2d at 644. Defendant argues that erroneous admission of Mr. Davis' cell phone number was prejudicial because defendant's telephone contact with Mr. Davis was important circumstantial evidence that tended to show defendant was the shooter. However, in light of the entire case presented by the State, defendant has not established that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" by the jury. N.C.G.S. § 15A-1443(a). Other substantial evidence presented by the State established defendant's intent to shoot Dinoff, his purchase and possession of the murder weapons, his presence in the mobile home at the time of the shooting, his attempt to cover up his actions, and his inculpatory statements made while awaiting trial. In addition, the State offered other evidence from which jurors could conclude defendant called Mr. Davis after the murders, including Mrs. Davis' testimony that Mr. Davis received a telephone call at approximately 1:00 a.m. on the night of the murders, defendant's cell phone records, which showed he made multiple calls shortly after the murders, and Mr. Davis' call to defendant's cell phone during defendant's interview with Detective Azelton. Accordingly, the trial court's erroneous admission of Mr. Davis' phone number was not prejudicial.

Although defendant also argues that admission of this hearsay violated his Sixth Amendment right to confront Mr. Davis, defendant did not object on this basis before the trial court. "[C]onstitutional error will not be considered for the first time on appeal." *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005); *see also* N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the rul-

ing the party desired the court to make if the specific grounds were not apparent from the context."). Because defendant did not raise this constitutional issue at trial, he has failed to preserve it for appellate review and it is waived. *Chapman*, 359 N.C. at 366, 611 S.E.2d at 822. Accordingly, this assignment of error is overruled.

[11] Twelfth, defendant argues that the trial court erred by admitting over his objection Jason Sharpe's testimony as to the reputation of victim VonCannon for peacefulness. When the prosecutor asked Sharpe, "What was his [VonCannon's] reputation for peacefulness?," Sharpe responded:

> For peacefulness? He wasn't a violent person, I know that. I mean, yeah, he's a little crazy, you know, like we all were, you know, I mean we were young punks, you know, you know, you know, I mean we do drugs and stuff, but I mean he wasn't the type of person to just maliciously, you know, just want to create random acts on people and you know, get in fights with people and stuff like that. He was always an easygoing laid back kind of guy.

Evidence of a victim's character is inadmissible during the guilt-innocence phase of a capital trial unless offered by the accused to show a "pertinent trait of character of the victim of the crime" or by the State "to rebut the same." N.C.G.S. § 404(a)(2) (2007). Therefore, "the State cannot introduce evidence of the victim's peacefulness until after defendant has put forward evidence that the victim was the first aggressor." *State v. Faison*, 330 N.C. 347, 356, 411 S.E.2d 143, 148 (1991). Here, there was no such evidence, and the State concedes that the trial court erred by admitting the testimony.

Nevertheless, as discussed above, evidentiary error does not require reversal unless the error was prejudicial, *Alston*, 307 N.C. at 339-40, 298 S.E.2d at 644, and the burden of showing prejudice is on the defendant, N.C.G.S. § 15A-1443(a); *Milby*, 302 N.C. at 142, 273 S.E.2d at 720. For purposes of section 15A-1443(a), prejudice means "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a).

The prejudicial effect of character evidence is usually understood to be its tendency to persuade jurors that the person being described acted in conformity with his or her reputation for having a certain character trait. *See, e.g.*, *id.* § 8C-1, Rule 404 cmt. (" 'Character evi-

dence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character.' " (quoting advisory committee's note)). Accordingly, the prejudicial effect of Sharpe's testimony that VonCannon was not a violent person would be its tendency to persuade jurors that VonCannon was not violent on the night he was killed. After reviewing the record as a whole, we are satisfied that defendant was not prejudiced by this testimony. Other evidence showed that two men armed with at least two semiautomatic assault rifles and a pistol murdered the unarmed victims. Defendant acknowledges in his brief that all admissible evidence indicates VonCannon did not provoke the attack, and, in fact, no evidence indicates that any aspect of VonCannon's character played any role in the events of 10 and 11 January 2005. Accordingly, we conclude that any prejudicial effect arising from the admission of this inadmissible character evidence was de minimis. There is no reasonable possibility that a different result would have been reached at trial had the disputed testimony been excluded.

Defendant nevertheless argues that the prejudicial effect of the evidence was to "engender undue sympathy for a person having simply been in the wrong place at the wrong time." However, Sharpe's description of VonCannon is a genuinely mixed bag, on the one hand characterizing him as "crazy," a "young punk," and a drug user, while on the other hand depicting him as not violent or malicious, and "easygoing." This testimony does not paint a particularly appealing picture and would not necessarily generate sympathy for VonCannon. Moreover, this short testimony was given in response to a single question. After reviewing Sharpe's testimony in context and considering the entirety of the State's evidence, we conclude that this disputed testimony did not encourage jurors to convict defendant out of sympathy for VonCannon. This assignment of error is overruled.

[12] Thirteenth, defendant argues that the trial court erred by failing to intervene *ex mero motu* during the prosecutor's guilt-innocence phase closing argument. Specifically, defendant contends that the prosecutor argued facts not in evidence when he told the jury the reason Allred advised Kingrey that defendant and Malanowski had shot someone was that defendant had given Allred this information in a telephone call following the shootings. Defendant also contends that the prosecutor improperly argued that Allred knew to clean out Kingrey's apartment because of defendant's supposed call to Allred:

> And do you know that Josh Allred, the testimony is, shows up at the apartment and what does he say according to Kimmey Kingrey? He says George and Logan done shot somebody. We gotta get this sh-t out of the apartment. Now how did he know that? How does Josh Allred know that? He knows it because on the side of the road George Wilkerson called him and said man, go clean my apartment out. Kimmey's got no car, because the car is right there. I gotta deal with my car and I gotta deal [with] my apartment, so clean them guns and the dope out of the apartment.

Defendant emphasizes that the State did not call Allred as a witness to testify to the substance of the phone call.

Defendant further argues that the prosecutor, while discussing the theory of acting in concert, improperly told jurors that Malanowski would also be tried for involvement in the killings. Defendant states that this argument "minimized the importance for the jury in determining whether the evidence supported Wyatt's identification of Malanowski or supported the State's contention that [defendant] fired the shots."

In a closing argument in a criminal trial, "an attorney may not . . . make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." *Id.* § 15A-1230(a) (2007). "Counsel may, however, argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709-10 (1995) (citing *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144 (1993)), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

Here, the prosecutor's argument that Allred knew about the murders because defendant told him about them is a reasonable inference that can be drawn from evidence introduced through telephone records and the testimony of Detective Azelton indicating that defendant's cellular telephone was used to make several calls to Allred's cellular telephone around the time the murders were committed. Similarly, the prosecutor's argument that Allred thus knew to advise Kingrey to clean out her apartment may be inferred from the

same evidence. *State v. Frye*, 341 N.C. 470, 498, 461 S.E.2d 664, 678 (1995) ("Prosecutors may, in closing arguments, create a scenario of the crime committed as long as the record contains sufficient evidence from which the scenario is reasonably inferable."), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). The prosecutor's arguments drew reasonable inferences from this evidence and were not improper, let alone grossly improper.

Moreover, the prosecutor's argument that defendant and Malanowski would be equally guilty was an accurate statement of law applicable to the State's theory of the case, which was that defendant and Malanowski acted in concert to commit the murders. "Under the doctrine of acting in concert when two or more persons act together in pursuance of a common plan or purpose, each is guilty of any crime committed by any other in pursuance of the common plan or purpose." *Thomas*, 325 N.C. at 595, 386 S.E.2d at 561; *see also State v. Joyner*, 297 N.C. 349, 356-57, 255 S.E.2d 390, 395 (1979). The trial court instructed the jury on the State's theory after determining that the State presented sufficient evidence from which jurors could find that defendant and Malanowski acted in concert. Because section 15A-1230(a) permits counsel to argue applicable law, the prosecutor's argument was not improper. These assignments of error are overruled.

[13] Fourteenth, defendant argues that the trial court erred by failing to intervene *ex mero motu* when the prosecutor expressed personal opinions during closing arguments in the guilt-innocence phase of defendant's trial. Specifically, defendant states that the prosecutor committed gross impropriety by vouching for the credibility of Mrs. Davis and Kimberly Kingrey when he argued:

> Did you hear on cross-examination him damage [Mrs. Davis'] credibility one bit? She was matter of fact, *she told the truth*, and what she said is corroborated, and I'll get to some of that later.
>
> . . . .
>
> [Kimberly Kingrey] does get into some bizarre testimony that she thinks that Josh Allred is wearing boots. But I told you the pictures [sic] that he's not wearing boots when he's taken to—down to be questioned. He's wearing skateboarder tennis shoes. What's Kimmey Kingrey talking about? I don't know. *I put Kimmey Kingrey up as my witness because I think she's telling the truth*, but is she or was she at the time someone that is a likeable per-

> son? No, she's not. I don't pretend that she is. But I do know that the evidence is consistent with her testimony. (Emphasis added.)

Defendant further avers that the prosecutor improperly argued his personal belief in defendant's guilt when he said:

> If two or more persons join in a common purpose to commit murder, each of them if actually or constructively present is not only guilty of that crime if the other person commits the crime but is also guilty of any other crime committed by the other in pursuance of the common purpose to commit murder or as a natural or probable consequence thereof. Common sense. If you and I form the intent and yet I'm constructively present or actually present, but you do all the acts, we're both guilty, and that's why Logan Malanowski's day is coming in that seat. Even though he has admitted killing both of these victims and the evidence is overwhelming that he did, Logan Malanowski is charged, you've heard the evidence, and he's going to be sitting there soon. *Because under this theory of acting in concert, he's just as guilty as [defendant].* (Emphasis added.)

As above, "[t]he standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

"During a closing argument to the jury an attorney may not . . . express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant. . . ." N.C.G.S. § 15A-1230(a). However, "prosecutors are allowed to argue that the State's witnesses are credible." *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005), *cert. denied*, 548 U.S. 925, 165 L. Ed. 2d 988 (2006). As to Mrs. Davis, the prosecutor did not personally vouch for her veracity but instead provided jurors reason to believe Mrs. Davis by arguing that her testimony was truthful because it was corroborated. Somewhat similarly, as to Kingrey, the prosecutor pointed out that her testimony was consistent with the evidence. In so doing, the prosecutor conceded weaknesses by acknowledging that Kingrey is not a likeable person and that some of Kingrey's statements, such as her statements about Ferguson's footwear, did not fit the State's theory of the case. While the prosecutor's passing comment that he believed Kingrey was telling the truth violated section 15A-1230(a), the comment was made while admitting weaknesses in her testimony.

Taken in context, we do not believe this argument about Kingrey was so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.

As to the prosecutor's argument that defendant and Malanowski are equally culpable for the murders of Dinoff and VonCannon, we concluded above that the prosecutor correctly explained the legal theory of acting in concert. The prosecutor's statement that "[Malanowski]'s just as guilty as [defendant]" was part of this argument, pointing out that the law allows two people to be found guilty of one crime. Because the prosecutor's depiction of the law was accurate, the argument was proper. These assignments of error are overruled.

[14] Fifteenth, defendant argues that, should this Court conclude that no single error identified in the guilt phase of his trial was prejudicial, the cumulative effect of the errors nevertheless was sufficiently prejudicial to require a new trial. Cumulative errors lead to reversal when "taken as a whole" they "deprived [the] defendant of his due process right to a fair trial free from prejudicial error." *State v. Canady*, 355 N.C. 242, 254, 559 S.E.2d 762, 768 (2002). Although defendant has contended to this Court that numerous errors were made during trial, we have found error only in the admission of (1) hearsay in the form of Mr. Davis' cell phone number, (2) Sharpe's opinion testimony concerning VonCannon's reputation for peacefulness, and (3) Mrs. Davis' assumption that her husband sold drugs to defendant in their back bedroom. In addition, the prosecutor's personal vouching for Kingrey's veracity was improper. However, these errors, individually or collectively, do not fatally undermine the State's case. We have reviewed the record as a whole and, after comparing the overwhelming evidence of defendant's guilt with the evidence improperly admitted, we conclude that, taken together, these errors did not deprive defendant of his due process right to a fair trial. This assignment of error is overruled.

[15] In his sixteenth argument, defendant contends that the trial court erred by denying his motion to dismiss the charges of felony murder and first-degree burglary. Specifically, defendant contends that the State failed to present sufficient evidence that he possessed the felonious intent that is an essential element of first-degree burglary, *see State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 352 (1988), when he broke and entered into Dinoff and Wyatt's residence. "When considering a motion to dismiss, the trial court must view the

evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). "If substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to deny the motion." *Id.* "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citations and internal quotation marks omitted). Supporting evidence may be "direct, circumstantial, or both." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). Moreover, "evidence of what a defendant does after he breaks and enters a house is evidence of his intent at the time of the breaking and entering." *State v. Gray*, 322 N.C. 457, 461, 368 S.E.2d 627, 629 (1988); *accord State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992).

Here, the State's evidence showed that defendant threatened to kill Dinoff over thirty dollars worth of cocaine that defendant believed Dinoff had stolen. In a 911 call made shortly after receiving the threats, Wyatt stated: "He told me that they'd be here in fifteen minutes" and "[t]hey told me that if—you know, if they did not get thirty bucks, that they were going to shoot anyone who came across them." In one of his 11 January 2005 statements to Detective Azelton, defendant acknowledged that he was inside the mobile home at the time of the murders and that he searched Dinoff's and VonCannon's pockets. Defendant added that Dinoff was shot when it became apparent that he did not have any money, though he named Malanowski as the shooter. Investigators found Dinoff's wallet next to his body on the couch and a twenty dollar bill on the gravel driveway outside the home. Although Detective Azelton did not mention the twenty dollar bill to defendant, during a statement to Detective Azelton made two days later, defendant volunteered that the money was not his, explaining that Malanowski probably dropped the bill when running from the home. From this substantial evidence the jurors could find that defendant broke and entered into Dinoff and Wyatt's residence with intent to commit felony larceny therein.

Defendant interprets other evidence introduced in this case to support his arguments either that the murders were committed solely for the purpose of preserving the perpetrators' reputations as drug dealers or that the perpetrators had abandoned their intent to rob Dinoff by the time they broke into the mobile home. However,

"[w]hen ruling on a motion to dismiss for insufficient evidence . . . . [a]ny contradictions or conflicts in the evidence are resolved in favor of the State and evidence unfavorable to the State is not considered." *Miller*, 363 N.C. at 98, 678 S.E.2d at 594 (citations omitted). Accordingly, these assignments of error are overruled.

[16] Seventeenth, defendant contends the trial court committed prejudicial error when it denied his motion to suppress his post-arrest statements to investigators. Defendant argues that these statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), because his statements "were involuntary" and because he was unable to waive his rights "knowingly, voluntarily, and intelligently." The gist of defendant's arguments is first, that he was intoxicated and thus unable to waive his rights consistent with *Miranda* and second, that the statements resulted from improper official coercion. Defendant claims that the admission of his statements at trial violated his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 18, 19, 23, 24, and 27 of the North Carolina Constitution.

Defendant filed a pretrial motion to suppress his statements, and the trial court conducted a *voir dire* hearing on the motion. After hearing evidence from Detective Azelton and Lieutenant Davis and considering the arguments of counsel, the trial court made extensive oral findings of fact. In those findings, the trial court determined that the evidence showed defendant was apprehended at approximately 1:00 a.m. on 11 January 2005, and Detective Azelton was assigned to interview him. Defendant appeared relieved when Detective Azelton entered the interrogation room, and although defendant refused to speak to Sheriff Hurley, he agreed to talk to Detective Azelton.

The trial court further found that Detective Azelton observed that defendant's pupils were dilated and his eyes were red and glassy. While defendant appeared to have been smoking marijuana, Detective Azelton had interviewed him on previous occasions, and she noted that his manner of speech was the same as during the prior interviews. Defendant acknowledged that he had smoked marijuana, used cocaine, and drunk alcohol some time before the incident under investigation. Nevertheless, defendant's answers to Detective Azelton's questions were responsive, articulate, cogent, logical, and clear, even though these responses were not always consistent with the evidence the investigators were finding. When defendant stated

that he was "high," he used this term in the past tense and only to explain why he might be unable to remember the events that occurred earlier in the evening. Defendant did not use the term to refer to his present ability to understand and answer the investigators' questions. The trial court found that no evidence in the record indicated that defendant stated that he was under the influence of an impairing substance while being questioned.

The trial court further found that once Sheriff Hurley left the room, Detective Azelton read defendant his *Miranda* rights as follows:

> Question: Do you understand each of these rights I have explained to you.
>
> The Defendant's response: Yes.
>
> [Question]: Two. Having read the rights in mind, do you wish to answer questions.
>
> [Answer]: Yes. Defendant's answer.
>
> [Question]: Three. Do you now wish to answer questions without a lawyer present?
>
> Defendant's answer: No, I don't need a lawyer. Yeah I'll talk to you.

The *Miranda* warning form was then executed by defendant.

Detective Azelton let defendant tell his story, then asked him to repeat the story, wrote down his statement, read the statement back to defendant to check its accuracy, and had defendant sign and date the statement. During the initial interview, defendant answered a call on his cell phone from his friend "Will." The first portion of the interview concluded at approximately 3:42 a.m.

Detective Azelton then left defendant in the interview room for approximately ten minutes. When she returned, she informed defendant that she did not believe he was being truthful and, without again administering *Miranda* warnings, asked defendant several more questions that defendant answered without objection. As before, Detective Azelton wrote out defendant's statements, read them back to him for clarity, and had him sign the statements.

Detective Azelton left the room for a second time for approximately twenty-three minutes, then returned with Lieutenant Davis

and Detective Julian. Lieutenant Davis, who did not re-advise defendant of his *Miranda* rights, interviewed defendant for approximately twenty minutes. Defendant did not object to the presence of the new detectives, and the final interview ended at approximately 7:12 a.m. In all, defendant was interviewed for approximately four hours.

Defendant also volunteered to assist Detective Azelton by drawing a map that marked areas where specific evidence could be found and then offered to lead investigators to the location of some of the evidence. Defendant was placed in the back of a patrol car and driven to the scene. While investigators were searching for the evidence at approximately 8:00 a.m. on 11 January 2005, defendant fell asleep in the patrol car.

As noted, defendant was not re-*Mirandized* after Detective Azelton initially read defendant his *Miranda* rights. However, there is no evidence in the record that defendant ever requested to terminate the interview, nor did defendant request counsel at any time during any of the interviews. Although defendant occasionally trailed off in the middle of his sentences, he did not exhibit any confusion or slur his words during the interviews. Based upon these findings of fact, the trial court concluded as a matter of law that defendant's statements were given voluntarily pursuant to a knowing, intelligent, and voluntary waiver of his *Miranda* rights and that the *Miranda* warnings initially given by Detective Azelton were sufficient to allow admission of all defendant's statements made the morning of 11 January 2005.

A trial court's findings of fact regarding the voluntary nature of an inculpatory statement are conclusive on appeal when supported by competent evidence. *State v. Parton*, 303 N.C. 55, 69, 277 S.E.2d 410, 420 (1981), *overruled in part on other grounds by State v. Freeman*, 314 N.C. 432, 437-38, 333 S.E.2d 743, 746-47 (1985). However, a trial court's determination of the voluntariness of a defendant's statements "is a question of law and is fully reviewable on appeal." *State v. Barden*, 356 N.C. 316, 339, 572 S.E.2d 108, 124 (2002) (citation and internal quotation marks omitted), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Conclusions of law regarding the admissibility of such statements are reviewed de novo. *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003).

To be valid, a waiver of *Miranda* rights must be (1) given voluntarily "in the sense that it was the product of a free and deliberate

choice rather than intimidation, coercion, or deception," and (2) "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421 (1986). When determining the validity of a *Miranda* waiver, the reviewing court applies a totality-of-circumstances test. *Id.*

As to defendant's claim that he was under the influence of drugs when he made his statements, "intoxication is a circumstance critical to the issue of voluntariness." *State v. McKoy*, 323 N.C. 1, 22, 372 S.E.2d 12, 23 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). The trial court did not find defendant was intoxicated or under the influence of a controlled substance when he gave his statements, but even if he was, "[t]he fact that [the] defendant was intoxicated at the time of his confession does not preclude the conclusion that defendant's statements were freely and voluntarily given." *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981), *superceded by statute*, N.C.G.S. § 8C-1, Rule 607 (1983), *on other grounds as recognized in State v. Covington*, 315 N.C. 352, 357, 338 S.E.2d 310, 314 (1986). "An inculpatory statement is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *Id.*; *see also Parton*, 303 N.C. at 69-70, 277 S.E.2d at 420 (finding no error in trial court's denial of the defendant's motion to suppress his confession to murder given after receiving *Miranda* warnings when the trial court found the statements to be voluntary, even though the arresting officer believed the defendant to be intoxicated but the defendant was not staggering and was coherent). Here, the trial court's finding of fact was largely based on the interviewing detectives' testimony that defendant appeared to be impaired but was able to respond to questioning coherently and logically. This testimony, combined with other similar evidence, fully supports the trial court's finding of fact that defendant comprehended his rights at the time that he executed the waiver. Therefore, the trial court's findings of fact support the court's conclusion of law that defendant knowingly and voluntarily waived his rights under *Miranda*.

Defendant also argues that his statements were the result of improper police coercion. To be admissible, a defendant's statement must be "the product of an essentially free and unconstrained choice by its maker," *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 1057 (1961), and the State must show by a preponderance of the evidence that defendant's confession was voluntary, *State v. Perdue*,

320 N.C. 51, 59, 357 S.E.2d 345, 350 (1987). A court "determine[s] whether a statement was voluntarily given based upon the totality of the circumstances." *State v. Walls*, 342 N.C. 1, 30, 463 S.E.2d 738, 752 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996).

In *Colorado v. Connelly*, the United States Supreme Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." 479 U.S. 157, 167, 93 L. Ed. 2d 473, 484 (1986). Coercive police activities on which the court should focus include: "extensive cross-questioning," "undue delay in arraignment," "failure to caution a prisoner," and "refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is still only a suspect," *Culombe*, 367 U.S. at 601, 6 L. Ed. 2d at 1057, as well as "the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward [the defendant,] his physical and mental state, [and] the diverse pressures which sap or sustain his powers of resistance and self-control," *id.* at 602, 6 L. Ed. 2d at 1057. The voluntariness of a defendant's statements "is a question of law and is fully reviewable on appeal." *Barden*, 356 N.C. at 339, 572 S.E.2d at 124 (citation and internal quotation marks omitted).

Here, the evidence shows that the police employed a nonconfrontational interview method. From the time defendant was taken into custody until the questioning ended, defendant never objected to police questioning, never requested counsel, and was cooperative with detectives, even if not consistently truthful. The authorities initially permitted defendant outside contact with friends when defendant answered his cell phone during the course of the interviews and was allowed to converse with the caller. In short, there is no evidence of the type of coercive police activities required to render a confession involuntary. Accordingly, we conclude that defendant's post-arrest statements were not coerced.

For the reasons stated above, we determine that defendant validly waived his *Miranda* rights and that defendant's post-*Miranda* statements were voluntarily given. The trial court did not err in denying defendant's motion to suppress his post-arrest statements. These assignments of error are overruled.

[17] In his eighteenth argument, defendant contends that the trial court erred in denying his motion to suppress the results of the search of his cellular telephone. Defendant maintains that the trial

court erroneously ruled that defendant consented to the seizure of the phone and that the subsequent search of the phone while he was in police custody was improper.

Before trial, defendant filed a motion to suppress the evidence relating to the seizure of his cell phone. The court conducted an evidentiary hearing during which Detective Azleton testified that defendant received a call on the phone while in custody. When the detective asked defendant who the caller was, he answered that it was his friend "Will." Detective Azleton asked who else had called defendant that morning, and defendant scrolled through his cell phone's log, showing her the numbers of the telephones that had called his phone and the times the calls were made. Detective Azleton testified that she then told defendant, "George, we're going to need to take that. And he said okay and gave it to me." When questioned specifically whether defendant consented to her taking his cell telephone, Detective Azelton answered, "Yes." Defendant declined the court's offer to be heard as to the legality of the seizure. The trial court made oral findings

> that the cell phone was seized subject to the arrest of the Defendant.
>
> The Court further finds that the Defendant, after having received a telephone call while being interviewed by Detective Azelton, voluntarily surrendered the telephone to Detective Azelton at her request.
>
> The Court therefore finds:
>
> One—or concludes that One, the telephone was seized subject to a valid arrest of the Defendant and further, the Court concludes that the Defendant consented to the seizure of his phone by the Sheriff's Department.
>
> It is therefore ordered that the Motion to Suppress Evidence as to the seized call [sic] phone is denied.

At trial, the cell phone was admitted into evidence over defendant's renewed objections. The State used the serial number, located inside the cell phone, to prove that this phone was used to make calls to Allred around the time of the murders.

When reviewing a motion to suppress evidence, this Court determines whether the trial court's findings of fact are supported by competent evidence and whether the findings of fact support the conclu-

sions of law. *State v. Haislip*, 362 N.C. 499, 499, 666 S.E.2d 757, 758 (2008) (per curiam). If supported by competent evidence, the trial court's findings of fact are conclusive on appeal, even if conflicting evidence was also introduced. *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations omitted). However, conclusions of law regarding admissibility are reviewed de novo. *Hyatt*, 355 N.C. at 653, 566 S.E.2d at 69.

The trial court correctly found that the seizure was pursuant to defendant's arrest.

> [O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.

United States v. Edwards, 415 U.S. 800, 807, 39 L. Ed. 2d 771, 778 (1974). "Nor is there any doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial." *Id.* at 803-04, 39 L. Ed. 2d at 776; *see, e.g.*, *State v. Steen*, 352 N.C. 227, 240-41, 536 S.E.2d 1, 9-10 (2000) (the defendant's clothing was seized pursuant to a lawful arrest and could be searched six days later because the effects in the defendant's possession at the time he was lawfully in custody could be seized and searched without a warrant; any question of the defendant's consent to the search was irrelevant), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). Similarly, in the case at bar, the seizure and the search of the telephone were properly accomplished pursuant to a lawful arrest. The trial court did not err in denying defendant's motion to suppress the evidence resulting from the search of defendant's cell phone. These assignments of error are overruled.

PRESERVATION ISSUES

Defendant raises three additional issues that he concedes have previously been decided by this Court contrary to his position. First, defendant argues that the trial court erred by permitting the prosecutor to comment about defendant's lack of remorse during closing argument of the capital sentencing proceeding. We have held that such comments are permissible as long as the prosecutor does not

argue that lack of remorse is an aggravating circumstance. *See*, *e.g.*, *Augustine*, 359 N.C. at 734-35, 616 S.E.2d at 533. Here, the prosecutor expressly told jurors that lack of remorse is not an aggravating circumstance. Second, defendant argues that the trial court committed plain error by permitting each murder to be submitted as an aggravating circumstance of the other murder when it submitted the (e)(11) aggravating circumstance to the jury. *See* N.C.G.S. § 15A-2000(e)(11) (2007) ("The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons."). This Court has consistently held that when a defendant is convicted of two murders, each murder may be used to aggravate the other without violating the defendant's double jeopardy rights. *See*, *e.g.*, *State v. Boyd*, 343 N.C. 699, 719-20, 473 S.E.2d 327, 338 (1996), *cert. denied*, 519 U.S. 1096, 136 L. Ed. 2d 722 (1997). Last, defendant argues that the trial court lacked jurisdiction to enter judgments of conviction against him because the short-form murder indictments failed to allege all elements of the offenses for which he was charged. This Court has repeatedly held that short-form murder indictments satisfy the requirements of our state and federal constitutions. *See*, *e.g.*, *State v. Hunt*, 357 N.C. 257, 278, 582 S.E.2d 593, 607, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003). We have considered defendant's arguments on these issues and decline to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[18] As required by section 15A-2000(d)(2), we next consider whether the record supports the aggravating circumstances found by the jury, whether the death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," and whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2007).

Following defendant's capital sentencing proceeding, the trial court submitted two aggravating circumstances for the jury's consideration: (1) the murder was committed while defendant was engaged in the commission of first-degree burglary, pursuant to section 15A-2000(e)(5), and (2) the murder was part of a course of conduct in which defendant engaged and that included the commission by defendant of other crimes of violence against other persons, pur-

suant to section 15A-2000(e)(11). The jury found both of these aggravating circumstances to exist beyond a reasonable doubt. Our review of the record indicates that both circumstances are fully supported by the evidence presented at trial. Moreover, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

In conducting our proportionality review, we determine whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.* § 15A-2000(d)(2). We compare this case to those in which we have determined the death penalty was disproportionate. This Court has held the death penalty to be disproportionate in eight cases: *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that this case is not substantially similar to any of these cases.

Here, defendant committed two murders. "This Court has never found a sentence of death disproportionate in a case where a defendant was convicted of murdering more than one victim." *State v. Meyer*, 353 N.C. 92, 120, 540 S.E.2d 1, 17 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 54 (2001). In addition, the murders occurred inside the home of one of the victims. We have previously observed that a murder in one's home is particularly shocking, "not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure." *State v. Brown*, 357 N.C. 382, 394, 584 S.E.2d 278, 285-86 (2003) (internal quotation marks omitted), *cert. denied*, 540 U.S. 1194, 158 L. Ed. 2d 106 (2004). Moreover, defendant was convicted of first-degree murder both under the felony murder rule and on the basis of malice, premeditation, and deliberation. "Although a death sentence may properly be imposed for convictions based solely on felony murder, a finding of premeditation and deliberation indicates a more calculated and cold-blooded crime for which the death penalty is more often appropriate." *State v. Taylor*, 362 N.C. 514, 563, 669 S.E.2d 239, 276

(2008) (citations and internal quotation marks omitted). We also consider the brutality of the murders. *State v. Duke*, 360 N.C. 110, 144, 623 S.E.2d 11, 33 (2005), *cert. denied*, 549 U.S. 855, 166 L. Ed. 2d 96 (2006). These murders involved the use of at least two semiautomatic assault rifles and a pistol against young, unarmed victims, resulting in multiple close range gunshot wounds to each victim's head or neck. Finally, this Court has determined that the section 15A-2000(e)(11) aggravating circumstance, standing alone, is sufficient to support a death sentence. *State v. Polke*, 361 N.C. 65, 77, 638 S.E.2d 189, 196 (2006), *cert. denied*, ––– U.S. ––––, 169 L. Ed. 2d 55 (2007).

This Court also compares the present case with cases in which we have found the death penalty to be proportionate. *State v. al-Bayyinah*, 359 N.C. 741, 762, 616 S.E.2d 500, 515 (2005), *cert. denied*, 547 U.S. 1076, 164 L. Ed. 2d 528 (2006). After carefully reviewing the record, we conclude that this case is more analogous to cases in which we have found the sentence of death proportionate than to the cases in which we have found it disproportionate or to the cases in which juries have consistently recommended sentences of life imprisonment. Although defense counsel presented evidence of several mitigating circumstances, including circumstances related to defendant's childhood and substance addiction, and although at least one or more jurors found several of these mitigating circumstances to exist, we are nonetheless convinced that the sentence of death here is not disproportionate.

Accordingly, we conclude that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error, and the death sentence recommended by the jury and imposed by the trial court is not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. DANE LOCKLEAR, JR.

No. 578A05

(Filed 28 August 2009)

1. Evidence— prior crimes or bad acts—murder—similar offense—distinct from joinder—admissibility

The trial court did not abuse its discretion in a prosecution for first-degree murder by admitting evidence of a prior murder. The decision about joinder of offenses does not necessarily determine the presence of a transactional connection between the offenses and does not determine the admissibility of evidence. Here, there were similarities between the murders and the 32 month period between the offenses is not too remote and goes to the weight of the evidence rather than the admissibility.

2. Evidence— prior crimes or bad acts—defendant's admission—convicted felon and prior murder—explanation of events—motive

There was no plain error in a first-degree murder prosecution where a statement was admitted from defendant in which he admitted being a convicted felon and being involved in a prior murder. The statements objected to were an integral part of defendant's explanation of events and were relevant to motive, and defendant did not show that the jury would have found him not guilty without the statement or that its admission constituted a fundamental error resulting in a miscarriage of justice.

3. Evidence— prior crimes or bad acts—drug-related—other evidence—no plain error

In light of the evidence against defendant, there was no plain error in a first-degree murder prosecution in the admission of a statement from defendant that he had been involved in drug-related activities.

4. Constitutional Law— Confrontation Clause—forensic reports—not prejudicial

The admission of forensics reports from a pathologist and dentist who did not testify violated the Confrontation Clause where the State did not show that either witness was unavailable or that defendant had a prior opportunity to cross-examine them. However, the evidence would not have influenced the verdict in

light of the other evidence and because the defendant was also found guilty under the felony murder rule (where the autopsy played no role).

5. Evidence— letter received by inmate—not authenticated—admissibility to show credibility

An unauthenticated letter in which defendant purportedly asked an incarcerated witness to change her story was otherwise irrelevant but admissible on redirect examination in response to defendant's attack on the inmate's credibility. The letter showed her willingness to come forward and cooperate. Even assuming error, such error was not prejudicial.

6. Homicide— second-degree murder—lesser-included offense—instruction denied

The trial court did not err in a first-degree murder prosecution by not giving the requested instruction on second-degree murder as a lesser-included offense where there was clear evidence supporting each element of first-degree murder, and defendant did not show that rage rendered him incapable of deliberate thought and the ability to reason. The only evidence of rage was from defendant's own statements. Moreover, the argument concerning premeditation and deliberation has no bearing on his conviction under the felony murder rule.

7. Homicide— felony murder—merger with assault—further felony of arson

The trial court did not err by submitting felony murder to the jury where defendant argued that the killing should have merged with the underlying assault, but there was also the underlying felony of arson.

8. Constitutional Law— effective assistance of counsel—conflict of interest—counsel defending ineffectiveness allegation

Defendant did not show ineffective assistance of counsel due to an alleged conflict of interest where a pretrial hearing was held concerning the withdrawal of two experts from the case. Defendant cannot fault defense counsel for privileged information disclosed by third parties, protected work product was not revealed, and delays were not solely the result of deficient performance by counsel.

9. Criminal Law— judge's comments—recusal—denied

There was no error in the denial of a motion to recuse where the judge's single reference to his past interaction with defendant did not demonstrate any personal bias or prejudice against defendant, and there was no evidence of a decision based on emotion rather than evidence.

10. Sentencing— capital—instructions—mental retardation

The trial court erred in a capital sentencing proceeding by not giving defendant's requested instruction that he would be sentenced to life without parole if the jury found mental retardation. The average jury may not understand what a finding of mental retardation will mean for a defendant.

Justice MARTIN dissenting.

Justice BRADY dissenting.

Justice NEWBY joins in the dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Robert F. Floyd, Jr. on 13 June 2005 in Superior Court, Robeson County, upon a jury verdict finding defendant guilty of first-degree murder. On 2 January 2008, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 8 September 2008.

Roy Cooper, Attorney General, by William B. Crumpler, Joan M. Cunningham, and Amy C. Kunstling, Assistant Attorneys General, for the State.

Staples S. Hughes, Appellate Defender, by Constance E. Widenhouse, Assistant Appellate Defender; and Janet Moore for defendant-appellant.

TIMMONS-GOODSON, Justice.

Defendant Dane Locklear, Jr. was indicted for one count each of first-degree murder, felonious larceny, burning of personal property, and first-degree arson. The case was tried capitally, and on 1 June 2005, the jury returned verdicts finding defendant guilty of the first-degree murder of Frances Singh Persad on the basis of malice, premeditation, and deliberation, and also under the felony murder rule on the bases of assault with a deadly weapon inflicting serious injury

and arson. The jury also found defendant guilty of misdemeanor larceny, burning of personal property, and first-degree arson. Following a mental retardation hearing, the jury found defendant was not mentally retarded. The capital sentencing hearing proceeded, after which the jury recommended a sentence of death.

Defendant appealed his capital conviction to this Court, and we allowed his motion to bypass the Court of Appeals as to his other convictions. We find no error in defendant's trial, but we vacate his death sentence and remand for a new sentencing hearing.

FACTUAL BACKGROUND

The State presented evidence that in the early morning hours of 27 February 2000, firefighters responded to reports of a fire at the residence of Frances Singh Persad at 52 Beck Street in Red Springs, North Carolina. When they arrived at the scene, firefighters found the home engulfed in flames. After extinguishing the fire, firefighters discovered the charred body of Persad lying on the floor of the front bedroom. A bloodied one-by-four board, a bed slat, lay next to her body. Persad's vehicle, a red Ford Mustang, was not at the home. The shotgun that Persad normally kept in her bedroom was also missing. The subsequent criminal investigation revealed the fire was intentionally set and that Persad died from carbon monoxide poisoning. Persad also sustained blunt-force injuries to her head and sharp-force injuries to her neck. Investigators soon focused their attention on defendant, whom Persad had befriended while he was a patient at Southeastern Regional Medical Center. Persad worked at the medical center as a psychiatric nurse, and her initial friendship with defendant had developed into a sexual relationship.

Several days later, on 1 March 2000, a land surveyor working in a rural wooded area in Robeson County discovered Ms. Persad's red Ford Mustang. The wooded area was near a canal with a dirt road beside it, known as "Canal Road." The Mustang was burned down to bare metal and was still smoking. Defendant's extended family resided in the area. Upon searching the area, police found defendant hiding in a nearby house.

Heather Justice testified on behalf of the State. Justice stated defendant was an acquaintance of her former boyfriend, John Campbell. Justice testified defendant sold Campbell a "very large black weapon," a gun, in exchange for "a little over 200 pieces of dope" worth "$200." Other witnesses established that this was the

same shotgun belonging to Persad. Justice further testified that defendant and Campbell arrived at her residence one Sunday early morning in February of 2000. Defendant was driving a red Mustang, and Campbell was sitting in the passenger seat of the vehicle. Campbell came into the house and asked whether defendant could use the bathroom. As defendant entered the residence, Justice noticed he appeared to have fresh blood on his hands and clothes. After defendant went into the bathroom, Justice asked Campbell "what was going on, what did he do—what was he bringing people with blood in my house for." Defendant left approximately ten minutes later.

The State introduced into evidence several statements defendant gave to law enforcement officers in which he confessed to killing Persad. One statement was audiotaped, while the second was videotaped. Defendant told Detective Ricky Britt of the Robeson County Sheriff's Office and several other law enforcement officers that Persad picked him up on the evening of 26 February 2000 after completing a second shift at the hospital. Persad drove them in her red Mustang to her home. Defendant and Persad were drinking in bed together after sexual intercourse when they began to argue. Although defendant could not recall the exact subject of their disagreement, defendant stated that Persad was angry with him because he had taken a shotgun from her house a few days earlier. The argument "upset" him, and Persad was "screaming" at him. Defendant told Detective Britt that "the next thing [he knew] is that [he] had grabbed a two by four that was in her room . . . and [] began beating her with it." According to defendant, Persad attempted to reach the telephone to call 911, but he beat her down. She said she "didn't want to die." Defendant continued to beat Persad in the head with the board until he believed she was dead. He checked her heartbeat, but "knew she was gone." She bled profusely, and defendant had "a lot of blood" on him. Defendant then set the curtains and couch on fire and fled the home. He drove Persad's Mustang to a river, where he attempted to wash the blood from his body and clothes. Defendant eventually drove to a rural area near Canal Road and burned the Mustang.

While confessing to Persad's murder, defendant confessed to a second killing that occurred several years earlier. Defendant told Detective Britt he killed a young woman named Cynthia Wheeler, who was a student at the University of North Carolina at Pembroke at the time of her disappearance in June of 1997. At that time, investigators found Wheeler's vehicle at the same location near the canal

where Persad's vehicle was discovered. Like Persad's Mustang, Wheeler's vehicle was burned down to bare metal. The skeletal remains of Wheeler's body were found several months later along the same canal, approximately one to two miles away from where Wheeler's burned vehicle was located. Defendant told Detective Britt that he and Wheeler engaged in sexual intercourse in her vehicle, but that Wheeler became angry when she discovered defendant was not wearing a condom. Wheeler scratched defendant's face, which "upset" him. Defendant beat Wheeler in the face, then allowed her to dress. Wheeler told defendant she intended to tell law enforcement officers that defendant raped her, then began to run away. Defendant caught her, then beat and choked her. Wheeler told him, "[p]lease don't do this." At some point, defendant realized he had "gone too far" and "tried to wake her up." He checked her pulse and heartbeat. When he realized Wheeler was dead, he dumped her body in a wooded area along the canal and burned her vehicle.

The jury found defendant guilty of the first-degree murder of Frances Persad on the basis of premeditation and deliberation, as well as under the felony murder rule, with both assault with a deadly weapon inflicting serious injury and arson as underlying felonies. The case proceeded to sentencing.

Defendant presented evidence of mental retardation at the sentencing hearing. Dr. Timothy Hancock, a clinical psychologist, testified as an expert in cognitive impairment or mental retardation. Dr. Hancock testified he considered defendant's case "a slam dunk for retardation" and that it was one of the few *pro bono* cases his clinic accepted every year "based on merit and the strength of the findings." Dr. Hancock testified defendant obtained a full scale IQ score of 68 on the Wechsler Adult Intelligence Scale ("WAIS") test he administered to defendant in January 2005. Dr. Hancock's testing also showed defendant's adaptive functioning was significantly deficient in social skills, communication skills, self-care, work skills, and community use. Dr. Hancock stated that, in his opinion, defendant was mentally retarded as defined by the North Carolina General Statutes.

Dr. Hancock also testified to earlier testing of defendant. In September 2004 defendant obtained a full scale IQ score of 69 under a WAIS IQ test administered by another clinical psychologist, Dr. Brad Fisher. Dr. Fisher determined that defendant had adaptive deficits in functional academics, self-care, community use, and work skills. Dr. Fisher concluded defendant was mentally retarded.

According to Dr. Hancock, defendant's school records confirmed he had significant impairment in the functional academics area. In 1984, when defendant was fourteen years old, he had an IQ score of 65 on the Slosson IQ test and an IQ score of 69 on the Stanford-Binet IQ test. The Slosson test results showed defendant had a mental age of nine years at the time. Defendant was placed in "educably [sic] mentally handicapped" classes in 1984. Dr. Hancock stated this was "the educational version of mentally retarded." Defendant dropped out of school at the age of sixteen when his mother died.

The State presented evidence of defendant's records from Southeastern Regional Mental Health, as well as his medical records from the Department of Correction. Although defendant had been previously diagnosed with antisocial personality disorder, post-traumatic stress disorder, depression, and cocaine, alcohol, and marijuana dependence, his intellectual functioning was diagnosed as borderline and not retarded. The State also presented evidence that defendant kept several books and letters in his prison cell. Records from the Department of Correction showed diagnoses of defendant's "malingering."

During the charge conference for the mental retardation issue, defense counsel requested the trial court to instruct jurors that, should they find defendant mentally retarded, he would be sentenced to life imprisonment without parole. Defense counsel argued "not to include that, you know, the jury would have no way of knowing what would happen to a defendant if he's found mentally retarded, whether he's going to go free or what's to happen to him. So, they need to know that he's going to—you know, he is still going to be in prison for life without parole. Defense counsel repeated the request:

> Where it says the law provides that no defendant who is mentally retarded shall be sentenced to death, and I ask the Court to also include an additional sentence or paraphrase after that that upon a finding that a defendant is mentally retarded, he will be sentenced to life without parole. As I said, I explained that so the jury would know that Mr. Locklear is going to be in jail for life without parole. Because otherwise, they don't know what's going to happen to him if they should find that he's mentally retarded. If they don't know what's going to happen to him, your Honor, that may cause a concern if they find him retarded, you know, what's to happen to him, where is he going to go.

The prosecutor argued the instruction was unnecessary. The following colloquy then occurred:

> THE COURT: As we discussed at the bench, is there anything to prevent counsel for either the State or defendant arguing the law as it relates to what type of punishment would be imposed upon a finding of either mental retardation or no mental retardation?
>
> [PROSECUTOR]: I'm not aware of any restriction.
>
> THE COURT: So, you're not arguing that the defendant cannot argue to the jury—
>
> [PROSECUTOR]: He can argue it.
>
> THE COURT: —if you find him mentally retarded, then he will be sentenced in accordance with the law of the state of North Carolina to life in prison without parole?
>
> [PROSECUTOR]: That's consistent.
>
> [DEFENSE COUNSEL]: I sort of beg to differ. To say that he's not to be sentenced to death doesn't explain to the jury what's going to happen to him. And if I get in an argument and say, well, if you find he's retarded, he gets a life sentence, here comes the instruction that says something different, that doesn't include that in there—
>
> THE COURT: There's two big different things.
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: One is something different and one doesn't include it in—
>
> [DEFENSE COUNSEL]: Well, if I say something that's not included in the instructions, then what's the jury going to think? They listen to the Court's instructions of law, and this said, you know, that's what the instruction—what's going to happen to him, and they don't know, and that's the big question. And that will be the big question, and that's a reasonable question for them to have, well, if I find him retarded, what's going to happen to him.

The trial court denied defendant's requested instruction.

The jury found defendant was not mentally retarded. Following the presentation of evidence on mitigating and aggravating circumstances, the jury recommended a sentence of death.

Additional facts will be provided as needed to discuss specific issues pertaining to defendant's assignments of error.

GUILT-INNOCENCE PHASE

Evidentiary question on the two murders

[1] Defendant argues the trial court erred in allowing the State to introduce evidence that defendant killed Cynthia Wheeler in 1997. Although defendant was charged with murdering both Persad and Wheeler, the offenses were not joined for trial. Defendant asserts that the severance of the cases indicates the underlying factual circumstances surrounding the murders were too dissimilar to allow joinder of the offenses. This dissimilarity, contends defendant, militates against introduction of the evidence of Wheeler's murder. Defendant argues the evidence of Wheeler's murder was introduced for no legitimate purpose other than to demonstrate his propensity to kill Persad, and that introduction of the evidence unduly prejudiced him, requiring a new trial.

Defendant concedes that admission of evidence of a prior offense under Rule of Evidence 404(b) differs from joinder of offenses. *See*, *e.g.*, *State v. Greene*, 294 N.C. 418, 423, 241 S.E.2d 662, 665 (1978) (noting that whether offenses may be properly joined is a separate question from whether evidence from one case may be properly admitted at the trial of the other). Although the decision to join offenses for trial often involves considerations similar to those reviewed when determining whether to admit evidence of a prior offense under Rule 404(b), the decision to join or not join offenses does not determine admissibility of evidence under Rule 404(b). *State v. Cummings*, 326 N.C. 298, 308-11, 389 S.E.2d 66, 72-73 (1990) (holding that, although the offenses were not joined for trial, the trial court properly admitted evidence of one murder at the trial of the other under Rule 404(b)); *State v. Corbett*, 309 N.C. 382, 388-89, 307 S.E.2d 139, 144 (1983) (determining that joinder of the offenses, although improper, was not prejudicial in part because "[e]vidence of each of these offenses would have been admissible in the separate trials of the others in order to prove the identity of the assailant"). Moreover, the decision to join two or more offenses for trial is discretionary and does not necessarily indicate the lack of a transactional connection between the offenses. *See* N.C.G.S. § 15A-926(a) (2007); *State v. Chapman*, 342 N.C. 330, 342-43, 464 S.E.2d 661, 668 (1995) (noting that the decision to consolidate for trial offenses having a transactional connection is within the discretion of the trial court), *cert.*

denied, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996). Thus, although the offenses may be sufficiently connected such that joinder would be permissible, the trial court may properly decline to consolidate them for trial. *See* N.C.G.S. § 15A-926(a). Defendant does not contest the trial court's decision to try the two murders separately. We therefore do not agree with defendant that the failure to consolidate the two offenses required exclusion of all evidence of Wheeler's murder. We now examine whether the evidence was otherwise properly admitted.

Rule of Evidence 404 provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Id. § 8C-1, Rule 404(b) (2007). Rule 404(b) is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Thus, as long as the evidence of other crimes or wrongs by the defendant " 'is relevant for some purpose *other than* to show [the] defendant['s] . . . propensity' " to commit the charged crime, such evidence is admissible under Rule 404(b). *Id.* at 279, 389 S.E.2d at 54 (quoting *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

Here, the trial court noted the following similarities between the murders:

> [Both victims are] females; that an argument arose between the Defendant and each of the victims during sexual intercourse, or at or around the time of sexual intercourse. That the Defendant beat them with both his hands and at some point—struck them with his hands during the argument. I do note that he further testified and his statement further indicated—the oral and video statement, he further hit Ms. [Persad] with a two-by-four. And I think in both instances he checked the pulse of the victims, or checked to see if they were, in fact, deceased or dead, then he made efforts to dispose of the bodies.

> In Ms. Wheeler's case he took the body on the hood of a vehicle to—off of Canal Road and disposed of it in the woods. And in Ms. [Persad's] case he set the house afire. Both instances, according to his statement, he indicated he had just lost control, in effect, blacked out. As to both of the victim's vehicles, they were burnt off or near Canal Road within 100 to 200 feet of each other. That the death of Cynthia Wheeler occurred on or about June of 1997. That the death of [Frances Persad] occurred on or about February 27, the year 2000. That the proximity and time between the two—or the amount of time between the two alleged deaths and murders is not so remote as to diminish the probative value.

The trial court further noted that the arguments between defendant and the victims arose as a result of alleged misconduct on the part of defendant. The trial court ruled the evidence of Wheeler's death was admissible for purposes of showing defendant's knowledge, plan, opportunity, intent, *modus operandi*, and motive to kill Persad. The trial court also determined the evidence was more probative than prejudicial.

Although defendant argues the murders are temporally and factually distinct from one another, the trial court's findings indicate significant similarities between the deaths of the victim and Wheeler. As for the thirty-two month time lapse between the deaths, "remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) (citing *State v. Smoak*, 213 N.C. 79, 93, 195 S.E. 72, 81 (1938)); *see also State v. Peterson*, 361 N.C. 587, 600-03, 652 S.E.2d 216, 226-27 (2007)) (holding that, when there were significant similarities between the death of the defendant's wife and the death of a woman sixteen years earlier with whom the defendant had a close personal relationship, the trial court did not abuse its discretion by admitting evidence of the prior death, even though the defendant was never criminally charged with the earlier death), *cert. denied*, —— U.S.——, 170 L. Ed. 2d 377 (2008).

Defendant argues that, even if admissible, the evidence was excessively prejudicial, requiring its exclusion under Rule of Evidence 403. We review a trial court's decision to admit or exclude evidence under Rule 403 for abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citing *Peterson*, 361 N.C. at 602-03, 652 S.E.2d at 227). We reverse the trial court only when " 'the court's

ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *Peterson*, 361 N.C. at 602-03, 652 S.E.2d at 227 (citations and internal quotation marks omitted)). " 'In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record.' " *Id.* (quoting *Peterson*, 361 N.C. at 603, 652 S.E.2d at 227 (citations and internal quotation marks omitted)). We hold the trial court did not abuse its discretion in admitting evidence of the Wheeler murder.

Defendant assigns error to four other instances in which he asserts the trial court erroneously admitted evidence of other prior bad acts. The objectionable evidence includes: (1) defendant's videotaped statement in which he mentions being a convicted felon; (2) defendant's audiotaped statement in which he identifies a certain mobile home as one where he sold drugs; (3) testimony by a witness that defendant sold the shotgun he took from Persad in exchange for illegal drugs; and (4) testimony by a detective that a visitor attempted to smuggle cocaine and marijuana to defendant while he was being held at the sheriff's office. Defendant contends the evidence of his criminal record and drug-related activities was irrelevant to any material issue at trial and unfairly prejudicial. Defendant asserts that the cumulative prejudicial effect of these errors warrants a new trial. We disagree.

To the extent defendant failed to object to introduction of much of the evidence he now contends was inadmissible, or objected on grounds other than those now argued on appeal, he has waived his right to appellate review other than for plain error. We reverse for plain error only in the most exceptional cases, *see State v. Garcell*, 363 N.C. 10, 35-36, 678 S.E.2d 618, 634 (2009) (quoting *State v. Raines*, 362 N.C. 1, 16, 653 S.E.2d 126, 136 (2007)), and only when we are convinced that the error was either a fundamental one resulting in a miscarriage of justice or one that would have altered the jury's verdict. *See id.* at 35-36, 678 S.E.2d at 634-35.

We now examine each of the four instances in turn. The first instance arises from defendant's videotaped statement in which he confesses to killing Wheeler. In the statement, defendant describes how Wheeler became angry with him during sexual intercourse when she discovered he was not wearing a condom as he had promised to do. Wheeler scratched his face, which "upset" him. He beat her in the face in the back seat of the car, but then stopped and allowed her to dress. As she was leaving the vehicle, Wheeler told defendant she was

going to tell law enforcement that defendant raped her. She then ran away. Wheeler's threat angered and concerned defendant, because he believed that, as she was a college student and he was already a convicted felon, law enforcement "would not believe [him] over her."

[2] Defendant contends the evidence that he was a convicted felon was improperly admitted because evidence of prior convictions is inadmissible when the defendant does not testify. *See* N.C.G.S. § 8C-1, Rule 609 (2007) (permitting admission of evidence of prior convictions when the defendant testifies); *State v. Badgett*, 361 N.C. 234, 247, 644 S.E.2d 206, 214 (stating that "it is error to admit evidence of the defendant's prior conviction when the defendant does not testify" (citations omitted)), *cert. denied*, —— U.S. ——, 169 L. Ed. 2d 351 (2007). At trial, however, defendant only objected to the evidence on the ground it violated Rule 404(b). Defendant is therefore limited to plain error review of this argument. We conclude defendant has failed to show that the jury would have found him not guilty of murdering Persad absent his statement in the videotape that he was a convicted felon or that admission of this evidence constituted fundamental error resulting in a miscarriage of justice.

Defendant further asserts, as he did at trial, that admission of the evidence violated Rule of Evidence 404(b). The trial court overruled defendant's objection. Defendant argues the evidence only related to the Wheeler case and was irrelevant to the murder of Persad. We do not agree. Defendant's status as a convicted felon was an integral part of his explanation regarding the sequence of events and his motive in killing Wheeler. Wheeler threatened to accuse him of rape, and defendant believed law enforcement would discount his version of events because of his prior conviction. Wheeler's threat angered and concerned defendant, whereupon he chased her down and killed her. This evidence, in turn, was probative of defendant's murder of Persad insofar as it tended to show both defendant's possible motive in killing Persad—to prevent her from reporting the theft of her shotgun to police—and his *modus operandi*. We moreover conclude that, even if erroneously admitted, such admission did not prejudice defendant.

[3] The next three instances of admission of evidence to which defendant has assigned error concern his involvement in drug-related activities. As noted above, this evidence included that defendant once sold drugs, that he sold the shotgun belonging to Persad for drugs, and that one of his visitors while he was at the sheriff's office

attempted to smuggle cocaine and marijuana to him by hiding the drugs in some food. Defendant, however, either did not object to admission of the evidence, or failed to state any grounds for his objection. He has therefore failed to preserve these assignments of error for review other than for plain error. *See Garcell*, 363 N.C. at 35, 678 S.E.2d at 634. In light of the evidence against defendant, we conclude that admission of the evidence of defendant's drug-related activities would not have influenced the jury's verdict. We therefore overrule these assignments of error.

Crawford issue of admitting opinion evidence

[4] Defendant argues the trial court erred in admitting opinion testimony as to the cause of Wheeler's death rendered by a non-testifying pathologist and opinion testimony from a non-testifying dentist about the identity of Wheeler's remains. Although we agree that admission of the testimony violated the dictates of *Crawford* and was therefore erroneous, we find such error harmless beyond a reasonable doubt.

The State tendered John D. Butts, M.D., the Chief Medical Examiner for North Carolina, as an expert in the field of forensic pathology. Dr. Butts testified as to State's Exhibit 101, which Dr. Butts identified as a copy of an autopsy report for Cynthia Wheeler. The autopsy report was prepared by Karen Chancellor, M.D., a forensic pathologist who performed the autopsy on Wheeler's body in 1997. Dr. Butts testified that, according to the autopsy report prepared by Dr. Chancellor, the cause of Wheeler's death was blunt force injuries to the chest and head. Dr. Butts also testified to the results of a forensic dental analysis performed by Dr. Jeffrey Burkes, a consultant on the faculty of the University of North Carolina School of Dentistry. The forensic dental analysis was included in the autopsy report. Dr. Butts stated that, by comparing Wheeler's dental records to the skeletal remains, Dr. Burkes positively identified the body as that of Wheeler. Neither Dr. Chancellor nor Dr. Burkes testified.

Defense counsel objected to Dr. Butts's testimony regarding Wheeler's autopsy, as well as to admission of the autopsy report, on the grounds that, *inter alia*, admission of the evidence violated defendant's Sixth Amendment right to confront the witnesses against him. The trial court overruled the objections. Defendant argues the trial court erred in admitting opinion testimony by non-testifying witnesses as to the cause of Wheeler's death and the identity of her remains. We agree, but determine that admission of the evidence did not prejudice defendant.

The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004); *State v. Lewis*, 361 N.C. 541, 545, 648 S.E.2d 824, 827 (2007). The State argues the autopsy report was not "testimonial" and therefore, is not barred by the Confrontation Clause. However, the United States Supreme Court squarely rejected this argument in the recent case of *Melendez-Diaz v. Massachusetts*, ––– U.S. –––, 129 S. Ct. 2527, ––– L. Ed. 2d ––– (2009). There, the defendant objected on *Crawford* grounds to the introduction of a forensic analysis performed by a non-testifying analyst. The evidence at issue identified a substance seized by law enforcement officers and linked to defendant as cocaine. The Court determined that forensic analyses qualify as "testimonial" statements, and forensic analysts are "witnesses" to which the Confrontation Clause applies. *See id.* at –––, 129 S. Ct. at 2532, ––– L. Ed. 2d at –––. The Court specifically referenced autopsy examinations as one such kind of forensic analyses. *See id.* at –––, n.5, 129 S. Ct. at 2536, n.5, ––– L. Ed. 2d at –––. Thus, when the State seeks to introduce forensic analyses, "[a]bsent a showing that the analysts [are] unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them" such evidence is inadmissible under *Crawford*. *Id.* at –––, 129 S. Ct. at 2532, ––– L. Ed. 2d at –––; *see also State v. Watson*, 281 N.C. 221, 229-32, 188 S.E.2d 289, 294-96 (holding the trial court erred in admitting evidence of the cause of the victim's death contained in the victim's death certificate), *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972).

Here, the State sought to introduce evidence of forensic analyses performed by a forensic pathologist and a forensic dentist who did not testify. The State failed to show that either witness was unavailable to testify or that defendant had been given a prior opportunity to cross-examine them. The admission of such evidence violated defendant's constitutional right to confront the witnesses against him, and the trial court therefore erred in overruling defendant's objections. We must now determine whether admission of the evidence was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2007) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless . . . it was harmless beyond a reasonable doubt."); *Lewis*, 361 N.C. at 549, 648 S.E.2d at 830.

The evidence erroneously admitted tended to establish two facts: (1) positive identification of Wheeler's body; and (2) the cause of Wheeler's death. Neither fact was critical, however, to the State's case against defendant for the murder of Persad. The State presented copious evidence that defendant killed Persad, including defendant's confessions to the crime. The State also presented other evidence of Wheeler's murder. Defendant admitted he killed Wheeler by beating and choking her to death and that he then burned her vehicle. We conclude the erroneously admitted evidence regarding Wheeler's cause of death and the identification of her body would not have influenced the jury's verdict. *See Watson*, 281 N.C. at 233, 188 S.E.2d at 296 (determining that, in light of the overwhelming evidence of the victim's murder by the defendant, "the minds of an average jury would not have found the evidence less persuasive had the conclusory evidence contained in the certified copy of the death certificate [of the victim] been excluded. The admission of the evidence contained in the certified copy of the death certificate was at most harmless error beyond a reasonable doubt." (citations omitted)).

In addition, as discussed above, the State presented evidence of Wheeler's murder to show defendant's knowledge, plan, opportunity, intent, *modus operandi*, and motive to commit the premeditated and deliberate murder of Persad. However, the jury also found defendant guilty under the felony murder rule, for which the erroneously admitted autopsy evidence regarding Wheeler played no role. Thus, even assuming *arguendo* that the wrongful admission of the autopsy evidence influenced the jury to find that defendant murdered Persad with premeditation and deliberation, that evidence would not affect the jury's verdict of guilt under the felony murder rule. Defendant has failed to show prejudice arising from this error.

Overruled objections to re-direct examination of a witness

[5] Defendant contends the trial court committed prejudicial error by overruling his objection to the State's re-direct examination of Heather Justice. Justice testified regarding defendant's exchange of Persad's shotgun for drugs, and his appearance at her home at the approximate time of Persad's death. Defendant was driving a red Ford Mustang and was spattered with fresh blood at the time.

Defense counsel cross-examined Justice regarding her previous criminal convictions, her inability to recall dates, and prior inconsistencies in her statements. At the time Justice testified, she was incarcerated for the manslaughter conviction of her boyfriend Campbell.

Upon re-direct, the State questioned Justice about a letter she received while serving her sentence. Over defendant's objections, Justice testified she believed the letter came from defendant and that in his letter, defendant asked her to "change [her] story." Defendant contends the letter was never authenticated as his, and its contents were therefore inadmissible.

However, "[t]he State has the right to introduce evidence to rebut or explain evidence elicited by defendant although the evidence would otherwise be incompetent or irrelevant." *State v. Johnston*, 344 N.C. 596, 605, 476 S.E.2d 289, 294 (1996) (citations omitted). "Such evidence is admissible to dispel favorable inferences arising from defendant's cross-examination of a witness." *Id.* at 605-06, 476 S.E.2d at 294 (citations omitted). Here, defense counsel sought to impeach Justice by cross-examining her regarding her manslaughter conviction and inability to recall certain dates. The State's re-direct attempted to restore Justice's credibility with the jury in part by demonstrating her willingness to come forward and cooperate with law enforcement. Thus, while evidence of the letter was otherwise irrelevant, it was admissible in response to defendant's attack on Justice's character during cross-examination. *See id.* We moreover conclude that, even assuming error, such error was not prejudicial. We overrule these assignments of error.

Denial of instruction on second-degree murder

[6] Defendant asserts there was evidence from which the jury could have found him guilty of second-degree murder, and the trial court therefore erred in failing to submit the requested instruction to the jury. According to defendant's statements, he lost control while arguing with Persad and "the next thing [he knew]" he "had grabbed a two by four that was in her room . . . and began [] beating her with it." Defendant continued to beat Persad in the head until he believed she was dead, then set fire to the residence. Defendant argues the jury could find from this evidence that he was provoked to a state of blind rage by his argument with Persad, that he beat her while in that state of rage, and that he then set fire to the house believing she was already dead. Defendant contends the evidence justified submission of second-degree murder. We do not agree.

The well-established rule for submission of second-degree murder as a lesser-included offense of first-degree murder is: "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, includ-

ing premeditation and deliberation, 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." *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203-04, 344 S.E.2d 775, 781-82 (1986). The evidence must be sufficient to allow a rational jury to find the defendant guilty of the lesser offense and to acquit him of the greater. *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841 (quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401 (1980)), *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995).

Here, there was clearly evidence to support each of the elements of premeditated and deliberate murder. The determinative question then becomes whether there was sufficient evidence to negate these elements such that the jury should have been allowed to consider second-degree murder. *See Strickland*, 307 N.C. at 293, 298 S.E.2d at 658. "The fact that the defendant was angry or emotional at the time of the killing will not negate the element of deliberation unless such anger or emotion was strong enough to disturb the defendant's ability to reason." *State v. Solomon*, 340 N.C. 212, 222, 456 S.E.2d 778, 785 (citation omitted), *cert. denied*, 516 U.S. 996, 133 L. Ed. 2d 438 (1995).

> Thus, evidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his ability to reason. Without evidence showing that the defendant was incapable of deliberating his actions, the evidence could not support the lesser included offense of second-degree murder.

Id.; *see also State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 596 (1992) (indicating that a perpetrator " 'may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time' " (quoting *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991))).

Defendant has failed to show that his rage was of such magnitude that it rendered him incapable of deliberate thought and ability to reason. The evidence showed that defendant struck Persad numerous times with a board, then set fire to the house. Under the "felled victim" theory of premeditation and deliberation, "when numerous wounds are inflicted, the defendant has the opportunity to premedi-

tate and deliberate from one shot [here, a blow] to the next." *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). Even when a weapon " 'is capable of being fired rapidly, some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger.' " *Id.* As defendant physically beat Persad with a board, as opposed to firing a gun, he had even more time for thought and deliberation between each blow.

We moreover note that the only evidence of defendant's "blind rage" comes from his own statements to law enforcement. In *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998), we concluded the defendant was not entitled to an instruction on second-degree murder when the State produced evidence that he set fire to an apartment building to destroy evidence of his earlier mail theft from residents. *Id.* at 463-64, 496 S.E.2d at 363. This Court held that the defendant's "self-serving statement that he set the fire as a prank," made shortly after the crime, "was not sufficient to support an instruction on second-degree murder." *Id.* at 464, 496 S.E.2d at 363. In addition, defendant's argument goes only to his conviction of premeditated and deliberate murder, and has no bearing on his conviction of first-degree murder under the felony murder rule. We overrule this assignment of error.

Submitted first-degree felony murder based on felonious assault

[7] Defendant argues the trial court erred in submitting first-degree felony murder to the jury based on felonious assault as the underlying felony. Defendant asserts the evidence shows his assault of Persad with a board inflicted injuries that proximately led to her death. Defendant contends the assault should have merged with the murder charge and could not be used separately as a basis for felony murder. Assuming *arguend*o that defendant's position is correct, he cannot show reversible error. The jury convicted defendant of first-degree murder based on premeditation and deliberation, as well as under the felony murder rule, with both felonious assault with a deadly weapon inflicting serious injury and arson as the underlying felonies. Defendant's argument has no bearing on his conviction of premeditated and deliberate murder or felony murder based on arson. We overrule these assignments of error.

Ineffective Assistance of Counsel

[8] Defendant contends he received ineffective assistance of counsel based on several grounds. First, defendant argues an actual conflict

of interest caused his counsel to disclose privileged information to the State, which the State then used against defendant. This asserted conflict arose in September of 2004, when the Capital Defender, Robert Hurley, sent a facsimile message to Judge Robert F. Floyd, Jr., the Senior Resident Superior Court Judge for Robeson County, expressing his concern over the withdrawal of two experts from defendant's case. Mr. Hurley had no prior involvement in defendant's case, in that counsel for defendant, William Davis and Donald Bullard, were appointed in March of 2000, before formation of the Office of Indigent Defense Services ("IDS") in July of 2001. Although both Mr. Davis and Mr. Bullard were experienced capital defense attorneys, neither had chosen to be included on the IDS roster. Mr. Hurley included in his facsimile to Judge Floyd copies of the two letters of withdrawal. The experts, psychiatrist Moira Artigues, M.D., and psychologist James Hilkey, Ph.D., stated in their letters that they were withdrawing because of trial counsel's failure to communicate and to supply them with information they had requested to review in order to render an opinion on defendant's case. The letters from Drs. Artigues and Hilkey were addressed to William Davis, but they were copied to Mr. Hurley. In his message to Judge Floyd, Mr. Hurley stated that the withdrawal of defendant's experts raised questions as to the adequacy of trial counsel's preparation for the case and the availability of alternative experts.

On 28 September 2004, one day after receiving the facsimile from Mr. Hurley, Judge Floyd held a hearing with defense counsel Davis and Robeson County district attorney L. Johnson Britt to determine defense counsel's preparedness for trial. Mr. Davis stated that his decision not to supply Drs. Artigues and Hilkey with the requested information, including "discovery and investigative reports," was deliberate "because they don't need the information to do an evaluation, a medical evaluation" and that the experts had "all the information . . . that I wanted them to have and I think they were entitled to." Mr. Davis stated that Drs. Artigues and Hilkey had never previously informed him that they felt unprepared to testify in defendant's case, and that, but for the now-absent experts, the case was ready for trial. Mr. Davis also complained that the letter from Mr. Hurley contained "information . . . privileged to our defense. He's got stuff in there about evaluations, substance abuse. And that's privileged information that he shouldn't—if he got it, he shouldn't be disclosing it."

Judge Floyd held a second, closed hearing on the matter to explore Mr. Hurley's intervention in the case. Defendant was present at

the hearing, along with defense counsel Davis and Bullard, as well as Mr. Hurley, district attorney Britt, Dr. Artigues, Dr. Hilkey, and several other persons. Judge Floyd cautioned all parties that, should they find it necessary to "disclose information that is pertinent to the defense of Mr. Locklear, [to] put the Court on notice prior to that disclosure" so that such discussions could proceed outside the presence of Mr. Britt or anyone representing the State. Mr. Britt was absent from a portion of the hearing for this reason. Judge Floyd also expressed his belief that the resignation letters from Drs. Artigues and Hilkey contained no "information, in and of itself, in light of their resignation . . . that was at that point prohibited to be disclosed." At the hearing, Mr. Davis repeated his position that he had given Drs. Artigues and Hilkey "all the information that I had and that I intended for them to have as Mr. Locklear's attorney, and that I felt they should have."

Defendant asserts that, in revealing the letters from Mr. Hurley, Dr. Artigues, and Dr. Hilkey to district attorney Britt, and referring to them at the hearings, his counsel revealed confidential and privileged communications to the prosecution without authorization. These communications, argues defendant, contained "counsel's mental processes and work product on sensitive mental health issues." Defendant claims the State later used this information to attack the credibility of defendant's expert at the sentencing hearing. According to defendant, his attorneys "threw him under the bus" in an effort to protect themselves from accusations of dilatory performance. We are not persuaded.

First, it is unclear from the record who first disclosed the facsimile from Mr. Hurley, along with its accompanying letters from Drs. Artigues and Hilkey, to Mr. Britt. Defendant argues it was Mr. Davis, while the State contends it was Judge Floyd. While the transcript shows that Judge Floyd distributed copies of Mr. Hurley's facsimile to Mr. Davis and Mr. Britt at the 28 September hearing, it is silent on whether Mr. Britt had already obtained the facsimile by then. It seems unlikely that Mr. Davis would have given the facsimile to Mr. Britt, given his complaint to Judge Floyd that Mr. Hurley should not have included information in the letter Mr. Davis considered privileged. Defendant cannot fault defense counsel for privileged information disclosed by third parties.

Moreover, we do not conclude that disclosure of the privileged information prejudiced defendant. Although the letter from Mr.

Hurley included the statement that "defendant had an IQ of 65 when he was 14 years of age," this same information was disclosed in an affidavit attached to defendant's motion for a pretrial mental retardation hearing filed less than a week after Mr. Hurley sent the facsimile. References to defendant's history of substance abuse would also have worked no prejudice, as the prosecution was already aware that defendant had significant substance abuse issues. Defendant obtained other experts in time for his trial and did not rely on either Dr. Artigues or Dr. Hilkey. Defendant has failed to show that the outcome of his trial would have been different had the State not known of the experts' resignations and their reasons for doing so. *State v. Gainey*, 355 N.C. 73, 113, 558 S.E.2d 463, 488 (noting that, under *Strickland*, a defendant must show "he was prejudiced by his trial counsel's deficient performance to such a degree that 'but for counsel's unprofessional errors, the result of the proceeding would have been different' " (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984))), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002).

The letters contained no protected work product prepared by defense counsel. Nor do we conclude Mr. Davis revealed protected work product when he responded to questioning by Judge Floyd. Mr. Davis appropriately responded to the trial court's questions in general terms. Although Mr. Davis noted he had "reasons" for not giving the appointed experts all the requested information, he did not reveal what his reasons were, or otherwise disclose trial strategy. *See State v. Prevatte*, 356 N.C. 178, 218, 570 S.E.2d 440, 462 (2002) (concluding that, "[b]ecause the attorneys described in general terms what had been done, rather than disclosing any of their mental processes, there was no work product violation" (citation omitted)), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). Further, to the extent that the majority of defendant's argument focuses on prejudice arising at the sentencing proceeding, our disposition of his case renders these arguments moot.

Defendant also cites delay in his case as grounds for ineffective assistance. However, defendant does not demonstrate that the delay was due solely to deficient performance on the part of his counsel, nor that any delay prejudiced his case. Unfortunately, delay in capital cases is not unusual, particularly in Robeson County. Judge Floyd noted the "overwhelming number of capital cases to be tried here in Robeson County." While Judge Floyd expressed his concern over defense counsel's lack of communication with Dr. Artigues and Dr.

Hilkey, he found "[t]here has been no showing that any lapse of time and delay that has occurred has visited any prejudice upon [defendant] at this time." Defendant indicated at the hearing that he desired continued representation from Mr. Davis and Mr. Bullard. Judge Floyd predicted that, with the necessary delay of obtaining new experts, defendant's case would not be "tried [until] probably in the first half of [2005]." Defendant's case was tried in April of 2005.

Defendant assigns error to a number of further instances he contends constitute ineffective assistance of counsel. We have reviewed these contentions carefully and find them unpersuasive. We conclude defendant has failed to show he received ineffective assistance of counsel.

Recusal

[9] Defendant argues prejudicial error occurred when his motion to recuse Judge Floyd was denied. Defendant contends Judge Floyd displayed "irrefutable bias" against defendant when he apparently told defense counsel in an unrecorded bench conference during argument on the defense motion for a pretrial hearing on mental retardation there was "no way" he would find defendant mentally retarded, based in part on his previous interactions with defendant. Judge Floyd denied the motion for a pretrial hearing on mental retardation. Defense counsel moved to recuse Judge Floyd from presiding over defendant's motion for a pretrial mental retardation hearing and the trial of defendant's case. Judge Floyd subsequently withdrew his ruling on the motion for a pretrial hearing on mental retardation and reset that motion, along with the recusal motion, before another judge, who denied both motions.

Upon motion by the defendant, judges must disqualify themselves from presiding over a criminal trial if they are "[p]rejudiced against the moving party or in favor of the adverse party." N.C.G.S. § 15A-1223 (2007). The Code of Judicial Conduct also suggests recusal when the impartiality of a judge "may reasonably be questioned . . . where [] [t]he judge has a personal bias or prejudice concerning a party." Code Jud. Conduct Canon 3C (1)(a), 2008 Ann. R. N.C. 475, 480.

Judge James F. Ammons, Jr. considered defendant's motions and denied them. Judge Ammons found as fact that: Judge Floyd made his remark "only after . . . reviewing all of the evidence and arguments" by counsel; after reviewing the same documents, he agreed with

Judge Floyd's conclusion that defendant was not entitled to a pretrial hearing based on the evidence; Judge Floyd never said he would not allow evidence on the issue of mental retardation to be presented to the jury; Judge Floyd was "extremely familiar with" the case, having heard many of the motions, and review of the transcripts of those motions demonstrated Judge Floyd's "knowledge of the case," as well as "his fairness and impartiality"; recusal of Judge Floyd would cause needless delay in an already delayed case; and there were no grounds for recusal.

We conclude that Judge Floyd's single reference to his past interaction with defendant does not demonstrate any personal bias or prejudice against defendant. Nor do we discern any evidence that Judge Floyd's decision to deny the motion for a pretrial mental retardation hearing was based on emotional, rather than evidentiary, considerations. Judge Floyd's denial of the pretrial hearing on mental retardation did not affect defendant's ability to present his mental retardation claim to the jury. We overrule this assignment of error.

Jury Selection

Defendant presents several arguments regarding jury selection. Defendant contends the trial court improperly limited his questioning of prospective jurors about their views on mental retardation. The bulk of defendant's argument addresses the asserted need for a new sentencing hearing because of these alleged errors. In light of our decision to grant defendant a new sentencing hearing, we do not address these issues. To the extent defendant contends the jury selection errors were structural, requiring a new trial, we have considered these arguments and find them unpersuasive.

SENTENCING PROCEEDING

[10] Defendant assigns error to the trial court's instructions to the jury on mental retardation. Specifically, defendant contends the trial court should have instructed the jury that a verdict finding him mentally retarded would result in a sentence of life imprisonment without parole. After careful consideration, we agree with defendant that heightened attention to procedural safeguards is necessary in cases of alleged mental retardation in order to protect against the inadvertent and unconstitutional execution of mentally retarded defendants. We conclude the trial court erred in refusing to give defendant's requested instruction, and that defendant was prejudiced thereby. We therefore remand for a new sentencing hearing.

Execution of the mentally retarded violates the Eighth Amendment's prohibition against excessive punishment. *See Atkins v. Virginia*, 536 U.S. 304, 321, 153 L. Ed. 2d 335, 350 (2002), *cited with approval in State v. Poindexter*, 359 N.C. 287, 292, 608 S.E.2d 761, 765 (2005). Even before the United States Supreme Court announced its decision in *Atkins*, the North Carolina General Assembly amended our capital punishment statutes to exempt mentally retarded defendants from receiving the death penalty. *See* Act of July 25, 2001, ch. 346, sec. 1, 2001 N.C. Sess. Laws 1038, 1038 (adopting N.C.G.S. § 15A-2005). Accordingly, our General Statutes now provide that "no defendant who is mentally retarded shall be sentenced to death." N.C.G.S. § 15A-2005(b) (2007). North Carolina's enactment of a prohibition on executing the mentally retarded was part of a national consensus, reflected by similar enactments in state legislatures across the country, that "our society views mentally retarded offenders as categorically less culpable than the average criminal." *Atkins*, 536 U.S. at 316, 153 L. Ed. 2d at 347. The Court in *Atkins* noted that "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." *I*d. at 317, 153 L. Ed. 2d at 347-48.

The task of identifying mentally retarded offenders can be a challenging one. *See id.* Our General Statutes define mental retardation as "[s]ignificantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18." N.C.G.S. § 15A-2005(a)(1)(a) (2007). "Significantly subaverage general intellectual functioning" is "[a]n intelligent quotient of 70 or below." *Id.* § 15A-2005(a)(1)(c) (2007). "Significant limitations in adaptive functioning" are defined as "[s]ignificant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills." *Id.* § 15A-2005(a)(1)(b) (2007).

Procedurally, upon motion by a defendant, the trial court in its discretion may order a pretrial determination of mental retardation. *See id.* § 15A-2005(c) (2007). The State must consent to such a hearing, at which the defendant "has the burden of production and persuasion to demonstrate mental retardation by clear and convincing evidence." *Id.* If the defendant shows to the satisfaction of the trial court that he is mentally retarded, the case may only proceed non-capitally. *Id.* Such procedure sensibly avoids the needless burden of

capital proceedings for those defendants whose mental retardation is clearly and convincingly evident.

If the trial court determines that a defendant has failed to show mental retardation by clear and convincing evidence, the defendant may seek a jury determination of mental retardation during the sentencing hearing. Subsection 15A-2005(e) provides:

> If the court does not find the defendant to be mentally retarded in the pretrial proceeding, upon the introduction of evidence of the defendant's mental retardation during the sentencing hearing, the court shall submit a special issue to the jury as to whether the defendant is mentally retarded as defined in this section. This special issue shall be considered and answered by the jury prior to the consideration of aggravating or mitigating factors and the determination of sentence. If the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment.

N.C.G.S. § 15A-2005(e) (2007). Thus, the jury often has the unenviable task of identifying "gray area" defendants; that is, those offenders who are not *clearly* mentally retarded but who may nevertheless present enough evidence of mental retardation to render them ineligible for the death penalty. *See Atkins*, 536 U.S. at 317, 153 L. Ed. 2d at 348 (noting that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus"). Notably, the defendant's burden of production and persuasion to show mental retardation to the jury at the sentencing stage is lower than that required at the pretrial hearing stage. The defendant must only "demonstrate mental retardation to the jury by a preponderance of the evidence." N.C.G.S. § 15A-2005(f) (2007). The lesser burden of proof indicates legislative awareness of "gray area" defendants and lawmakers' intent to protect against the inadvertent execution of mentally retarded offenders.

Once evidence of mental retardation is presented to the jury at the sentencing proceeding, the trial court must "give appropriate instructions." *Id.* § 15A-2000(b) (2007). The significance of the requirement for "appropriate instructions" on the issue of mental retardation is apparent for several reasons. As previously noted, a jury finding of mental retardation renders the case noncapital. *Id.* § 15A-2005(e) ("If the jury determines the defendant to be mentally

retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment."). Identifying mentally retarded offenders can be an inherently difficult task requiring particular attention to procedural safeguards. *See Atkins*, 536 U.S. at 317, 153 L. Ed. 2d at 348 (noting that "some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards"). The difficulty of this task increases the likelihood that mentally retarded offenders will be unconstitutionally sentenced to death. *See id.* at 321, 153 L. Ed. 2d at 350 ("Mentally retarded defendants in the aggregate face a special risk of wrongful execution."). Careful instruction by the trial court is therefore important to "steadfastly guard[]" the procedural protections to which the defendant is entitled. *Id.* at 317, 153 L. Ed. 2d at 348.

In the present case, defendant presented substantial evidence of mental retardation to the jury during the sentencing proceeding. Dr. Hancock considered defendant's case "a slam dunk for retardation." Defense counsel requested that the trial court "include an additional sentence or paraphrase . . . that upon a finding that a defendant is mentally retarded, he will be sentenced to life without parole." Counsel argued that absent such instruction, the jury might mistakenly believe defendant would "go free" or otherwise misunderstand "what's to happen to him." The trial court refused defendant's request and instead gave the following pattern jury instruction: "The law provides that no defendant who is mentally retarded shall be sentenced to death. The one issue for you to determine at this stage of the proceedings reads: Is the defendant, Dane Locklear, Jr., mentally retarded?" 1 N.C.P.I.—Crim. 150.05 (2001).

It is well settled that "[i]f a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance." *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993) (citations omitted). In capital cases, the trial court is required to "give appropriate instructions in those cases in which evidence of the defendant's mental retardation requires the consideration by the jury of the provisions of G.S. 15A-2005." N.C.G.S. § 15A-2000(b). Section 15A-2005, in turn, provides that "[i]f the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment." *Id.* § 15A-2005(e). Defendant's requested instruction was therefore correct in itself and supported by evidence.

Given the relatively recent enactment of N.C.G.S. § 15A-2005, this Court has not previously had the opportunity to examine whether "appropriate instructions" by the trial court should include an instruction on the consequences of declaring a defendant mentally retarded. Our approach to jury instructions in capital cases involving the insanity defense informs our present case. In *State v. Hammonds*, 290 N.C. 1, 15, 224 S.E.2d 595, 604 (1976), we held the trial court erred in denying defendant's request to instruct the jury on the consequences of finding him not guilty by reason of insanity. The Court stated that "the average jury does not know what a verdict of not guilty by reason of insanity will mean to the defendant. This uncertainty may lead the jury to convict the accused in a mistaken belief that he will be set free if an insanity verdict is returned." *Id.* at 14, 224 S.E.2d at 603. The Court reasoned that

> [t]o allow a jury to speculate on the fate of an accused if found insane at the time of the crime only heightens the possibility that the jurors will fall prey to their emotions and thereby return a verdict of guilty which will insure that [the] defendant will be incarcerated for his own safety and the safety of the community at large.

Id. at 15, 224 S.E.2d at 603. So persuaded, we adopted the rule that a defendant who interposes an insanity defense is entitled to an instruction on commitment procedures if requested. *Id.* at 15, 224 S.E.2d at 604.

Just as "the average jury does not know what a verdict of not guilty by reason of insanity will mean to the defendant," *id.* at 14, 224 S.E.2d at 603, the average jury may not understand what a finding of mental retardation will mean for a defendant. Speculation over the punishment a defendant will receive if found to be mentally retarded may cause jurors to "fall prey to their emotions" and render a finding on mental retardation based on "an overriding fear for the safety of the community," *id.* at 15, 224 S.E.2d at 603-04, rather than on the clinical evidence. *See Atkins*, 536 U.S. at 321, 153 L. Ed. 2d at 350 (noting that mental retardation "may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury"). Thus, like a defendant who interposes an insanity defense, a defendant asserting mental retardation is entitled to an instruction by the trial court regarding punishment "sufficient to remove any hesitancy of the jury in returning a [finding of mental retardation], engendered by a fear that by so doing they would be releasing the defend-

ant at large in the community." *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982). We therefore conclude the trial court erred in failing to give defendant's requested instruction.

We further conclude that the error prejudiced defendant. Notably, although the jury rejected defendant's mental retardation claim, the jury found as mitigating circumstances many facts that would also tend to establish mental retardation on the part of defendant. For example, the jury found as mitigating circumstances that defendant: received an IQ score of sixty-five at age fourteen on the Slosson test, a scientifically standardized and accepted, individually administered test of general intelligence; was in the bottom two percent of the population in global adaptive functioning, according to testing documented in his school records; attended special education classes for educable mentally handicapped children and performed poorly throughout his school career; had significant adaptive deficits from childhood in the areas of functional academics; had learning difficulties from his earliest days; and "obtained a Full Scale IQ score of 68" on the WAIS-III test given by Dr. Timothy Hancock, which was "consistent with the score obtained by Dr. Brad Fisher on the prior version of the same test, the WAIS-R." The jury also found that defendant's cognitive impairment decreased his ability to control his impulsivity in stressful situations.

The State contends defendant cannot show prejudice because trial counsel told jurors during closing arguments that defendant would be sentenced to life imprisonment if they found him to be mentally retarded. We disagree. " '[O]n matters of law, arguments of counsel do not effectively substitute for statements by the court.' " *State v. Spruill*, 338 N.C. 612, 654, 452 S.E.2d 279, 302 (1994) (quoting *Simmons v. South Carolina*, 512 U.S. 154, 173, 129 L. Ed. 2d 133, 148 (1994) (Souter & Stevens, JJ., concurring) (alteration in original)), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995). This is because arguments of counsel are likely to be viewed as statements of advocacy, whereas a jury instruction is a definitive and binding statement of law. *Boyde v. California*, 494 U.S. 370, 384, 108 L. Ed. 2d 316, 331 (1990). Further, although the attorneys in their arguments referenced defendant's receiving life imprisonment, counsel for the State also argued that defendant's mental retardation claim was "about Dane Locklear avoiding punishment." In light of the jury's mitigation findings, we conclude there is a reasonable possibility the jury would have found defendant mentally retarded absent the omitted instruction. N.C.G.S. § 15A-1443(a) (2007); *State v. Lamb*, 321 N.C. 633, 644,

365 S.E.2d 600, 606 (1988) (concluding it was "not reasonably possible that, had the trial court given [the] defendant's [requested] instruction verbatim, a different result would have occurred at trial"). Defendant is therefore entitled to a new sentencing hearing. On remand, the trial court should instruct the jury in compliance with N.C.G.S. § 15A-2005(e) that "[i]f the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment."

In light of our decision to remand defendant's case for a new sentencing hearing, we do not address defendant's remaining arguments regarding sentencing, nor do we engage in proportionality review.

PRESERVATION ISSUES

Defendant assigns as error multiple issues he concedes have been decided unfavorably to him in prior opinions of this Court. Most of defendant's preservation issues assign error to the sentencing proceedings. We need not address such asserted error in light of our disposition of defendant's case, but we nonetheless note that defendant presents no compelling reason to overrule our precedents on these issues. Defendant also objects to the use of a "short-form" murder indictment as constitutionally deficient. As he acknowledges, however, this Court has repeatedly and consistently upheld the legitimacy of short-form indictments for first-degree murder. *See*, *e.g.*, *State v. Maness*, 363 N.C. 261, 292, 677 S.E.2d 796, 816 (2009); *State v. Lawrence*, 352 N.C. 1, 9-11, 530 S.E.2d 807, 813-14 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). Thus, we reject these arguments.

We conclude defendant received a fair trial, free from prejudicial error. However, we conclude the trial court committed prejudicial error during the sentencing proceeding. We therefore vacate defendant's death sentence and remand this case to Superior Court, Robeson County, for a new capital sentencing proceeding.

NO ERROR IN GUILT-INNOCENCE PHASE; DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

Justice MARTIN dissenting.

The trial court instructed the jury that: (1) only two sentencing options were available—death and life without parole; and (2) a find-

ing of mental retardation would eliminate death as an option. Having received these instructions, the jury was fully aware that a finding of mental retardation would mandate a sentence of life without parole.

The execution of mentally retarded defendants violates the United States Constitution, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), and state law, N.C.G.S. § 15A-2005(b) (2007). For this reason, the trial court in a capital case must observe procedural protections designed to meet the challenges associated with identifying such defendants. The narrow issue here, however, is whether the jury in this case understood the consequences of a finding that defendant was mentally retarded.

When a defendant claims that an instruction is ambiguous and subject to erroneous interpretation, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). A "reasonable likelihood" is more than a "possibility." *See id.* "[T]he proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." *Victor v. Nebraska*, 511 U.S. 1, 6 (1994) (citing *Estelle v. McGuire*, 502 U.S. 62, 72 & n.4 (1991)); *see also State v. Smith*, 360 N.C. 341, 347, 626 S.E.2d 258, 261-62 (2006) (applying reasonable likelihood test to challenged jury instruction).

Moreover, the challenged instruction " 'may not be judged in artificial isolation, but must be viewed in the context of the overall charge,' " *Boyde*, 494 U.S. at 378 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)), and the proceedings generally, *see id.* at 381. In this regard, the United States Supreme Court has explained that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning" but rather "[d]ifferences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." *Id.* at 380-81.

This Court recently stated that, in reviewing jury instructions allegedly subject to erroneous interpretation, "we inquire whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that violates the Constitution. . . . In determining whether the defendant has met the reasonable likelihood

standard this Court must review the trial court's instruction to the jury in the context of the overall charge." *Smith*, 360 N.C. at 347, 626 S.E.2d at 261-62 (citations and internal quotation marks omitted).

The trial court here opened the sentencing proceeding by instructing the jury that its sole purpose was to determine which of two sentences, death or life without parole, defendant would receive: "Members of the jury, having found the defendant guilty of murder in the first degree, it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment without parole." At no time during the sentencing proceeding was the jury advised of any potential third form of punishment, nor was the jury advised that, the defendant having been found guilty of first-degree murder, he nevertheless might be released.

"[J]urors are presumed to pay close attention to the particular language of the judge's instructions in a criminal case . . . and [to] follow the instructions as given." *State v. Trull*, 349 N.C. 428, 455, 509 S.E.2d 178, 196 (1998) (citation omitted), *cert. denied*, 528 U.S. 835 (1999). This presumption is particularly appropriate here, as the trial court's instruction was the first sentence spoken to the jury on the first day of the sentencing proceeding. As this Court recently observed: "The trial court alluded to only two possible sentences, death or life imprisonment without parole. Therefore, if the jury followed these instructions, they knew of only these two possible sentences. We must presume that the jury followed these instructions." *State v. Smith*, 359 N.C. 199, 219, 607 S.E.2d 607, 622, *cert. denied*, 546 U.S. 850 (2005).

Following presentation of mental retardation and other sentencing evidence, the trial court gave the instruction now challenged on appeal. The instruction, which tracked both state statutory law, N.C.G.S. § 15A-2005(b), and the pattern jury instruction, 1 N.C.P.I.—Crim. 150.05 (2001), read: "The law provides that no defendant who is mentally retarded shall be sentenced to death. The one issue for you to determine at this stage of the proceedings reads: Is the defendant, Dane Locklear, Jr., mentally retarded?" Having been told that its two sentencing options were death and life without parole and that a finding of mental retardation would foreclose a death sentence, the jury could reach only one reasonable conclusion: a finding of mental retardation would result in a sentence of life without parole.

That the jury understood the consequences of a finding of mental retardation is supported not only by "the context of the overall

charge," *Boyde*, 494 U.S. at 378, but also by "all that [took] place at the trial," *id.* at 381. During closing arguments on mental retardation, counsel for both parties specifically informed the jury that a finding of mental retardation would result in a sentence of life without parole. The prosecutor stated, "If Dane Locklear can prove that he is mentally retarded, then as a matter of law, he cannot be sentenced to death. And if you've been convicted of first degree murder, as he has been in this case, he has to be sentenced to life in prison without parole." Similarly, defense counsel stated, "If we show . . . that he's retarded, it's a life sentence without parole." These arguments corroborated the trial court's instructions and weigh against a conclusion that the jury's verdict was influenced by an erroneous understanding of the law. *See Middleton v. McNeil*, 541 U.S. 433, 438 (2004) (per curiam) (explaining that a state court is not precluded "from assuming that counsel's arguments clarified an ambiguous jury charge" and that "[t]his assumption is particularly apt when it is the *prosecutor's* argument that resolves an ambiguity in favor of the *defendant*").

Read in total isolation, the challenged instruction did not rule out the possibility that a mentally retarded defendant might receive punishment other than life without parole. But the jurors did not hear the instruction in isolation. Instead, they heard the instruction in the context of a capital sentencing proceeding that the trial court had told them would result in a recommendation of either death or life without parole. It would defy "commonsense understanding," *Boyde*, 494 U.S. at 381, for the jury to speculate that the trial court would postpone the determination of mental retardation to the middle of a proceeding about death versus life imprisonment if a finding of mental retardation would make defendant eligible for some third result. This is especially true when, as in this case, both parties' counsel told the jury otherwise.

The majority compares the instant case with this Court's decision in *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976). The majority concludes that here, as there, the trial court's instructions left the jury uninformed about the consequences of its verdict and prone to speculate that defendant would be released to the community should it find him mentally retarded. *See id.* at 15, 224 S.E.2d at 603-04. *Hammonds* is distinguishable from the instant case in two significant respects. First and foremost, the jury in *Hammonds* was never told the consequences of a verdict of not guilty by reason of insanity. *Id.* at 11, 224 S.E.2d at 601. Because defendants who are found not guilty

generally go free, the trial court's failure to inform the jury of the statutory commitment procedure may well have left the impression that an acquittal by reason of insanity would result in the release of a potentially dangerous defendant. *Id.* at 13, 224 S.E.2d at 602. Here, on the other hand, the jury had already found defendant guilty of first-degree murder when it was asked to determine whether he was mentally retarded. Because defendants who are found guilty of murder generally do not go free, and because the trial court's instructions as a whole limited the punishment for a mentally retarded defendant guilty of first-degree murder to life without parole, there was no rational basis for the jury to speculate that defendant would receive anything other than a life sentence.

Additionally, this Court noted in *Hammonds* that the jury was further confused by the prosecutor's misleading statement in closing argument that " 'if you conclude [the defendant] is not guilty [by reason of insanity], . . . he walks out of this courtroom not guilty, returned to this community.' " *Id.* at 11, 224 S.E.2d at 601. Here, in contrast, counsel for both parties corroborated the trial court's instructions by correctly informing the jury that a finding of mental retardation would result in a sentence of life without parole. Put simply, the concerns raised in *Hammonds* are not implicated here, and defendant has not shown a reasonable possibility that his requested instruction would have led to a different result at his sentencing proceeding. *See* N.C.G.S. § 15A-1443(a) (2007).

"[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (citations omitted). "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation," *McNeil*, 541 U.S. at 437, and resentencing is improper "where the claimed error amounts to no more than speculation," *Boyde*, 494 U.S. at 380. Here, the challenged instruction did not confuse the jury or lead it to disregard "constitutionally relevant evidence" of mental retardation. *Id.* Accordingly, the trial court's instruction on mental retardation does not entitle defendant to a new sentencing proceeding.[1]

I respectfully dissent.

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1. While the trial court's instruction does not entitle defendant to a new sentencing proceeding, the Committee on Pattern Jury Instructions may nevertheless wish to consider additional language stating that a finding of mental retardation will result in a sentence of life imprisonment without parole. *See State v. Benton*, 299 N.C. 16, 22, 260 S.E.2d 917, 921 (1980) (stating that when a challenged pattern instruction "cor-

Justice BRADY dissenting.

The majority's assertion that there was a reasonable likelihood that the jury was able to "speculate" as to defendant's fate in the sentencing proceeding ignores the contents of the record before us. Because the trial court informed the jury that a finding of mental retardation would result in a life sentence without parole, there was no prejudicial error in denying defendant's request for special mental retardation jury instructions. Therefore, I respectfully dissent.

At the charge conference, defendant orally requested a special instruction informing the jury that finding defendant to be mentally retarded would result in a sentence of life imprisonment without the possibility of parole. This specific instruction was denied. The crux of defendant's argument, and the majority opinion, is based upon the illogical reasoning that the jury was allowed to speculate that defendant could possibly "go free" and escape punishment if jurors found defendant to be mentally retarded. Defendant claims, and the majority agrees, that by denying defendant's orally requested instruction, the trial court permitted the jury to hypothesize about defendant's fate and as a result, violated defendant's due process and Eighth Amendment rights.

At the outset, I note that I could find nothing in the record indicating that defendant ever tendered a written request to the trial court for alternative or supplemented mental retardation jury instructions to the trial court. As a matter of law, "such requested special instructions 'should be submitted in *writing* to the trial judge at or before the jury instruction conference.' " *State v. Augustine*, 359 N.C. 709, 729, 616 S.E.2d 515, 530 (2005) (emphasis added) (quoting Gen. R. Pract. Super. & Dist. Cts. 21, para. 1, 2005 Ann. R. N.C. 18), *cert. denied*, 548 U.S. 925 (2006). Accordingly, this Court has repeatedly ruled that a trial court does not err when it denies oral requests for jury instructions that have not been submitted in writing. *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997), *cert. denied*, 522 U.S. 1053 (1998); *State v. Martin*, 322 N.C. 229, 236- 37, 367 S.E.2d 618, 622-23 (1988); *see also* N.C.G.S. § 15A-1231(a) (2007). Defendant's request was made orally at the jury charge conference and it appears that no written request was ever tendered. On this

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rectly declared the law" and, when read in context with the entire charge to the jury, "was not so confusing as to mislead the jury or affect the verdict," the defendant was not entitled to a new trial, but suggesting that the instruction "might be reviewed by the Committee . . . for possible clarification").

basis alone, this Court should conclude that the trial court committed no error in denying defendant's requested instruction.

However, even if I choose the majority's path and overlook defendant's apparent failure to make a written request for special jury instructions, I still conclude that the trial court committed no error in denying defendant's request. The appropriate standard under which to review constitutional challenges to jury instructions is "whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that violates the Constitution." *State v. Smith*, 360 N.C. 341, 347, 626 S.E.2d 258, 261 (2006) (citations and internal quotation omitted). In demonstrating such a likelihood, the burden is upon the defendant "to show more than a possibility that the jury applied the instruction in an unconstitutional manner." *Id.* at 347, 626 S.E.2d at 261-62 (citations and internal quotation marks omitted). Furthermore, "[i]n determining whether the defendant has met the reasonable likelihood standard this Court must review the trial court's instruction to the jury in the context of the overall charge." *Id.* at 347, 626 S.E.2d at 262 (citations and internal quotation marks omitted).

In the instant case, during the sentencing proceeding the jury heard evidence concerning mental retardation and aggravating and mitigating circumstances. After this evidence was presented, the trial court instructed the jury to deliberate and reach a verdict solely on the mental retardation issue. Both the State and defendant's counsel presented arguments before the jury concerning mental retardation. The trial judge in this case then recited, verbatim, North Carolina Criminal Pattern Jury Instruction 150.05 when instructing the jury on mental retardation. The instruction states: "The law provides that no defendant who is mentally retarded shall be sentenced to death. The one issue for you to determine at this stage of the proceedings reads: 'Is the defendant, Dane Locklear, Jr., mentally retarded?' " *See* 1 N.C.P.I.—Crim. 150.05 (2001) (footnote call number omitted).

Before these instructions were given, defendant orally requested during the charge conference additional instructions on mental retardation specifically stating that upon a finding of mental retardation, defendant would be sentenced to life without parole. The majority is correct that "[i]f a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance." *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993) (citations omitted). However, the majority

incorrectly concludes that defendant's requested instruction was not given "in substance" to the jury. At the very outset of the sentencing proceeding, after the guilt phase and before the jury heard any evidence concerning mental retardation, the trial court instructed as follows: "Members of the jury, having found the defendant guilty of murder in the first degree, it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment without parole." The effect of this charge at the beginning of the sentencing proceeding was to inform the jury that only two possible sentences were available for defendant—death or life imprisonment without parole. The jurors heard every piece of evidence regarding mental retardation within the context of this instruction. Defendant's argument that the jury was permitted to speculate that he would "go free" is contrary to the very first instruction jurors were given at the sentencing proceeding, which explicitly eliminated that possibility.

Defendant and the majority rely heavily upon our decision in *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976), to argue that the denial of defendant's requested instructions was prejudicial error. *Hammonds* is noticeably distinguishable from the case *sub judice*. In *Hammonds*, this Court held that "upon request, a defendant who interposes a defense of insanity to a criminal charge is entitled to an instruction by the trial judge setting out in substance the commitment procedures outlined [by statute], applicable to acquittal by reason of mental illness."[2] *Id.* at 15, 224 S.E.2d at 604. First, the jury in *Hammonds* was considering the issue of insanity, not mental retardation. However, even assuming *arguendo* that the *Hammonds* rule is applicable to defendants who claim mental retardation, application of the rule in this case is still inappropriate. In *Hammonds*, as this Court specifically noted, during the *guilt* determination phase of the trial "the fate of defendant, should he be acquitted by reason of insanity, became a central and confusing issue in the arguments of counsel." *Id.* at 13, 224 S.E.2d at 602. Thus, the purpose of the *Hammond*s rule is "to remove any hesitancy of the jury in returning a verdict of not guilty by reason of insanity, engendered by a fear that by so doing [it] would be releasing the defendant at large in the community." *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982). The

2. As noted above, even if the *Hammonds* rule were directly applicable to the instant case, defendant's instructions were given to the jury *in substance*.

Next, it is important to recognize that the defendant in *Hammonds* tendered a *written* request for supplemental jury instructions. *See* Transcript of Record at 117-24, *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976) (No. 40).

same fears are not present here. The jury in the instant case was not deciding the defendant's guilt; this had already been determined in the guilt-innocence phase of the trial. Also, unlike the consequences of a verdict finding the defendant not guilty by reason of insanity in the *Hammonds* trial, there is no indication in the record that the question of what would happen to defendant upon the finding of mental retardation was confusing or ever in dispute. Both the State and counsel for defendant were in agreement and communicated to the jury during the sentencing proceeding that if defendant was found to be mentally retarded, he would be sentenced to life in prison without parole. Thus, the fears the *Hammonds* rule was designed to eliminate were not present in the case *sub judice*.

Additionally, when defense counsel orally requested special mental retardation jury instructions at the charge conference, the State reminded the trial court that the instruction had previously been given at the beginning of the sentencing proceeding. The trial court then asked, "[i]s there anything to prevent counsel for either the State or defendant arguing the law as it relates to what type of punishment would be imposed upon a finding of either mental retardation or no mental retardation?" This prompted a discussion in which the State confirmed with the trial court that counsel was entitled to argue before the jury that if it found defendant to be mentally retarded "he will be sentenced in accordance with the law of the state of North Carolina to life in prison without parole[.]" Therefore, at the time the trial judge denied defendant's oral request, he was acutely aware that the jury had already received the same instruction and that counsel could again explain the instruction during closing arguments. "Jurors need adequate instructions, but they do not need to hear them repeated *ad nauseam*." *State v. Garcell*, 363 N.C. 10, 60, 678 S.E.2d 618, 649 (2009); *see also State v. Gainey*, 355 N.C. 73, 107, 558 S.E.2d 463, 485, *cert. denied*, 537 U.S. 896 (2002). It was reasonable and within the trial court's discretion to deny defendant's additional request for supplemental jury instructions based on the consideration that those instructions would be superfluous in light of the trial court's initial instructions and arguments of counsel.

Counsel for the State and defendant informed the jury that a finding of mental retardation would result in a sentence of life imprisonment without parole. During closing arguments, counsel for the State asserted: "If Dane Locklear can prove that he is mentally retarded, then as a matter of law, he cannot be sentenced to death. And if you've been convicted of first degree murder, as he has been in this

case, *he has to be sentenced to life in prison without parole*." (Emphasis added.) Likewise, defense counsel clearly explained in his closing argument that defendant would be sentenced to life without parole if the jury found defendant to be mentally retarded:

> [A]s you know and you heard, when a person is mentally retarded, it doesn't get any better. Doesn't get any better. You know, nobody can make somebody who's retarded smart. Can't do it. He's fixed that way for life. It's a sad thing, but it is, and that's why we have this law, 15A-2005. If we show these things, that he's retarded, *it's a life sentence without parole*. You don't execute children. You don't execute mentally retarded.

(Emphasis added.)

The majority opinion asserts that under *State v. Spruill*, "arguments of counsel do not effectively substitute for statements by the court." 338 N.C. 612, 654, 452 S.E.2d 279, 302 (1994) (quoting *Simmons v. South Carolina*, 512 U.S. 154, 173 (1994) (Souter & Stevens, JJ., concurring)), *cert. denied*, 516 U.S. 834 (1995). However, the majority uses this statement out of context. In *Spruill*, this Court referenced the above statement from Justice Souter's concurring opinion in *Simmons v. South Carolina* to support the proposition that a "trial court has a duty to censor any remarks not warranted by evidence or law." *Id*. This Court cited Justice Souter's concurring remarks in relation to a trial court's responsibility to correct misstatements of law or fact interjected by counsel during closing arguments. *Spruill* does not speak to whether it is sufficient for counsel to correctly inform the jury of matters of evidence and law. Even if the statement from *Spruill* is on point with the instant case, the majority still ignores that here, the trial court instructed the jury on the two sentencing options—life imprisonment without parole or the death penalty—at the outset of the sentencing proceeding. Thus, the remarks made by counsel during closing arguments were repetitions of instructions already given by the trial court and were not "substitutions for," but rather elaborations of, "statements by the court."

Finally, the majority claims that defendant was prejudiced because the State "argued that defendant's mental retardation claim was 'about Dane Locklear avoiding punishment.' " To suggest that the jury could possibly have misconstrued these statements to believe that defendant would someday be released from prison is unconvincing. When the complete statement is read in context, it is clear that the prosecutor was insinuating no such thing:

> So, then, you ask yourselves, well, why are they saying he's mentally retarded now? For one reason and one reason only. If Dane Locklear can prove that he is mentally retarded, then Dane Locklear cannot face the ultimate consequences for what he has done. If Dane Locklear can prove that he is mentally retarded, then as a matter of law, he cannot be sentenced to death. And if you've been convicted of first degree murder, as he has been in this case, he has to be sentenced to life in prison without parole. That's what this diagnosis is about. This diagnosis is not about Dane Locklear being mentally retarded from the time he was a child, throughout his life. This diagnosis is about Dane Locklear avoiding punishment.

The State plainly tells the jury that if defendant does not receive the death penalty "he has to be sentenced to life in prison without parole." This remark appears just two sentences before the statement the majority finds prejudicial. "Statements or remarks in closing argument 'must be viewed in context and in light of the overall factual circumstances to which they refer.' " *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (quoting *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995), *cert. denied*, 516 U.S. 1148 (1996)), *cert. denied*, —— U.S. ——, 129 S. Ct. 59, 172 L. Ed. 2d 58 (2008). When read in context, it is clear that the State was not suggesting that if the jury found defendant to be mentally retarded he would one day be eligible for parole. Defendant was not prejudiced by these statements.

Considering that the jury was instructed at the beginning of the sentencing proceeding that defendant would either receive the death penalty or life imprisonment without parole, and that both the State and defense counsel reiterated these points during closing arguments, it is inconceivable that any juror was confused about defendant's fate should the jury decide he was mentally retarded. As such, there is no reasonable likelihood that the jury could have applied the given instructions in a way that violated defendant's constitutional rights. The majority has succumbed to engaging in pure speculation rather than accepting the reality of the record before us. Accordingly, I respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. LEKKIE CONSTANTINE WILSON

No. 436A08

(Filed 28 August 2009)

1. Appeal and Error— preservation of issues—failure to object—right to a unanimous jury verdict

The Court of Appeals did not err in an armed robbery case by concluding defendant's assignment of error, based on the trial court's instructions to a single juror that violated defendant's right to a unanimous jury verdict under Article I, Section 24 of the North Carolina Constitution, was preserved for appeal notwithstanding defendant's failure to object because: (1) it is well established that for the trial court to provide explanatory instructions to less than the entire jury violates the defendant's constitutional right to a unanimous jury verdict; (2) N.C. R. App. P. 10(b)(1) recognizes that errors may be "deemed preserved" "by rule or law" without any action by the parties; and (3) while the failure to raise a constitutional issue at trial generally waives that issue for appeal, where the error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel since the right to a unanimous jury verdict is fundamental to our system of justice.

2. Constitutional Law–denial of unanimous verdict— harmless error analysis—new trial

The Court of Appeals did not err in an armed robbery case by granting defendant a new trial based on the trial court's instructions to a single juror that violated defendant's right to a unanimous jury verdict under Article I, Section 24 of the North Carolina Constitution since the State failed to show the error was harmless beyond a reasonable doubt because, for the State to meet its burden, the record must reveal the substance of the conversations at issue or the conversations must be adequately reconstructed, and the record in the present case does not disclose the substance of the trial court's unrecorded bench conferences with the foreperson, nor have the conversations been reconstructed.

Justice BRADY dissenting.

Justice NEWBY joins in the dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 192 N.C. App. ——, 665 S.E.2d 751 (2008), reversing judgments entered 2 February 2007 by Judge Jack W. Jenkins in Superior Court, Carteret County, and ordering that defendant receive a new trial. Heard in the Supreme Court 24 February 2009.

Roy Cooper, Attorney General, by Kevin Anderson, Assistant Attorney General, for the State-appellant.

L. Jayne Stowers for defendant-appellee.

TIMMONS-GOODSON, Justice.

In this case we consider whether defendant waived appellate review by failing to object to instructions by the trial court to a single juror. We hold that, because the trial court's instructions to a single juror violated defendant's right to a unanimous jury verdict under Article I, Section 24 of the North Carolina Constitution, the error was preserved for appeal notwithstanding defendant's failure to object. We further hold that the State failed to show the error was harmless beyond a reasonable doubt. Accordingly, we affirm the decision of the Court of Appeals granting defendant a new trial.

Background

Defendant Lekkie Constantine Wilson was tried on 30 January 2007 in Superior Court, Carteret County for armed robbery and conspiracy to commit armed robbery. The State's evidence tended to show that on the evening of 16 October 2005, defendant and Tavoris Courtney robbed a convenience store in Newport, North Carolina, of over one thousand dollars in cash. Defendant's wife worked as a clerk in the store on the night of the robbery. Courtney testified that defendant helped plan the robbery and drove the getaway car after Courtney entered the store armed with a handgun and demanded money from defendant's wife. Defendant's evidence tended to show that Courtney's testimony was inconsistent with prior written statements in which Courtney denied defendant's involvement. Defendant also presented evidence that Courtney received a substantially reduced bond in exchange for his testimony for the State.

On 1 February 2007, after the close of the evidence, the trial court instructed the jury regarding the relevant law. The jury then retired to the jury room and began deliberations. Approximately twenty minutes after retiring for deliberations, the jury notified the deputy that

there was a problem with the foreperson that needed to be addressed on the record. Instead of summoning all the jurors to the courtroom to hear the jury's request, the trial court proposed to the attorneys that only the foreperson be summoned. The trial court asked counsel for the State and counsel for defendant whether they objected to this procedure, and neither stated an objection.

The trial court summoned only the foreperson and held the following exchange with the foreperson on the record:

> THE COURT: It's my understanding there may be some issue you may need to address and to the extent you're comfortable telling me, can you tell me what THE [sic] nature of the concern is?
>
> FOREPERSON: They seem to think that I already have my mind made up.
>
> THE COURT: You come here and if counsel will come up here, please.

Calling the foreperson, counsel for the State, and counsel for defendant to the bench, the trial court conducted an unrecorded bench conference. The trial court then asked the foreperson to step aside and conducted an unrecorded bench conference with both counsel. The trial court then asked both counsel to return to their places and held the following conversation with the foreperson on the record:

> THE COURT: Sir, to make sure I understand then, there is an issue that has arisen regarding your opinion about the case basically, is that right?
>
> FOREPERSON: Yes.
>
> THE COURT: Issue between you and the other jurors?
>
> FOREPERSON: Yes.
>
> THE COURT: This is an issue that I believe you and the other jurors need to handle in the jury room.
>
> FOREPERSON: I need to say one more thing.
>
> THE COURT: Yes, sir. Go on.
>
> FOREPERSON: I can't . . .

Calling the foreperson to the bench once more, the trial court conducted a second unrecorded bench conference with the foreper-

son, counsel for the State, and counsel for defendant. The court then summoned the remaining eleven jurors and instructed the entire jury as follows:

> You all have a duty to consult with one another and deliberate with a view toward reaching an agreement, if it can be done without violence to individual judgment. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, each of you should not hesitate to reexamine your own views and change your opinion, if it is erroneous, but none of you should surrender your honest conviction as to the weight of the evidence solely because of the opinion of your fellows [sic] jurors or for the purpose of returning a verdict.

After giving the jury these instructions, the trial court directed the jurors, with the exception of the foreperson, to return to the jury room but not to resume deliberations. The trial court conducted a third unrecorded bench conference with the foreperson and counsel. The trial court then engaged in the following colloquy with the foreperson on the record:

> THE COURT: [O]ne other instruction I want to give you first and then have the other jurors come back out.
>
> The issues about which we had talked in this courtroom, both here at the bench and also openly on the record, are issues that you are not to share with the other jurors and I do not wish for you to go back in there and somehow talk about what we talked about here or anything else.
>
> Do you understand that?
>
> FOREPERSON: Yes, sir.
>
> THE COURT: It's my understanding based on what you have said up here that I do believe you can continue to be a fair and impartial juror in this case, consider the evidence you've heard, the contentions of counsel, instructions of the court and proceed accordingly, is that correct?
>
> FOREPERSON: Yes, sir.
>
> THE COURT: And at this time, do you know of any reason why you cannot continue as a juror in this case?
>
> FOREPERSON: No, sir.

After summoning the rest of the jury back to the courtroom, the trial court instructed the entire jury as follows:

> Ladies and gentlemen of the jury, this is a formality but I do need to bring you back out to tell you all twelve as a group that you may retire back to the jury room and resume your deliberations, all of you as a group to go back there and continue your deliberations.

At approximately 4:00 p.m., the jury returned to the jury room and resumed deliberations. The trial court summoned the jury to the courtroom at approximately 4:55 p.m. and recessed for the day. On 2 February 2007, the jury continued deliberations from approximately 8:49 a.m. until 11:59 a.m. The jury returned verdicts finding defendant guilty of armed robbery and conspiracy to commit armed robbery. The trial court arrested judgment on the conspiracy offense and sentenced defendant to a term of forty-eight to sixty-eight months imprisonment for the armed robbery offense. Defendant appealed.

The Court of Appeals held that (1) the trial court violated defendant's right to a unanimous jury verdict under Article I, Section 24 of the North Carolina Constitution by giving instructions to the foreperson that it did not give to the rest of the jury, (2) the error was preserved for appeal notwithstanding defendant's failure to object at trial, and (3) the State failed to show the error was harmless beyond a reasonable doubt. *State v. Wilson*, ––– N.C. App. –––, –––, –––, 665 S.E.2d 751, 753, 755-56 (2008). The dissent in the Court of Appeals concluded that defendant waived his right to appellate review and failed to show that the trial court's conversations with the foreperson constituted plain error. *Id.* at –––, 665 S.E.2d at 758-59 (Tyson, J., dissenting). The State appeals on the basis of the dissent.

Analysis

Based upon the dissent in the Court of Appeals, the only questions presented for our consideration are (1) whether by failing to object at trial, defendant waived his argument that the trial court violated his right to a unanimous jury verdict and (2) whether defendant is entitled to a new trial under the applicable standard of review. *See* N.C. R. App. P. 16(b). We address each question in turn.

The Right to a Unanimous Jury Verdict

Article I, Section 24 of the North Carolina Constitution states that "[n]o person shall be convicted of any crime but by the unanimous

verdict of a jury in open court." N.C. Const. art. I, § 24. The unanimity provision requires the trial court to summon all jurors before hearing a request from the jury and before giving additional instructions. *State v. Ashe*, 314 N.C. 28, 40, 331 S.E.2d 652, 659 (1985). In *Ashe*, the jury requested a review of the trial transcript during the defendant's trial for first-degree murder. Without objection, the trial court summoned only the foreperson and held the following colloquy on the record:

> THE COURT: Mr. Foreman, the bailiff indicates that you request access to the transcript?
>
> FOREMAN: We want to review portions of the testimony.
>
> THE COURT: I'll have to give you this instruction. There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence as you recall it and as you can agree upon that recollection in your deliberations.

Id. at 33, 331 S.E.2d at 655-56. We held that the trial court violated Article I, Section 24 and N.C.G.S. § 15A-1233(a) by failing to summon the entire jury before hearing and addressing the jury's request to review the trial transcript. *Id.* at 40, 331 S.E.2d at 659. We later explained in *State v. McLaughlin*, 320 N.C. 564, 569, 359 S.E.2d 768, 772 (1987), that our reference to Article I, Section 24 in *Ashe* "was intended to convey no more than the seemingly obvious proposition that for a trial judge to give explanatory instructions to fewer than all jurors violated . . . the unanimity requirement imposed on jury verdicts by Article I, section 24."

Similarly, in *State v. Nelson*, 341 N.C. 695, 698, 462 S.E.2d 225, 226 (1995), the jury requested a review of evidence during the defendant's trial for second-degree rape and first-degree kidnapping. Without objection, the trial court summoned only the foreperson, asked him questions, and instructed him not to tamper with the evidence in the jury room. *Id.* at 698-700, 462 S.E.2d at 226-27. Citing *Ashe*, we explained that "the failure to require all jurors to return to the courtroom to ask a question of the court violates . . . the unanimous verdict requirement of Article I, Section 24 of the North Carolina Constitution." *Id.* at 700-01, 462 S.E.2d at 227-28. Thus, it is well established that for the trial court to provide explanatory instructions to less than the entire jury violates the defendant's constitutional right to a unanimous jury verdict. We must therefore decide whether defendant's failure to object at trial defeats his ability to raise this issue on appeal.

Preservation of Issue for Appeal

[1] The State contends that by failing to object at trial, defendant waived appellate review of whether the trial court's conversations violated his constitutional right to a unanimous jury verdict. According to the State, Rule of Appellate Procedure 10(b)(1) and controlling case law prevent defendant from raising his constitutional challenge for the first time on appeal. We disagree.

Rule 10(b)(1) sets forth the following requirements for preserving errors for appeal:

> Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted *or which by rule or law was deemed preserved or taken without any such action*, may be made the basis of an assignment of error in the record on appeal.

N.C. R. App. P. 10(b)(1) (emphasis added). On its face, Rule 10(b)(1) recognizes that errors may be "deemed preserved" "by rule or law" without any action by the parties. *Id.*

While the failure to raise a constitutional issue at trial generally waives that issue for appeal, *see, e.g.*, *Ashe*, 314 N.C. at 39, 331 S.E.2d at 659, where the error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel. *Nelson*, 341 N.C. at 700, 462 S.E.2d at 227 (citing *Ashe* for the proposition that "the failure to object does not prevent the defendant from appealing"); *Ashe*, 314 N.C. at 39, 331 S.E.2d at 659; *see also* N.C. R. App. P. 10 drafting comm. comment., para. 3, *reprinted in* 287 N.C. 698, 701 (1975) (noting that some objections may be " 'deemed' taken without *any* action by counsel simply because the error is considered sufficiently fundamental"). In *Ashe*, for example, the State argued that, even if the trial court violated Article I, Section 24 by instructing a single juror, the defendant waived appellate review because he did not object at trial. 314 N.C. at 39, 331 S.E.2d at 659. We held that Article I, Section 24 "require[s] the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony" and the trial court's failure to do so "entitles [the] defendant to press these points on appeal, notwithstanding a failure to object at trial." *Id.* at 40, 331 S.E.2d at 659. Similarly, in *Nelson* we rejected any notion that the defendant waived appellate review of his Article I, Section 24 argument by failing to object at trial and the State's assertion that defend-

ant could not later complain because his attorney purportedly suggested the unconstitutional procedure at issue in the case. 341 N.C. at 700, 462 S.E.2d at 227.

Contrary to this precedent, the State echoes the dissent in the Court of Appeals by arguing that our decision in *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978), rather than *Ashe*, is controlling authority in this case. In *Tate*, twice during defendant's trial, a single juror asked or began to ask questions addressed to the trial court. *Id.* at 197, 239 S.E.2d at 827. Each time, the judge called the particular juror to the bench and held an unrecorded bench conference outside the presence of counsel for the defendant and counsel for the State. *Id.* The defendant's sole argument on appeal was that "in terms of simple fairness the trial court should have immediately informed the defendant and his counsel of the nature of the conversations." Thus, the issue in *Tate* was the defendant's right to be present at every stage of the trial under Article I, Section 23. *See State v. Boyd*, 332 N.C. 101, 104-05, 418 S.E.2d 471, 473 (1992) (explaining the basis of our holding in *Tate*). Unlike the right to a unanimous jury verdict under Article I, Section 24, the right to be present at every stage of the trial under Article I, Section 23 may be waived by noncapital defendants. *Id.* at 105, 418 S.E.2d at 473. Accordingly, we held in *Tate* that the defendant waived appellate review of the trial court's unrecorded conversations by failing to object at trial. In so holding, we explained our reasoning as follows:

> We are of the opinion that the trial court's private conversations with jurors were ill-advised. The practice is disapproved. At least, the questions and the court's response should be made in the presence of counsel. The record indicates, however, that defendant did not object to the procedure or request disclosure of the substance of the conversation. Failure to object in apt time to alleged procedural irregularities or improprieties constitutes a waiver.

294 N.C. at 198, 239 S.E.2d at 827 (citations omitted).

In relying on *Tate* for its waiver argument, the State overlooks that defendant in the instant case appeals from the violation of his right to a unanimous jury verdict under Article I, Section 24 rather than his right to be present at every stage of the trial under Article I, Section 23. Further, while the conversations in *Tate* may fairly be characterized as innocuous "procedural irregularities," the same cannot be said for the trial court's conduct in this case. The record

reveals that the trial court gave the foreperson instructions during its recorded and unrecorded conversations in violation of defendant's right to a unanimous jury verdict. The trial court's exchanges with the foreperson were prompted by the jury's belief that "that [the foreperson] already ha[d] [his] mind made up" regarding defendant's guilt or innocence. Rather than summoning and instructing the entire jury as to how to resolve this matter, the trial court instructed only the foreperson that "[t]his is an issue that . . . [the foreperson] and the other jurors need[ed] to handle in the jury room." Further, immediately following the third unrecorded bench conference with the foreperson, the trial court stated that it needed to give him "one other instruction" before admonishing him not to divulge to the remaining jurors the substance of his conversations with the trial court. These facts compel the conclusion that the trial court provided the foreperson with instructions that it did not provide to the rest of the jury in violation of defendant's right to a unanimous jury verdict.[1] We therefore conclude that *Ashe* and *Nelson* control rather than *Tate*.

Consistent with this precedent, we hold that where the trial court instructed a single juror in violation of defendant's right to a unanimous jury verdict under Article I, Section 24, the error is deemed preserved for appeal notwithstanding defendant's failure to object. In so holding, we adhere to the principle that the right to a unanimous jury verdict is fundamental to our system of justice. *See* N.C. Const. art. I, § 24; N.C. Const. of 1868, art. I, § 13; N.C. Const. of 1776, Declaration of Rights § 9; *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971); *State v. Stewart*, 89 N.C. 563, 564 (1883); *State v. Moss*, 47 N.C. (2 Jones) 66, 68 (1854). While Appellate Rule 10(b)(1) protects judicial economy and speaks to our adversarial system of justice by requiring the parties to object in the majority of instances, it nevertheless recognizes that some questions may be deemed preserved for review by rule or law. Pursuant to *Ashe*, the trial court's error in providing instructions to a single juror in the case at bar constitutes such a question.

Harmless Error

[2] Having determined that defendant's constitutional argument was preserved for appeal, we next consider whether defendant is entitled

1. The dissent characterizes the conversations between the trial court and the foreperson as mere "bench conferences" and surmises that this opinion "will lead to inconsistency and confusion in future cases" and a "chilling effect on juror communication." *Post* at 8-9, 18. However, those dire consequences will be avoided because our holding is limited to instructions and not all communications between judge and juror.

to a new trial as a result of the trial court's error. Following its contention that defendant waived appellate review, the State engages primarily in plain error analysis rather than harmless error analysis. According to the State, defendant cannot meet his burden under plain error review because he has failed to show that he was prejudiced by the trial court's conversations and because there was strong evidence at trial supporting the jury's verdict. In the event that this Court conducts harmless error review, the State argues that for the same reasons, the trial court's error was harmless beyond a reasonable doubt. We agree with defendant that the proper standard of review in the instant case is harmless error and conclude that the State's arguments are insufficient to meet its burden.

Where the error violates a defendant's right to a unanimous jury verdict under Article I, Section 24, we review the record for harmless error. *Nelson*, 341 N.C. at 700-01, 462 S.E.2d at 227-28; *see Ashe*, 314 N.C. at 36-39, 331 S.E.2d at 657-59 (applying the harmless error test and concluding that the defendant was entitled to a new trial). The State bears the burden of showing that the error was harmless beyond a reasonable doubt. *Nelson*, 341 N.C. at 701, 462 S.E.2d at 228. "An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction." *Id.*

In the instant case, the State's arguments are inadequate to show harmless error beyond a reasonable doubt. The record reveals that the jury was sufficiently concerned that the foreperson "already ha[d] [his] mind made up" regarding defendant's guilt or innocence to request instructions from the trial court and to elect another foreperson. In response to the jury's request for guidance, the trial court summoned only the foreperson and provided him with instructions on and off the record that it did not provide to the rest of the jury. The trial court instructed only the foreperson that jurors needed to resolve the issue in the jury room. The trial court's failure to similarly instruct the remaining jurors may have given them the impression that the trial court had resolved the matter, foreclosing further debate on this issue during deliberations. Further, following the third unrecorded bench conference with the foreperson, the trial court informed the foreperson that it needed to give him "one other instruction" and instructed him that "[t]he issues about which we had talked in this courtroom, *both here at the bench and also openly on the record*, are issues you that are not to share with the other jurors."

While the record sufficiently reveals that the trial court violated the unanimity requirement by instructing only the foreperson, the

record is inadequate to meet the demanding task of showing that the error was harmless beyond a reasonable doubt. For the State to meet its burden, the record must reveal the substance of the conversations at issue or the conversations must be adequately reconstructed. *See*, *e.g.*, *Boyd*, 332 N.C. at 106, 418 S.E.2d at 474 (holding that the State cannot demonstrate harmless error where the substance of the trial court's conversation with an excused juror was not revealed by the transcript or reconstructed at trial); *State v. Smith*, 326 N.C. 792, 794-95, 392 S.E.2d 362, 363-64 (1990) (holding that the State could not meet its burden of proving harmless error where the record did not reveal the substance of the trial court's unrecorded conversations with prospective jurors). The record in the present case does not disclose the substance of the trial court's unrecorded bench conferences with the foreperson, nor have the conversations been reconstructed.

In light of the limited record and the State's failure to present arguments that go to the proper standard of review, we hold that the State has failed to meet its burden of showing the trial court's error was harmless beyond a reasonable doubt. Accordingly, we affirm the decision of the Court of Appeals granting defendant a new trial.

AFFIRMED.

Justice BRADY dissenting.

Because it was within the discretion of the trial court to speak with the jury foreperson outside the presence of the jury, I would hold that the trial court committed no error. Furthermore, I believe that the majority's harmless error analysis jeopardizes needed juror candor. Therefore, I respectfully dissent.

The majority relies upon *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985), and *State v. Nelson*, 341 N.C. 695, 462 S.E.2d 225 (1995), to conclude that the trial court violated defendant's constitutional right to a unanimous verdict. This approach is inappropriate because the conversations between the trial court and the foreperson were of a different nature from the conversations that occurred in *Ashe* and *Nelson*.

Ashe and *Nelson* each involved a jury's request to review evidence presented during trial. In *Ashe*, the jury requested to review portions of the testimony from the trial transcript. 314 N.C. at 33, 331 S.E.2d at 655-66. The trial court instructed the jury foreperson,

on the record and in the presence of counsel, that the transcript was not available and that jurors would have to depend upon their best recollections of the evidence presented. *Id.* This Court ruled that the trial court's failure to instruct the entire jury on this issue was error. 314 N.C. at 35-36, 331 S.E.2d at 656-67. The Court's holding centered on an analysis of N.C.G.S. § 15A-1233(a), which states that if a jury "after retiring for deliberation requests a review of *certain testimony* or *other evidence*, the jurors must be conducted to the courtroom." N.C.G.S. § 15A-1233(a) (2007) (emphasis added); *Ashe*, 314 N.C. at 33-36, 331 S.E.2d at 656-57. This Court further explained in *Ashe* that the harm of the error was the risk of relaying a "secondhand rendition" of the trial court's evidentiary instructions. 314 N.C. at 36, 331 S.E.2d at 657.

Likewise, in *Nelson*, the trial court received a written request from the jury to review four specific kinds of evidence presented during the trial. 341 N.C. at 698, 462 S.E.2d at 226. Because the request was ambiguous, the trial court summoned the jury foreperson to provide clarification. *Id.* at 698-700, 462 S.E.2d at 226-27. After the foreperson explained the request, the trial court provided the requested evidence and instructed the foreperson that the jury should not alter or change the items in any way. *Id.* at 700, 462 S.E.2d at 227. This Court concluded that the trial court's actions were in error based again upon just a citation to N.C.G.S. § 15A-1233 and no constitutional analysis. *Id.*

The nature of the conversations between the trial court and the jury foreperson in the instant case is completely different from the nature of the conversations in *Ashe* and *Nelson*. Here, the bailiff alerted the trial court that there was "some issue with the foreperson." At this point, the trial court did not know whether the foreperson's "issue" was related to a question of fact or law concerning the case, a procedural inquiry, or a personal problem. The trial court consulted with counsel for defendant and the State and proposed speaking with the foreperson to discover the nature of the "issue." Both attorneys agreed, on the record, with the trial court's procedure. Once in the courtroom—in the presence of the trial judge, counsel for defendant and the State, and the court reporter—the foreperson informed the trial court that "[the other jurors] seem to think that I already have my mind made up."

The foreperson's "issue" was not related to any question from the jury concerning the evidence or law related to the case; thus, neither N.C.G.S. 15A-1233(a) nor the rules established in *Ashe* and *Nelson*

were implicated. From the record it appears the foreperson was unsure how to proceed with deliberations given the doubts of the other jurors concerning his perceived personal partiality. The foreperson's issue fell somewhere between a procedural inquiry and a personal problem, and therefore, it was within the discretion of the trial court to handle the issue. "When there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his discretion in the interest of efficiency, practicality and justice." *Shute v. Fisher*, 270 N.C. 247, 253, 154 S.E.2d 75, 79 (1967). The only well-recognized principle to which the trial court was required to adhere in this situation is that the trial court could not conduct a private bench conference with the jury foreperson:

> Our cases have long made it clear that it is error for trial judges to conduct private conversations with jurors. We said in *State v. Tate*: "[T]he trial court's private conversations with jurors were ill-advised. The practice is disapproved. At least, the questions and the court's response should be made in the presence of counsel."

State v. Boyd, 332 N.C. 101, 104-05, 418 S.E.2d 471, 473 (1992) (internal citations omitted) (quoting *State v. Tate*, 294 N.C. 189, 198, 239 S.E.2d 821, 827 (1978) (alteration in original)). The trial court did not violate this principle. During every bench conference with the jury foreperson, counsel for defendant and the State were present. Defense counsel was also present when the trial court spoke with the jury foreperson off the record to determine whether the foreperson could deliberate impartially. At the conclusion of the trial court's bench conferences, the State and defense counsel indicated that they were "satisfied" with the ability of the foreperson to proceed with the case.

Because the majority asserts the issue in *Tate* was "the right to be present at every stage of the trial under Article I, Section 23" of the North Carolina Constitution,[2] it finds the rule established in *Tate* and *Boyd* inapplicable to the instant case. However, the majority's strained constitutional analysis of the opinions in *Ashe* and *Nelson* is off target with the actual facts of the case before us. The

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2. Interestingly, this Court did not decide the juror issue in *Tate* under Article I, Section 23, and the defendant did not argue an Article I, Section 23 violation. *See Tate*, 294 N.C. at 197-98, 239 S.E.2d at 827; *see also* Brief of Defendant-Appellant at 30-31, *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978) (No. 97). Only later, in *State v. Boyd*, 332 N.C. at 104-05, 418 S.E.2d at 473, did this Court discuss the issue in *Tate* as an Article I, Section 23 violation.

majority states that *Nelson* "explains" that the "failure to require all jurors to return to the courtroom to *ask a question* of the court violates . . . the unanimous verdict requirement of Article I, Section 24 of the North Carolina Constitution." *Nelson*, 341 N.C. at 700-01, 462 S.E.2d at 227-28 (emphasis added). While the Court did use this language in *Nelson*, it was merely to paraphrase the holding in *Ashe*, and the characterization is too broad. The holding in *Ashe* was specific and narrow, stating: "Both Art. I, § 24 of the North Carolina Constitution and N.C.G.S. § 15A-1233(a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request *to review testimony* and to exercise its discretion in denying or granting the request."[3] 314 N.C. at 40, 331 S.E.2d at 659 (emphasis added). *Ashe* only requires the full jury to be present when asking the trial court to review testimony or other evidence. *Ashe* does not require the full jury to be present when *any* question is asked of the trial court. *Nelson*, and now the majority, characterize *Ashe* too broadly. However, while *Nelson's* broad paraphrase of *Ashe* was inconsequential because *Nelson* also dealt with a request to review evidence under N.C.G.S. § 15A-1233, the expansive language that is applied to the instant case has the effect of rashly extending *Ashe's* holding to situations that do not involve requests to review evidence.

It is clear that the circumstances in this case are distinguishable from those the majority relies upon in *Ashe* and *Nelson*. In the instant case the record reveals that there was no jury request to review any form of evidence or testimony, nor were there any instructions given by the trial court to the foreperson relating to an evidentiary matter. Nothing in the context of the recorded conversations among the trial court, the foreperson, and attorneys for defendant and the State indicates that the trial court gave an "instruction" related to either testimony given at trial or the applicable law relevant to defendant's case. As such, *Ashe* and *Nelson* provide no basis to conclude that defendant's right to a unanimous verdict was violated.

Nonetheless, the majority attempts to characterize the conversations between the trial court and jury foreperson as the type of formal jury instructions that implicate constitutional protections under *Ashe* and *Nelson*. The majority stretches to classify the conversation between the trial court and the foreperson as a formal jury "instruc-

3. It should be noted that this is the only time *Ashe* mentions the North Carolina Constitution. The analysis in *Ashe* addresses the statutory violation only, with no discussion of a constitutional violation.

tion." To the contrary, the trial court gave no guidance to the foreperson on any evidentiary matter or question of law. In fact, the trial court refrained from instructing the foreperson, stating that the issue was something "[the foreperson] and the other jurors need[ed] to handle in the jury room."

Even if we were to classify this remark as a formal jury "instruction," the trial court repeated the substance of the "instruction" to the jury as a whole. In the presence of defense counsel and the State, the trial court informed the foreperson that the jury's concern regarding his impartiality was "an issue that I believe you and the other jurors need to handle in the jury room." The majority states that the trial court gave these instructions only to the foreperson and that the failure to instruct the remaining jurors "may have given [the other jurors] the impression that the trial court had resolved the matter, foreclosing further debate on the issue." The record plainly demonstrates that the majority's speculation is unfounded. Immediately after the above exchange with the foreperson, the trial court summoned all twelve jurors and stated:

> TRIAL COURT: You all have a duty to consult with one another and deliberate with a view toward reaching an agreement, if it can be done without violence to individual judgment. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, each of you should not hesitate to reexamine your own views and change your opinion, if it is erroneous, but none of you should surrender your honest conviction as to the weight of the evidence solely because of the opinion of your fellow jurors or for the purpose of returning a verdict.

These remarks thoroughly informed jurors how they were to proceed in deliberations. The trial court did not contradict, but rather elaborated upon, the so-called instruction given to the foreperson moments earlier. The trial court explained that jurors were to consult with one another with the goal of reaching a verdict, that each person was to be impartial, and that jurors should deliberate honestly and openly without surrendering their personal convictions as to the weight of the evidence. In substance, the trial court communicated to the entire jury an elaborated version of what it told the foreperson.

The majority also worries that the trial court's warning to the foreperson "not to share with the other jurors" the issues they dis-

cussed during the bench conferences could be prejudicial. Again, this warning is not the type of instruction that triggers the provisions of *Ashe* and *Nelson* because it does not relate to an evidentiary matter. Moreover, this particular instruction—to not share any information discussed in the bench conferences—was likely given to alleviate the fears this Court expressed in *Ashe*. In *Ashe*, the trial court erred by instructing the jury foreperson to relay instructions to the remaining jurors. 314 N.C. at 35-36, 331 S.E.2d at 657. This procedure risked prejudice to a defendant because "rather than determining for himself or herself the import of the request and the court's response, [a juror] must instead rely solely upon their spokesperson's secondhand rendition, however inaccurate it may be." *Id.* at 36, 331 S.E.2d at 657. Here, the trial court's "instruction" to the foreperson was simply a precaution to prevent misinformation and confusion, especially considering that the trial court had already instructed the jury as a whole. Furthermore, "[w]e presume, as we must, that the jury followed the instructions as submitted to it by the trial court." *State v. Thompson*, 359 N.C. 77, 112, 604 S.E.2d 850, 875 (2004) (citation omitted), *cert. denied*, 546 U.S. 830 (2005). Thus, we trust that the whole jury properly deliberated fairly and impartially according to the trial court's instructions, which sufficiently protects defendant against any possible prejudice that may have resulted from the bench conferences with the foreperson.

Here, the trial court acted within its discretion to remedy the issue concerning the alleged impartiality of the jury foreperson. The trial court did so efficiently, while protecting the interests of defendant by insisting that defense counsel be present during all bench conferences. Furthermore, the record indicates that the trial court went to great lengths to give the full jury formal instructions and to tell the foreperson that he was not to discuss the bench conferences with the other jurors. In light of these facts, the majority's reliance on *Ashe* and *Nelson* to find error in the trial court's actions is unconvincing. Invariably, the majority's expansion of the narrow holding in *Ashe* will lead to confusion and inconsistency as trial courts grapple with jury issues. This result could be avoided by taking a common sense approach to the facts before us, which inevitably leads the analysis back to *State v. Tate*.

Tate involved a factual situation similar to the instant case, in which jurors in a criminal trial asked, or began to ask, questions of the trial judge on two different occasions during the trial. 294 N.C. at 197, 239 S.E.2d at 827. In both instances, the trial court summoned a

juror to the bench and engaged the juror in a private conversation.[4] *Id.* These conversations were not recorded, and counsel for neither the State nor the defendant was present. *Id.* at 197-98, 239 S.E.2d at 827. Before overruling the assignment of error due to the defendant's failure to preserve the issue for appeal, this Court stated its disapproval of the trial court's practice of holding *private* conversations with jurors. The Court in *Tate* stated that "[a]t least, the questions and the court's response *should be made in the presence of counsel*." *Id.* at 198, 239 S.E.2d at 827 (emphasis added). Thus, *Tate* clearly implies that a conversation between the trial court and a juror would not be private when held in the presence of counsel.

Factually, this case is similar to *Tate* in that the trial court held unrecorded bench conferences with a single juror; however, in the instant case, there were no *private* conversations between the trial court and the jury foreperson like those admonished in *Tate*. Here, each interaction between the trial court and the foreperson was either recorded or held in the presence of counsel for both the defendant and the State. The trial court ensured, as this Court advised in *Tate*, that defendant's legal advocate was present to monitor the conversations and to protect defendant's rights. While the majority distinguishes *Tate* by stating that it involved an "innocuous procedural irregularity," the facts of the instant case more closely resemble such a procedural irregularity than a request for evidentiary instructions as found in *Ashe* or *Nelson*.

Additionally, the two cases the majority cites in its harmless error analysis—*Boyd*, 332 N.C. 101, 418 S.E.2d 471, and *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990)—both rely on *Tate* to determine whether conversations between a trial court and juror amounted to error. *Boyd* was a capital case in which the trial court conducted a private, unrecorded bench conference with a prospective juror, then excused the juror and deferred her service. 332 N.C. at 102, 104, 418 S.E.2d at 471, 473. Neither counsel for the defendant nor the State was present during the conversation. *Id.* at 104, 418 S.E.2d at 473. This Court in *Boyd* concluded that the defendant's failure to object to the private bench conference in a capital trial did not prevent him from raising the issue on appeal and held that the error entitled the defendant to a new trial. *Id.* at 105-06, 418 S.E.2d at 473-74. In *Boyd*, it is clear that the Court found error based upon the *private* nature of the bench conference, "private" again being defined as a conversation

4. "Private" in this context means a conversation between only the trial court and the juror, outside the presence of counsel and the court reporter.

between the judge and juror alone, without the presence of counsel. Had counsel been present during the bench conference in *Boyd*, it stands to reason, based upon the Court's reliance on *Tate*, that the Court would have found no error. The majority characterizes the holding in *Boyd* by stating that "the State cannot demonstrate harmless error where the substance of the trial court's conversation with an excused juror was not revealed by the transcript or reconstructed at trial"; however, a more accurate description of *Boyd's* holding would add: "or made in the presence of the defendant's counsel."

Likewise, in *Smith*, the trial court conducted private, unrecorded conversations with prospective jurors "even though counsel and the defendant were in the courtroom." 326 N.C. at 793, 392 S.E.2d at 363. Following each of the conversations, the trial court excused the prospective juror. *Id.* *Smith* also cites *Tate* for the proposition that "*private* communication between a judge and a seated juror [is] expressly disapproved." 326 N.C. at 794, 392 S.E.2d at 363 (emphasis added). Again, the decision in *Smith* hinges upon the private nature of the conversation that occurred outside the presence of counsel.

A finding of error in this case should likewise turn upon whether the trial court engaged in a private conversation with the jury foreperson. The record is clear that no private conversations occurred. At all times during the recorded and unrecorded bench conferences, defendant's attorney was present to monitor and participate in the conversation. The trial court even conducted a conference with only the attorneys present before deciding the issue was something the jurors must handle in the jury room. After the unrecorded bench conferences, defense counsel also communicated to the trial court, on the record, that he was satisfied with the foreperson's ability to proceed with deliberations in a fair and impartial manner. This acknowledgment by defense counsel at the conclusion of all the bench conferences during jury deliberations provides a reasonable assurance that the trial court's actions were not prejudicial to defendant.

Also, notably missing from the majority's harmless error analysis is a discussion of the overwhelming evidence of defendant's guilt. "An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction." *Nelson*, 341 N.C. at 701, 462 S.E.2d at 228. Evidence presented to the jury included testimony from several law enforcement officers concerning the suspicious behavior of defendant and his wife following the convenience store robbery. Deputy Greg Mason of the Carteret County Sheriff's Department tes-

tified that he stopped defendant's vehicle minutes after the robbery and that Tavoris Courtney was a passenger in the vehicle. The jury was read a transcript of Courtney's confession to law enforcement, which implicated defendant, and heard testimony from Courtney describing defendant's involvement in planning the robbery and operating the get-away vehicle. In light of this strong evidence, it is inconceivable that any portion of the conversations between the trial court, the foreperson, and counsel for the defendant and the State contributed to defendant's conviction.

Yet, instead of considering the evidence of defendant's guilt, the majority frets over the trial court's three unrecorded bench conferences conducted in the presence of defense counsel. Generally, it is prudent to record bench conferences, but the trial court should have the discretion to determine whether certain juror communications should be recorded, especially those involving matters that a juror considers sensitive or personal. If a juror believes that he or she must go on the record to ask the trial court to address potential concerns or questions, it could have the effect of chilling essential juror candor and preventing necessary communications between the jury and the trial court. The instant case provides an example. For reasons unknown to the trial court, and perhaps other jurors, the jury foreperson believed that the other jurors thought he "already had his mind made up." The following colloquy that occurred suggests that the juror may not have been comfortable explaining his concerns on the record:

> THE COURT: Sir, to make sure I understand then, there is an issue that has arisen regarding your opinion about the case basically, is that right?
>
> FOREPERSON: Yes.
>
> THE COURT: Issue between you and the other jurors?
>
> FOREPERSON: Yes.
>
> THE COURT: This is an issue that I believe you and the other jurors need to handle in the jury room.
>
> FOREPERSON: I need to say one more thing.
>
> THE COURT: Yes, sir. Go on.
>
> FOREPERSON: *I can't . . .*
>
> TRIAL COURT: All right. Come up.

(Emphasis added.) After this exchange the trial court conducted a bench conference with the foreperson and counsel for both the State and defendant. Obviously, the transcript does not reflect the body language, tone of voice, or facial expressions of the foreperson, but the exchange reveals that there was likely something in the foreperson's demeanor that suggested he did not want to be "on the record," which in turn, prompted the trial court to conduct an unrecorded bench conference with the foreperson and attorneys. If the trial court were to insist that the foreperson speak on the record, as it seems the majority would have had it do, it could possibly have risked foreclosing further discussion with the foreperson. The trial court was in the best position to determine if conducting the bench conference off the record was necessary. As long as the trial court takes steps to ensure that defendant's rights are protected by including counsel in all bench conferences with jurors, it should be within the court's discretion to initially conduct conversations on or off the record.

Even if the bench conferences between the trial court, foreperson, and counsel were in error, the fact that defense counsel raised no objection to the conversations and agreed that the foreperson could proceed with deliberations in an impartial manner assures that the conversations were not prejudicial. However, if anything prejudicial did occur in the unrecorded bench conferences, statutory procedures were available to defense counsel to reconstruct the conversation for the record. It is unfair to saddle the State with the burden of proving that the substance of the unrecorded conversations was harmless beyond a reasonable doubt when defense counsel could have prompted a written preservation of the conversations by simply raising an objection to anything that caused concern. *See* N.C.G.S. § 15A-1241(c) (2007); *State v. Blakeney*, 352 N.C. 287, 307, 531 S.E.2d 799, 814 (2000) (stating that if a party "requests that the subject matter of a private bench conference be put on the record for appellate review, section 15A-1241(c) requires the trial judge to reconstruct the matter discussed as accurately as possible" (citation omitted)), *cert. denied*, 531 U.S. 1117 (2001). Defense counsel's failure to make this request is the very reason the majority must speculate as to the occurrence of a constitutional error and its effect on the outcome of defendant's trial. In *State v. Lee*, this Court responded to the defendant's complaints about unrecorded bench conferences by stating: "In the event that anything prejudicial to the defendant occurred during these bench conferences, it was the duty of defense counsel, who were aware that the conferences were not being recorded, to have

the record reflect the substance of the prejudicial matter." 335 N.C. 244, 266, 439 S.E.2d 547, 557, *cert. denied*, 513 U.S. 891 (1994). The majority's failure to adhere to this well-settled principle is remarkable, and it creates an incentive for attorneys to be less than vigilant in preventing error during trial in hopes that some inaction will benefit their clients on appeal.

Additionally, the Rules of Appellate Procedure allow defendant to furnish the appellate court a summary narration of the unrecorded bench conferences. N.C. R. App. P. 9(c)(1).[5] If anything prejudicial occurred during these unrecorded conferences, defendant has the burden under Rule 9(c)(1) to provide the Court with a summary of the objectionable material so that the Court is not forced to speculate about the alleged error. *Id.*; s*ee also State v. Daughtry*, 340 N.C. 488, 508, 459 S.E.2d 747, 756 (1995) (stating that this Court refuses to find reversible error when a defendant's complaints "rest[ ] on pure speculation").

Moreover, even though the majority presumes that the trial court's unrecorded bench conferences were in error, the doctrine of invited error should preclude defendant from raising the issue on appeal. Section 15A-1443(c) states: "A defendant is not prejudiced by . . . error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (2007). Defendant acquiesced to the very procedure about which he now complains. After the bailiff alerted the trial court that there was "some issue with the foreperson," the trial court consulted both the State and defendant's counsel, stating: "What I propose to do is bring the foreperson out—just the foreperson, not all of them—but from the foreperson find out what the nature of the issue is. Any objection to proceed in that fashion?" Both the State and defense counsel responded: "No, sir." "Ordinarily one who causes (or we think joins in causing) the court to commit error is not in a position to repudiate his action and assign it as ground for a new trial. . . . Invited error is not ground for a new trial." *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971) (citations omitted). In *Payne*, this Court precluded the defendant from complaining on appeal about the reading of testimony to the jury, when he stated his objection to the trial court only after previously consenting to the action. *See id.* Similarly, defense counsel here expressly consented to the trial court's proposal to only summon the jury foreperson to the courtroom. This express consent should preclude our consideration of error on appeal. Again, by ig-

5. Rule 9(c) applies to testimonial evidence, as well as "other trial proceedings necessary to be presented for review by the appellate court." N.C. R. App. P. 9(c).

noring the invited error doctrine, the majority establishes precedent that rewards parties for injecting possible error into the trial in hopes of profiting from it on appeal.

Finally, the Rules of Appellate Procedure should preclude this Court from considering this issue on appeal altogether. Rule 10(b) requires that to preserve an issue for appellate review, an appellant must "present[ ] to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desire[s] the court to make" and "to obtain a ruling upon the . . . request, objection or motion." N.C. R. App. P. 10(b)(1). This rule carries no less weight when the alleged trial error is constitutional in nature. *See, e.g.*, *State v. Gainey*, 355 N.C. 73, 110, 558 S.E.2d 463, 486 ("[C]onstitutional questions not raised before the trial court will not be considered on appeal."), *cert. denied*, 537 U.S. 896 (2002). As noted, defense counsel found nothing objectionable to the bench conferences during jury deliberations. As such, Rule 10(b) bars defendant's complaint from this Court's review.

The majority misses the mark on all fronts. The inappropriate adherence to *Ashe* and *Nelson* ignores the facts of this case and strips trial courts of needed discretion. The result is an expansion of the holding in *Ashe* that will lead to inconsistency and confusion in future cases. Furthermore, the majority's harmless error analysis essentially admonishes the trial court for promoting juror candor and will have a chilling effect on juror communication. Finally, by ignoring the doctrine of invited error and not adhering to Appellate Rule 10(b), the majority allows itself to engage in speculation and assumption. This approach promotes future inefficiency and legal risk-taking at the expense of justice. Accordingly, I respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

BEAUFORT COUNTY BOARD OF EDUCATION v. BEAUFORT COUNTY BOARD OF COMMISSIONERS

No. 106PA08

(Filed 28 August 2009)

1. Schools and Education— funding—dispute with county—resolution by court—constitutionality

N.C.G.S. § 115C-431 (which provides an eventual judicial resolution of disputes between school boards and county commissioners over the amounted needed to operate the school system) does not impermissibly delegate legislative authority and is constitutional. The statute does no more than invite the courts to adjudicate a disputed fact: the annual cost of providing a countywide system of education under the policies chosen by the legislature and the State Board of Education. This is within the historic and proper role of the judiciary.

2. Schools and Education— funding—judicial determination of minimum—county authority not infringed

N.C.G.S. § 115C-431 does not deprive the county commissioners of funding discretion granted by the State Constitution. The requirement that the commissioners provide the minimum level of funding required by state law does not abrogate their discretionary authority to contribute more.

3. Schools and Education— funding—judicial resolution of disputed amount—jury instruction

The Supreme Court exercised its general supervisory authority to promptly resolve a novel issue of great import, despite the lack of an objection or assignment of error, in a case involving the amount needed to operate a county school system. The instruction given to the jury on the word "needed" was too expansive, and was remanded for application of the more restrictive definition articulated herein.

4. Schools and Education— funding—responsibility for operating expenses

The statutes concerning school funding explicitly contemplate the funding of current school expenses by county commissioners when state funding is insufficient rather than local governments having responsibility for capital expenses only.

5. Schools and Education— funding—judicial dispute—denial of continuance—not a denial of due process

A county claiming a due process violation in a school funding case for the denial of a continuance had ample opportunity to communicate with the board of education and to request information, and the trial court did not err by denying the motion for a continuance. The legislature intended that the statutory process for resolving school funding disputes be carried out promptly.

Justice NEWBY concurring.

Justice HUDSON dissenting.

Justice TIMMONS-GOODSON joins in the dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 188 N.C. App. 399, 656 S.E.2d 296 (2008), finding no error in a judgment entered 9 August 2006 by Judge William C. Griffin, Jr. in Superior Court, Beaufort County. Heard in the Supreme Court 9 September 2008.

Schwartz & Shaw, P.L.L.C., by Brian C. Shaw and Richard Schwartz, for plaintiff-appellee.

Garris Neil Yarborough and Jonathan V. Maxwell for defendant-appellant.

James B. Blackburn, III, General Counsel, for North Carolina Association of County Commissioners, amicus curiae.

Tharrington Smith, L.L.P., by Ann Majestic and Robert M. Kennedy Jr.; and Allison B. Schafer, General Counsel, for North Carolina School Boards Association, amicus curiae.

MARTIN, Justice.

This action arises out of a dispute between the Beaufort County Board of Education (the School Board) and the Beaufort County Commissioners (the County Commission) over the amount of funding necessary to operate the local school system for the 2006-2007 fiscal year (FY 2006-2007). The School Board requested $12,106,304 and the County Commission allocated $9,434,217. After complying with the negotiation and mediation procedures set forth in N.C.G.S. § 115C-431 (2007) (section 431), the School Board sued the County

Commission.[1] At trial, a jury found that the School Board needed $10,200,000 for FY 2006-2007 school operations. The trial court entered a judgment requiring the County Commission to appropriate that amount to the School Board.

On appeal, the Court of Appeals found no error. *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 188 N.C. App. 399, 416, 656 S.E.2d 296, 307 (2008). We allowed discretionary review to determine whether "the statutory framework for resolving school funding disputes between the county board of education and the county board of commissioners [is] constitutional" and, if so, whether "the statutory framework [has] been properly applied in this case."

[1] The County Commission first contends that section 431 is unconstitutional on its face. We observe that a facial challenge to a statute is a " 'most difficult challenge to mount successfully.' " *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). A party must show that there are no circumstances under which the statute might be constitutional. *See id.* at 564, 614 S.E.2d at 486. We seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them. *See Henry v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986). This Court will only measure the balance struck in the statute against the minimum standards required by the constitution. *See id.*

The County Commission alleges that by allowing the court system to play a role in deciding the level of funding for public education, section 431(c) impermissibly delegates the legislature's constitutional duty to "provide . . . for a general and uniform system of free public schools." N.C. Const. art. IX, § 2(1). The County Commission argues that the statutory procedure in section 431(c) thus violates the constitutional requirement that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." *Id.* art. I, § 6. Like the United States Supreme Court, however, we acknowledge that our separation of powers clause does not prevent the General Assembly "from seeking assistance, within proper limits, from its coordinate Branches."

1. Section 431(c) allows school boards to sue county commissions when other resolution procedures fail. At trial, the court, via a jury if either party so requests, "find[s] the facts as to the amount of money necessary to maintain a system of free public schools, and the amount of money needed from the county to make up this total." *Id.*

Touby v. United States, 500 U.S. 160, 165 (1991) (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

In analyzing the role of the judiciary under section 431(c), we begin by examining the statutory procedures preceding litigation. The local school board first creates a budget setting out its estimate of the cost of providing education within its locale for the upcoming year and submits that budget to the county commission. *See* N.C.G.S. § 115C-429(a) (2007). The county commission then determines the amount of funds to be appropriated to the school board. *See* N.C.G.S. § 115C-429(b) (2007). If there is a dispute between the school board and the county commission, the two boards meet with a mediator in an effort to negotiate a compromise. *See* § 115C-431(a). If there is still no agreement, representatives from the two boards enter a formal mediation. *See* § 115C-431(b). If no agreement can be reached at the mediation, the school board may file an action in superior court. *See* § 115C-431(c). In any such action, the trial court is charged to

> find the facts as to the amount of money necessary to maintain a system of free public schools, and the amount of money needed from the county to make up this total. . . .
>
> . . . When the facts have been found, the court shall give judgment ordering the board of county commissioners to appropriate a sum certain to the local school administrative unit, and to levy such taxes on property as may be necessary to make up this sum when added to other revenues available for the purpose.

Id.

Because the trial court must determine the amount necessary to fund "a system of free public schools," *id.*, we look to other provisions of Chapter 115C to determine the meaning of that phrase. The Chapter contains copious provisions setting standards, often in minute detail, to which local schools must adhere.[2] The State Board

2. For a mere partial listing, see, for example, N.C.G.S. §§ 115C-81(a1) (mandating that the Basic Education Program adopted by the State Board be offered to every child); 115C-81(a3)(1) (mandating availability of alcohol and drug use prevention programs); 115C-81(b1) (requiring two full years of instruction on North Carolina history and geography); 115C-81(g) (requiring that the major principles of the nation's founding documents be taught); 115C-81(h) (requiring instruction in character traits of courage, good judgment, integrity, kindness, perseverance, respect, responsibility, and self-discipline); 115C-84.2 (mandating calendar); 115C-102.6C (mandating technology plan in accord with State Board's plan); 115C-166 (requiring industrial-quality eye protection while participating in certain activities); 115C-216 (requiring a course of training in the operation of motor vehicles); 115C-245(a) (prescribing minimum qualifica-

of Education (the State Board) is given the general administrative and supervisory role over public education and is responsible for "establish[ing] policy for the system of free public schools." N.C.G.S. § 115C-12 (2007).[3] The statutory provisions enacted by the legislature and guidelines adopted by the State Board, when viewed together, comprehensively define the phrase "a system of free public schools" used in section 431(c).

Since the General Assembly has so exhaustively defined its desired system, the section 431(c) procedure does no more than invite the courts to adjudicate a disputed fact: the annual cost of providing a countywide system of education under the policies chosen by the legislature and the State Board. Such fact-finding falls within the historic and proper role of the judiciary. *See*, *e.g.*, N.C. Const. art. IV, § 13 (discussing civil actions: "[T]here shall be a right to have issues of fact tried before a jury."). After finding the facts, the trial court enters judgment against the county commission as directed by the legislature. *See* § 115C-431(c). It is the legislature, not the judiciary, which has assigned responsibility to local government by requiring that judgment be entered against the county commission if the court finds the cost of schooling is greater than the amount appropriated. The legislature has therefore neither assigned policy-making power to the courts nor otherwise delegated its authority, and the judiciary is at all times exercising a function traditionally assigned to it under our tripartite system of government.

Furthermore, we have previously considered and upheld a provision nearly identical to section 431(c). Chapter 33, section 8, Laws of 1913, provided, just as section 431 does, for judicial fact-finding as to the cost of schools in the event of disagreement between a county school board and the county commission. *See* Act of Mar. 1, 1913, ch. 33, sec. 8, 1913 N.C. Pub. [Sess.] Laws 58, 60. As in this case, the

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tions for school bus drivers); 115C-264 to -264.3 (governing provision of food service, including a decrease in foods high in trans-fatty acids, restrictions on vending machine sales, and a preference for high-calcium foods and beverages); 115C-301 (governing allowable class sizes); 115C-364 (setting minimum age for admission); 115C-375.4 (2007) (requiring that parents be informed about meningococcal meningitis and influenza vaccines annually).

3. To list only a few examples from that section, the duties assigned to the State Board include setting policy regarding the following areas: regulation of salaries, adoption of textbooks, adoption of rules requiring implementation of the Basic Education Program (defined elsewhere), development and enforcement of the School-Based Management and Accountability Program, development of content standards and exit standards, promulgation of transportation regulations, and adoption of model guidelines for closing the academic achievement gap. *See* § 115C-12(9), (9c), (16), (17), (30).

county commission challenged the resolution scheme as unconstitutional. *See Bd. of Educ. v. Bd. of Cty. Comm'rs*, 174 N.C. 469, 474, 93 S.E. 1001, 1003 (1917). In response to that argument, we held, just as we do now, that the scheme "only empowers the courts to ascertain and determine a disputed fact relevant to a pending issue between the two boards, and thereupon command that the tax be levied accordingly, both the finding of the fact and the judgment thereon being, in our opinion, judicial in their nature." *Id.* The provisions of section 431(c) thus comport with the State Constitution, and any complaints about the policy or wisdom of the challenged procedures must necessarily be directed to the General Assembly.

[2] The County Commission next asserts that section 431(c) deprives it of funding discretion granted by the State Constitution. Our Constitution provides:

> (2) *Local responsibility.* The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

N.C. Const. art. IX, § 2(2). The County Commission maintains that allowing the court to ascertain "the amount of money necessary to maintain a system of free public schools," § 115C-431(c), is counter to the second sentence of the constitutional provision, which states that the local government "may . . . *add to or supplement*" the amount for which the legislature has assigned responsibility, N.C. Const. art. IX, § 2(2) (emphasis added).

In interpreting our Constitution, we are bound to "give effect to the intent of the framers of the organic law and of the people adopting it." *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953). Moreover, "where one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted." *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977) (citations omitted).

We now consider the meaning of the terms "necessary" and "needed," as used in section 431(c), in light of Article IX, Section 2(2) of the State Constitution. We acknowledge that these terms are susceptible to reasonable interpretations of varying strictness, about

which there has been argument from the earliest days of our republic. *See*, *e.g.*, *M'Culloch v. Maryland*, 17 U.S. 207, 212-13, 4 Wheat. 316, 323-25 (1819). If a fact-finder were to interpret "necessary" or "needed" in section 431(c) expansively, there is a danger that the resulting verdict could intrude on a county commission's funding discretion under Article IX, Section 2(2) by requiring the appropriation of a greater amount of money than that for which the legislature has assigned responsibility. Accordingly, in order to reconcile the statute with Article IX, Section 2(2), we accord a restrictive interpretation to the terms "necessary" and "needed" within section 431(c).

So construed, section 431(c)'s requirement that county commissions provide the minimum level of funding required by state law does not abrogate their discretionary authority to contribute more. As discussed above, the legislature has deemed it appropriate to assign responsibility to local government to provide funding to maintain the system of public schools. County commissions are thus required to furnish that amount. *See* N.C. Const. art. IX, § 2(2). Our State Constitution protects a local government's discretionary authority to provide more funding than legally required, not less. Consequently, section 431(c) does not encroach on local governments' discretion to contribute additional funds to schools beyond their minimum legal responsibility.

[3] We next consider the trial court's charge to the jury in the present case. Although counsel did not object or assign error to the trial court's instructions, " '[t]his Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice,' and may do so to 'consider questions which are not properly presented according to [its] rules.' " *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007) (quoting *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975)). We invoke our general supervisory authority mindful that because the trial court "did not have the legal standard which we articulate today to guide him in his consideration of the case, . . . it is not reasonable to expect him to have applied it without the benefit of this opinion." *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), *cert. denied*, 476 U.S. 1165 (1986). The instant case is analogous to other situations wherein this Court has invoked its general supervisory authority to promptly resolve a novel issue of great import. *See In re Brownlee*, 301 N.C. 532, 548, 272 S.E.2d 861, 870 (1981) (stating that the Court's general supervisory authority may be invoked when "[t]he novelty of the issues presented, coupled with

the *potential liability of the counties of North Carolina*, serves to emphasize the proper role of the judiciary in securing a prompt resolution" (emphasis added)).

The trial court instructed the jury that the word "needed" in section 431(c) means "that which is reasonable and useful and proper or conducive to the end sought." Rather than conveying a restrictive definition of "needed," which is necessary to preserve the discretionary authority of county commissions under Article IX, Section 2(2), the instruction conveyed an impermissible, expansive definition of this statutory term. Because the instruction was in error, we must remand for a new trial. At that trial, the trial court should instruct the jury that section 431(c) requires the County Commission to provide that appropriation legally necessary to support a system of free public schools, as defined by Chapter 115C and the policies of the State Board. The trial court should also instruct the jury, in arriving at its verdict, to consider the educational goals and policies of the state, the budgetary request of the local board of education, the financial resources of the county, and the fiscal policies of the board of county commissioners. *See* N.C.G.S. § 115C-426(e) (2007). Anything beyond this measure of damages impermissibly infringes upon the discretionary authority of the County Commission under Article IX, Section 2(2) of the State Constitution and may not be awarded by a jury.

[4] The County Commission next asserts that the trial court erred in its interpretation of the statutory framework. Specifically, the Commission alleges that the legislature has assigned to local governments responsibility only for capital expenses and not current expenses. The statutes explicitly contemplate the funding of current expenses by county commissions when state funding is insufficient. *See*, *e.g.*, § 115C-426(e) (stating that the local current expense fund shall include appropriations sufficient, when added to state funds, to conform to the educational goals of the state; and stating that these appropriations shall be funded by, among other sources, "moneys made available to the local school administrative unit by the board of county commissioners"). Moreover, as we have already discussed, section 431(c) itself assigns to the local government responsibility for funding "a system of free public schools," not merely the capital expense component. We therefore reject the argument that the General Assembly has not assigned responsibility for current expenses to local governments.

[5] Finally, the County Commission alleges that its due process rights were violated by the trial court's denial of its motion to continue. The legislature intended that the statutory resolution process be carried out promptly. *See* § 115C-431(c) ("When a jury trial is demanded, the cause shall be set for the first succeeding term of the superior court in the county, and shall take precedence over all other business of the court."). Assuming, without deciding, that the County Commission is a "person" for due process purposes, it had ample opportunity to communicate with and request information from the School Board after its budget proposal was submitted, including the time during which the boards were engaged in negotiation and mediation leading to the instant suit. *See* N.C.G.S. § 115C-429(c) (2007) ("The board of county commissioners shall have full authority to call for . . . all books, records, audit reports, and other information bearing on the financial operation of the local school administrative unit."); § 115C-431(a), (b). Therefore, the trial court did not err by denying the motion to continue.

In sum, we reject the County Commission's facial challenge and uphold section 431(c) as constitutional. Nonetheless, because the trial court's instructions invited the jury to step beyond its role of determining necessary funding and intrude upon the County Commission's constitutional discretion, we reverse the decision of the Court of Appeals and remand to that court for further remand to the trial court for a new trial.

REVERSED AND REMANDED.

Justice NEWBY concurring.

I agree with the majority that N.C.G.S. § 115C-431(c) can be read narrowly such that it withstands a facial challenge based on Article IX, Section 2 of the North Carolina Constitution. I also agree that, in order to ensure section 115C-431(c) is applied in a constitutional manner, limiting jury instructions are necessary in suits brought under that provision. I write separately because, although this case does not appear to present any constitutional violations, the paramount importance of educational funding compels me to address the interplay between section 115C-431 and the General Assembly's constitutional duty to ensure equal opportunities for a sound basic education for all of North Carolina's public school students.

The right to education is safeguarded in our State Constitution. Article I, Section 15 of the North Carolina Constitution establishes:

"The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." Our Constitution goes on to require: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." N.C. Const. art. IX, § 1. Article IX, Section 2 of our Constitution, which is entitled "Uniform system of schools," provides:

> (1) *General and uniform system: term.* The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.
>
> (2) *Local responsibility.* The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

By its plain language, Section 2(1) imposes solely on the General Assembly the duty to provide for the State's "uniform system of free public schools . . . wherein equal opportunities shall be provided for all students." In *Leandro v. State*, we concluded that this subsection "requires that access to a sound basic education be provided *equally in every school district*." 346 N.C. 336, 349, 488 S.E.2d 249, 256 (1997) (emphasis added). In so doing, we noted that the requirement of equal opportunities for all public school students is part of the General Assembly's constitutional duty to provide for the public schools. *Id.* at 348, 488 S.E.2d at 255.

The first sentence of Section 2(2) enables the General Assembly to require units of local government to bear some of the cost of maintaining their local public schools. However, no school budget "may be funded in such a fashion that it fails to provide the resources required to provide the opportunity for a sound basic education." *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 634, 599 S.E.2d 365, 388 (2004).

The second sentence of Section 2(2) permits local governing boards, if they so choose, to use local revenues to exceed the educational financing requirements placed on them by the General Assembly.

> Because the North Carolina Constitution expressly states that units of local governments with financial responsibility for public education may provide additional funding to supplement the educational programs provided by the state, there can be nothing unconstitutional about their doing so or in any inequality of opportunity occurring as a result.

Leandro, 346 N.C. at 349-50, 488 S.E.2d at 256.

Read together, the North Carolina Constitution and this Court's opinions in *Leandro* and *Hoke County* lead to the conclusion that, while the General Assembly may require local governments to contribute to the cost of maintaining their local public schools, and the local governments may choose to exceed that basic cost by contributing more than the General Assembly requires, the minimum definition of a sound basic education must be the same throughout the state. Along with the minimum substantive requirements of a sound basic education, *see id.* at 347, 488 S.E.2d at 255, there must be a corresponding minimum level of funding that is required for every student. While the legislature may delegate the authority to establish educational funding levels, it may not do so in a manner that allows the per-student financial aspect of a sound basic education to vary substantially by county. Otherwise the General Assembly will have unconstitutionally abdicated its duty to ensure "equal opportunities . . . for all students." N.C. Const. art. IX, § 2(1).

The General Assembly has codified the responsibilities for educational funding in section 115C-426 of the General Statutes, entitled "Uniform budget format." Three funds are identified: the State Public School Fund, the local current expense fund, and the capital outlay fund. N.C.G.S. § 115C-426(c) (2007). The State Public School Fund includes "appropriations for the current operating expenses of the public school system from moneys made available to the local school administrative unit by the State Board of Education." *Id.* § 115C-426(d) (2007). The capital outlay fund is used for facilities and capital improvements. *Id.* § 115C-426(f) (2007).

The parties to this case stipulated at trial that the only issue in controversy is the portion of the county's education budget known as the local current expense fund. Section 115C-426(e) defines this fund as follows:

> The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public

> School Fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners.

Id. § 115C-426(e) (2007). This provision must be read in light of Article IX, Section 2 of the North Carolina Constitution and our holdings in *Leandro* and *Hoke County*. Thus, at a minimum, the funding must be sufficient to provide a sound basic education. Likewise, the funding cannot interfere with the discretion of the local governing board to provide additional educational funding as established by Article IX, Section 2(2). Between these parameters, the statute envisions an amount,

> when added to appropriations from the State Public School Fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners.

Id. This is referred to in section 115C-431(c) as the "amount of money . . . needed from sources under the control of the board of county commissioners to maintain a system of free public schools." N.C.G.S. § 115C-431(c) (2007). It is this amount which is in controversy.

The counties' discretion under Article IX, Section 2(2) regarding whether (and by how much) to exceed the funding responsibility assigned to them by the State belongs to the counties alone, and the General Assembly cannot delegate that discretion away from "[t]he governing boards of units of local government with financial responsibility for public education." N.C. Const. art. IX, § 2(2). I therefore agree with the majority opinion's conclusion that, in a suit under N.C.G.S. § 115C-431(c), the fact finder may only determine the amount of funding that is statutorily required and may not decide the amount of discretionary county funding. As noted by the majority, in this case, the court must instruct the jury that the amount of money "needed from sources under the control of the board of county commissioners to maintain a system of free public schools," N.C.G.S. § 115C-431(c), is only the amount necessary to fulfill "the educational goals and policies of the State" as they are set forth in Chapter 115C. *Id.* § 115C-426(e).

Unlike the majority, I believe that even when the statutes are read narrowly, resolving a dispute under section 115C-426(e) through the procedure of section 115C-431(c) still raises constitutional concerns. Under the statutes, the many factors to be considered in reaching a funding decision include "the educational goals and policies of the State," "the educational goals and policies of . . . the local board of education," and "the financial resources and . . . fiscal policies of the board of county commissioners." *Id.* It concerns me that requiring judicial actors to weigh such policy considerations may be at odds with our Constitution's requirement that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. Similarly, I worry that section 115C-431(c) requires the courts to address nonjusticiable political questions. *See Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854, *cert. denied*, 533 U.S. 975, 122 S. Ct. 22, 150 L. Ed. 2d 804 (2001). The majority opinion maintains that section 115C-431(c) has not "assigned policy-making power to the courts," but I believe the determination of the amount of funding needed to support the public school system is fraught with political implications. Budgetary decisions by nature reflect policy considerations. Local priorities can shift over time, and those priorities are sure to affect the funding decisions of local governments and courts, especially when jury trial is available. If the constitutional guarantee of a sound basic education is to be realized throughout North Carolina, the funding decision should be left to a body like the General Assembly, which is in the best position to consider the full range of evidence and balance the competing objectives.

I acknowledge, however, that this Court has held it permissible for the General Assembly to delegate to the courts the task of determining school funding levels. In *Board of Education v. Board of County Commissioners*, this Court upheld a law that required the superior court division to resolve disputes regarding the amount of tax needed to be levied to maintain a county's public schools for a four month period. 174 N.C. 469, 474, 93 S.E. 1001, 1003 (1917). In accordance with the principle of stare decisis, I adhere to this precedent despite my strong reservations about courts' ability to properly address the myriad policy considerations that attend educational funding.

I am also concerned that the extent of discretion assigned to the counties under section 115C-431 leaves open the possibility that counties could establish educational funding at a level below that

which is required to provide a sound basic education. To be sure, the General Assembly has to a large extent acknowledged its duty to ensure that all public school students receive an equally sound basic education. Section 115C-408(b) of the General Statutes provides in pertinent part:

> To insure a quality education for every child in North Carolina, and to assure that the necessary resources are provided, it is the policy of the State of North Carolina to provide from State revenue sources the instructional expenses for current operations of the public school system as defined in the standard course of study.
>
> It is the policy of the State of North Carolina that the facilities requirements for a public education system will be met by county governments.

N.C.G.S. § 115C-408(b) (2007). These statements of policy recognize the significant variations in the counties' educational needs (due to differences in population, for example) and that those variations will be most manifest in the counties' "facilities requirements." *Id.* The General Assembly has therefore expressed a preference to permit the counties to tend to their capital needs as their individual circumstances dictate. "[T]he instructional expenses for current operations of the public school system," meanwhile, should be substantially equal on a per-student basis, especially since all students are provided the same "standard course of study." *Id.* Thus, by opting against county-based funding of instructional expenses for current operations in order "[t]o insure a quality education for every child in North Carolina," this statute underscores the constitutional policy that a sound basic education should be funded equally throughout the State. *Id.* The only reason adherence to that policy might not be fully ensured is that the lack of a statewide determination of the amount needed for a sound basic education potentially enables the counties to fund public education below the constitutionally required level. While I recognize the possibility that such a statewide determination is already being made, the record before the Court does not reflect that this is the case.

In summation, I believe the natural consequence of the General Assembly's constitutional duty to ensure an equally sound basic education for all public school students in North Carolina is a need for a statewide determination of the amount of money that must be expended per student to achieve that constitutional minimum. I fur-

ther believe N.C.G.S. § 115C-431 delegates discretion over educational funding in a manner that does not fully guarantee adherence to the constitutional mandate that "equal opportunities shall be provided for all students" across our state. N.C. Const. art. IX, § 2(1). Although this particular case does not appear to present any violations of that mandate, I believe the funding of our public schools is important enough to warrant consideration of this issue. Within the context of the instant case, while I believe that a court of law is not the proper mechanism for resolving the political questions associated with educational funding, stare decisis constrains me to concur with the majority.

Justice HUDSON dissenting.

I agree entirely with the bulk of the reasoning and analysis outlined in the majority opinion and particularly with its conclusion that N.C.G.S. § 115C-431(c) is constitutional on its face. However, I would decline to revisit the trial court's charge to the jury, an issue to which the majority concedes that "counsel did not object or assign error." There is no showing in the record or briefs before us that N.C.G.S. § 115C-431(c) was *not* properly applied in this case. For that reason, I would affirm the Court of Appeals decision finding no error in the trial court's entry of judgment based upon the jury's verdict. As such, I respectfully dissent.

In our order allowing the County Commission's petition for discretionary review, we specifically limited our review to whether "the statutory framework for resolving school funding disputes between the county board of education and the county board of commissioners [is] constitutional," and, if so, whether it was properly applied in this case. Likewise, as noted by the County Commission in its brief to this Court, "Legal error is presented; the relevant facts are not disputed." None of the arguments presented on appeal—before the Court of Appeals or this Court, by the County Commission, the School Board, or any of the amici curiae who submitted briefs—challenged, contested, or otherwise found fault with either the trial court's instructions to the jury or with the "amount of money necessary to maintain a system of free public schools" in Beaufort County, as determined by the jury. The *sole* basis of the appeal was the constitutionality of section 115C-431(c), both facially and as applied.

I recognize that this Court does have "rarely used general supervisory authority" to "consider questions which are not properly presented according to our rules." *State v. Stanley*, 288 N.C. 19, 26,

215 S.E.2d 589, 594 (1975) (citations omitted); *compare Bailey v. State*, 353 N.C. 142, 158 n.2, 540 S.E.2d 313, 323 n.2 (2000) (recognizing the Court's "constitutional supervisory powers over inferior courts" but declining to exercise that authority to allow a nonparty's petition to be heard, as the issue presented was not an "exceptional circumstance," nor was the nonparty subjected to "financial obligations imposed by order of a trial court" as in other cases) *with In re Brownlee*, 301 N.C. 532, 547-48, 272 S.E.2d 861, 870-71 (1981) (electing to "treat the papers which have ben filed [sic] . . . as a motion calling upon the court to exercise its supervisory powers" and allow a county to appeal the order in a juvenile proceeding because of the county's "significant interest in the outcome," including possible future expenditures). However, I disagree that the trial court's instructions to the jury here constitute the type of "exceptional circumstance" that calls for such action.

As noted by the majority opinion, we "will not hesitate to exercise . . . [that] authority when necessary to promote the *expeditious* administration of justice." *Stanley*, 288 N.C. at 26, 215 S.E.2d at 594 (emphasis added). In *State v. Ellis*, we exercised the authority to review a Court of Appeals decision on a motion for appropriate relief in a noncapital case, finding that such action "to review upon appeal any decision of the courts below," N.C. Const. art. IV, § 12, was "particularly appropriate when . . . *prompt and definitive resolution* of an issue is necessary to ensure the uniform administration of North Carolina *criminal* statutes," 361 N.C. 200, 205, 639 S.E.2d 425, 428-29 (2007) (emphases added). Likewise, although the majority points to *In re Brownlee* as an analogous case presenting "a novel issue of great import," we invoked our authority in *Brownlee* to allow the county to be a party to an appeal from a judgment that compelled the county to spend tens of thousands of dollars even though it was not a party to the case. 301 N.C. at 548, 272 S.E.2d at 870. We did not, however, create the county's arguments for it; rather, we simply reviewed the arguments the county had already presented to the Court.

Here, by acting *ex mero motu* to consider the trial judge's instructions to the jury and, by extension, the amount of the award fixed by the jury, the majority acts contrary to our own admonition that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant," as doing so leaves "an appellee . . . without notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam)

(citation omitted); *see also Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366-67 (2008) (holding that one factor to consider with respect to noncompliance with appellate rules is "whether and to what extent review on the merits would frustrate the adversarial process" (citations omitted)). A thorough review of this record and the briefs and arguments presented by all parties to this appeal clearly illustrates that, not only has the County Commission never objected to either the trial judge's instructions to the jury or to the amount awarded by the jury, neither has the School Board ever articulated an argument in support of the same. To step in and set aside a jury verdict that has not been challenged is indeed to "frustrate the adversarial process" through this decision.

Moreover, while the majority maintains that the trial judge "did not have the legal standard which we articulate today to guide him in his consideration of the case," *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 732 (1986), I disagree. In *McDowell*, a capital case, we undertook extensive analysis of existing case law to determine the proper standard on which to review the State's failure to disclose nonrequested evidence, noting that the disclosure requirement turned on the "materiality" of the evidence, a "somewhat elusive gauge" on which the leading United States Supreme Court case, *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), was less than clear as to the meaning of the term, and silent as to whether the trial judge or the jury should decide the question. *McDowell*, 310 N.C. at 69-73, 310 S.E.2d at 306-09. Both defendant and the State focused their arguments on appeal on the materiality standard, and whether it was properly applied by the trial judge. After articulating in plain terms what the standard should be, we remanded to the trial court to reconsider defendant's motion for appropriate relief in light of that standard—one that had not previously existed in our case law. *Id.* at 75, 310 S.E.2d at 310.

By contrast, the legal standard applied by the trial judge here clearly existed at the time of the trial and jury verdict: the plain language of section 115C431(c) itself articulates the standard to determine "what amount of money is needed from sources under the control of the board of county commissioners to maintain a system of free public schools." Had the County Commission found the instructions to the jury on the definition of the word "needed" objectionable, the County Commission could have made that issue part of its "unconstitutional as applied" challenge to the statute. Instead, in its argu-

ments on appeal, the County Commission focused primarily on its facial challenge and relied on *Board of Education v. Board of County Commissioners*, 240 N.C. 118, 81 S.E.2d 256 (1954), a case that is inapposite to the issue presented here. Even more telling, the County Commission did not object to the jury instructions at trial and, under our appellate rules, thereby waived any objections. *See* N.C. R. App. P. 10(b)(2) ("A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection[.]").

There has been no showing by the County Commission or any other party that the amount awarded by the jury here was excessive or that it went beyond the restrictive definition of "needed" articulated in the majority opinion. Indeed, the amount awarded by the jury, $10,200,000, was ultimately less than the $12,106,304 requested by the School Board, and much closer to the $9,434,217 originally budgeted by the County Commission. This amount is not the type of "runaway verdict" that suggests the jury somehow overstepped its role, or disregarded the trial judge's instructions, but one indicating that the jury took seriously its responsibilities and awarded a seemingly reasonable figure that comports with the cost and expense projections presented by the parties at trial.

The County Commission failed to present any persuasive argument or evidence that section 115C-431(c) is unconstitutional as applied here, and this Court should not unilaterally act to create its case. *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. In my view, the majority's decision to remand for a new trial unnecessarily delays and prolongs the dispute between the parties, already ongoing since the 2006-07 fiscal year, in a manner contrary to the stated purpose of invoking our general supervisory authority to contribute to "prompt and definitive resolution of an issue." *Ellis*, 361 N.C. at 205, 639 S.E.2d at 428-29. Perhaps even more significantly, this disposition runs entirely counter to the clear intention of the General Assembly that the statutory resolution process outlined in section 115C-431(c) be carried out promptly. *See* N.C.G.S. § 115C-431(c) (in addition to other provisions for an immediate hearing, specifying that, "When a jury trial is demanded, the cause shall be set for the first succeeding term of the superior court in the county, and shall take precedence over all other business of the court.").

This case does not present the type of "unusual [or] exceptional circumstance[]" in which we should invoke our "rarely used general

supervisory authority" to "consider questions which are not properly presented according to our rules." *Stanley*, 288 N.C. at 26, 215 S.E.2d at 594. Nor does setting aside the jury award address any important constitutional questions or otherwise "prevent manifest injustice to a party." N.C. R. App. P. 2; *see State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120 (2002) (invoking Rule 2 to "address defendant's contentions" "because these issues raise important constitutional questions in the context of a capital case), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003).

For these reasons, I would follow the majority opinion's rationale as to the facial constitutionality of N.C.G.S. § 15C-431(c) and further hold that the statute is constitutional as applied in this case. I would decline to suspend the rules and consider an argument not before us on appeal, and I would affirm in its entirety the Court of Appeals decision finding no error in the trial court's entry of judgment on the jury verdict. I respectfully dissent.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

BRIAN L. BLANKENSHIP, THOMAS J. DIMMOCK, AND FRANK D. JOHNSON v. GARY BARTLETT, AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; ROY COOPER, AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; AND NORTH CAROLINA STATE BOARD OF ELECTIONS

No. 455PA06-2

(Filed 28 August 2009)

1. Elections— judicial—districts—equal protection—intermediate scrutiny

A state constitutional equal protection challenge to Wake County Superior Court judicial election districts was remanded for further consideration where plaintiffs demonstrated gross disparity in voting power between similarly situated residents of Wake County. The Equal Protection clause of the North Carolina Constitution requires a degree of population proportionality in superior court districts and a heightened level of scrutiny is required, but the presence of a tension between elections and the judicial role means that the appropriate standard of review is between strict scrutiny and rational basis. Judicial districts will be sustained if the legislature's formulations advance important

government interests unrelated to vote dilution and do not weaken voter strength necessary to further those interests. If a violation of state equal protection is found, the trial court should defer initially to the General Assembly.

2. Evidence— public records—elections—Justice Department preclearance submissions—admissibility

The trial court did not err in a judicial elections case in its admission of Administrative Office of the Courts records concerning U.S. Justice Department preclearance. These records clearly fall within N.C.G.S. § 8C-1, Rule 803(8) as public records and there is no inherent error in admitting the evidence and then making findings based on the material the court considers trustworthy.

Justice TIMMONS-GOODSON dissenting.

Chief Justice PARKER and Justice HUDSON join in the dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 184 N.C. App. 327, 646 S.E.2d 584 (2007), reversing and vacating a judgment and order entered on 8 February 2006 by Judge Donald L. Smith in Superior Court, Wake County. Heard in the Supreme Court 23 February 2009.

Akins/Hunt, P.C., by Donald G. Hunt, Jr., for plaintiff-appellants.

Roy Cooper, Attorney General, by Alexander McC. Peters, Special Deputy Attorney General, for defendant-appellees.

BRADY, Justice.

Wake County voters are divided into four districts for purposes of exercising their constitutional right to elect superior court judges. However, the General Assembly gives residents in Superior Court District 10C approximately one-fifth, or only 20%, of the voting power of residents in Superior Court District 10A. Likewise, residents of Superior Court Districts 10B and 10D have approximately one-fourth, or 25% of the voting power of residents in Superior Court District 10A.

In this case we consider whether the Equal Protection Clause of the North Carolina Constitution applies to the General Assembly's

creation of an additional judgeship in Superior Court District 10A. We determine that the Equal Protection Clause applies to the legislature's actions and accordingly reverse the decision of the Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Both parties stipulated before the trial court as to the factual basis of this matter. According to the 2000 United States Census, Superior Court District 10A has a total population of 64,398 residents; District 10B has a total of 281,493 residents; District 10C has a total of 158,812 residents; and District 10D has a total of 123,143 residents. In 1987, pursuant to the then current version of N.C.G.S. § 7A-41, Districts 10A, 10C, and 10D each elected one superior court judge, while District 10B elected two superior court judges. However, in 1993 the General Assembly amended N.C.G.S. § 7A-41 to provide for the election of another superior court judge from District 10A, establishing the current districts as follows:

Superior Court District	Residents	Number of Superior Court Judges	Residents per Superior Court Judge
10A	64,398	2	32,199
10B	281,493	2	140,747
10C	158,812	1	158,812
10D	123,143	1	123,143

Plaintiffs Brian L. Blankenship and Thomas J. Dimmock are licensed attorneys who are qualified to run for the office of superior court judge in their respective districts, 10B and 10C. Plaintiff Frank D. Johnson is a citizen, taxpayer, and registered voter who resides in Superior Court District 10D. On 5 December 2005, by the filing of a complaint and the issuance of a civil summons, plaintiffs commenced suit against the North Carolina State Board of Elections; Gary Bartlett, in his official capacity as Executive Director of the State Board of Elections; and Roy Cooper, in his official capacity as Attorney General of North Carolina. In their complaint, plaintiffs allege that the 1993 amendment to N.C.G.S. § 7A-41 unconstitutionally created an additional superior court judgeship in Wake County's District 10A. On 9 December 2005, then Chief Justice I. Beverly Lake, Jr. designated this case as "exceptional" under Rule 2.1 of the General

Rules of Practice and assigned an emergency superior court judge, the Honorable Donald L. Smith, to hear the matter.

The trial court expedited the discovery and motions process and on 8 February 2006, following a two day bench trial, entered a judgment and order in favor of plaintiffs. The trial court concluded that the General Assembly acted arbitrarily and capriciously in creating "the judicial districts for superior court judges assigned to Wake County" and that "[t]he current districting plan for the election of superior court judges allocated to Wake County, North Carolina creates unequal weighing of votes." Based on the factual findings, the trial court concluded as a matter of law that N.C.G.S. § 7A-41 "as it applies to Wake County, North Carolina, is unconstitutional" because it "denies plaintiffs equal protection of the law under N.C. Const. Article I, § 16." The trial court stayed its order and judgment pending appeal.

Defendants appealed the trial court's judgment and order to the Court of Appeals, which held that there is no requirement of population proportionality in state judicial elections, that the trial court failed to consider evidence properly submitted by defendants, and that the trial court erred in finding that the General Assembly acted arbitrarily and capriciously in establishing the superior court districts at issue. This Court allowed plaintiffs' petition for discretionary review on 9 October 2008.

ANALYSIS

Plaintiffs' Equal Protection Challenge

[1] We must first determine whether the Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution requires any degree of population proportionality in the districts drawn for the election of superior court judges. We conclude that it does.

The Equal Protection Clause of Article I, Section 19 of the State Constitution "prohibits the State from denying any person the equal protection of the laws." *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002). Equal protection "requires that all persons similarly situated be treated alike." *Richardson v. N.C. Dep't of Corr.*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). The Equal Protection Clause necessarily operates as a restraint on certain activities of the State that either create classifications of persons or interfere with a legally recognized right. *See White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983)

(detailing the levels of scrutiny applied in equal protection analysis depending upon the type of classification or the right allegedly infringed). This Court's analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause. "However, in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court." *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974) (citing *State v. Barnes*, 264 N.C. 517, 520, 142 S.E.2d 344, 346 (1965)).

The right to vote is one of the most cherished rights in our system of government, enshrined in both our Federal and State Constitutions. *See* U.S. Const. amend. XV; N.C. Const. art. I, §§ 9, 10, 11. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The right to vote on equal terms in representative elections—a one-person, one-vote standard—is a fundamental right. *Northampton Cty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990).

Although federal courts have articulated that the "one-person, one-vote" standard is inapplicable to state judicial elections, there is considerable tension in the jurisprudence, as clearly illustrated by *Chisom v. Roemer*, 501 U.S. 380 (1991). *Chisom* first reaffirms that the one-person, one-vote constitutional standard used in legislative and executive branch elections does not apply to judicial elections. *Id.* at 402 ("[W]e have held the one-person, one-vote rule inapplicable to judicial elections . . . ." (citing *Wells v. Edwards*, 409 U.S. 1095 (1973))). When the Supreme Court first held the rule inapplicable, it summarily affirmed a district court decision based on the rationale that " '[j]udges do not represent people, they serve people.' " *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972) (quoting *Buchanan v. Rhodes*, 249 F. Supp. 860, 865 (N.D. Ohio), *appeal dismissed*, 385 U.S. 3 (1966), *judgment vacated per curiam*, 400 F.2d 882 (6th Cir. 1968)), *aff'd mem.*, 409 U.S. 1095 (1973). Yet, even in *Chisom*, the Supreme Court observed that judges were "representatives" for purposes of the Federal Voting Rights Act. 501 U.S. at 401 ("[I]t seems both reasonable and realistic to characterize the winners [of judicial elections] as representatives of that [judicial] district."). Moreover, in

Republican Party of Minnesota v. White, the Supreme Court rejected the notion that elected members of the judiciary are separate "from the enterprise of 'representative government.' " 536 U.S. 765, 784 (2002). Thus, the Supreme Court has indicated both that judges are representatives and that they do not represent people.

The presence of this seeming contradiction is not surprising. Judges are "often called upon to disregard, or even to defy, popular sentiment," creating a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom*, 501 U.S. at 400. That fundamental tension is manifested in the dueling conclusions that judges both are and are not representatives of the people. We agree with the Supreme Court that this tension "cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office." *Id.* at 400-01. Rather than wholly ignoring that tension, this Court acknowledges it by holding that our State's Equal Protection Clause requires a heightened level of scrutiny of judicial election districts.

At the same time, we readily recognize that many important interests are relevant to the crafting of judicial districts aside from mere population numbers. For instance, "[c]onvenience is an essential factor in arranging an effective judicial system, since it is often necessary for a judge to hear emergency measures." *Buchanan*, 249 F. Supp. at 864. The importance of this interest is reflected by the language used in our State Constitution requiring the legislature to divide the State into a "convenient number" of judicial districts. N.C. Const. art. IV, § 9. Further, there may be "diversity in [the] type and number of cases . . . in various localities" and "varying abilities of judges and prosecutors to dispatch the business of the courts." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964). The General Assembly has recognized the importance of the convenience of the people when traveling to county courthouses. While superior court sessions are generally held in the convenient, centralized location of the county seat, the General Assembly has allowed sessions of superior court to be held in larger cities that are not county seats. *See* N.C.G.S. § 7A-42 (2007). Because there are many important policy interests to be weighed in addition to population, we agree with the Supreme Court that strict scrutiny according to the one-person, one-vote rule is inappropriate here. *See Chisom*, 501 U.S. at 402-03.

We conclude that judicial elections have a component that implicates the fundamental right to vote and a separate component that is

ordinarily the province of the legislature, subject only to review for rationality by the courts. The right to vote on equal terms for representatives triggers heightened scrutiny, *see Stephenson*, 355 N.C. at 377-78, 562 S.E.2d at 393, even as the nonrepresentative aspects inherent in the role of the judiciary preclude strict scrutiny on a one-person, one-vote standard. Thus, neither rational basis nor strict scrutiny is an appropriate standard of review. Rather, we conclude the applicable standard lies somewhere in between.

Federal equal protection analysis provides us with another framework under which plaintiffs' claims should be decided. Federal courts have applied intermediate scrutiny in cases involving semisuspect classes, such as distinctions based upon gender, *Craig v. Boren*, 429 U.S. 190, 197 (majority), 210-11 (Powell, J., concurring) (1976); undocumented alien children, *Plyler*, 457 U.S. at 223-24, 230; and nonmarital children, *Clark v. Jeter*, 486 U.S. 456, 461 (1988). In *Plyler*, the Supreme Court determined the constitutionality of a Texas statute and school district policy that excluded funding for children who were not "legally admitted" into the United States and also authorized local school districts to deny enrollment of such students in the public schools. 457 U.S. at 205. The Court noted that illegal immigrants are not a suspect class and public education is not a fundamental right guaranteed by the United States Constitution. *Id.* at 223. After asserting that public education is not a "right," the Court stated: "But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Id.* at 221. Thus, considering the importance of education and how the statute at issue "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status," *id.* at 223, the Court held that the statute "can hardly be considered rational unless it furthers some substantial goal of the state," *id.* at 224.

The dissenting opinion in *Plyler* recognized that the Court had "patch[ed] together bits and pieces of what might be termed [a] quasi-suspect-class and quasi-fundamental-rights analysis." *Id.* at 244 (Berger, C.J., dissenting). Other federal courts have recognized that "quasi-fundamental rights" are subject to a higher level of scrutiny than rational basis and a lower level of scrutiny than strict scrutiny. *See United States v. Harding*, 971 F.2d 410, 412 n.1 (9th Cir. 1992) (stating that the Supreme Court in *Plyler* "recognized that infringements on certain 'quasi-fundamental' rights, like access to public education, also mandate a heightened level of scrutiny"), *cert. denied*, 506 U.S. 1070 (1993); *Lowrie v. Goldenhersh*, 716 F.2d 401, 411 (7th

Cir. 1983) (stating that intermediate level review is "limited to cases involving quasi-fundamental rights or quasi-suspect classes" (citing John E. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 Geo. L.J. 1071, 1082 (1974))); *Alma Soc'y Inc. v. Mellon*, 601 F.2d 1225, 1234 n.18 (2d Cir.) (noting that quasi-fundamental interests are subject to intermediate scrutiny), *cert. denied*, 444 U.S. 995 (1979); *Sam v. United States*, 682 F.2d 925, 935 (Ct. Cl. 1982) (stating that rational basis is the proper standard when neither fundamental nor quasi-fundamental rights are at stake), *cert. denied*, 459 U.S. 1146 (1983); *Houk v. Furman*, 613 F. Supp. 1022, 1029 n.3 (D. Me. 1985) (stating that commentators have noted that the application of intermediate scrutiny is limited "to cases involving 'a quasi-fundamental right or an "almost" suspect classification' " (quoting Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 Tex. L. Rev. 759, 773 (1977))); *Felix v. Milliken*, 463 F. Supp. 1360, 1370 (E.D. Mich. 1978) (recognizing that the Supreme Court in *Craig v. Boren* "arguably put legislatures on notice that a substantially closer relationship between the means chosen and the goals sought to be promoted by virtue of those means would be required in the future, at least where 'quasi-suspect' or 'quasi-fundamental' rights were affected"); *Frederick L. v. Thomas*, 408 F. Supp. 832, 836 (E.D. Pa. 1976) (recognizing that education is a "quasi-fundamental interest").

The North Carolina Constitution calls for the election of superior court judges and thus guarantees an individual right of the people to vote in those elections. N.C. Const. art. IV, § 9. "[A] constitution cannot be in violation of itself, and [] all constitutional provisions must be read *in pari materia*[.]" *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 394 (internal citations omitted). Thus, although North Carolina is under no mandate to give its citizens the right to vote for superior court judges, once it has done so in its constitution, that provision must be construed in conjunction with the Equal Protection Clause to prevent internal conflict. *See id.* Stated simply, once the legal right to vote has been established, equal protection requires that the right be administered equally. *See Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (stating that "equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights"). The dual nature of the nonrepresentative and representative aspects of elected superior court judges and the tensions inherent in any attempt to reconcile the right of the people to vote for superior court judges, the right to equal protection, and the legislature's

duty to draw convenient districts prevent us from declaring the right asserted by plaintiffs to be fundamental and entitled to strict scrutiny. However, the right asserted by plaintiffs is literally enshrined in the North Carolina Constitution and, as such, is distinguishable from other citizenship privileges that receive rational basis review. *See Plyler*, 457 U.S. at 221, 230 (majority). Accordingly, we hold that the right to vote in superior court elections on substantially equal terms is a quasi-fundamental right which is subject to a heightened level of scrutiny.

Federal jurisprudence offers an analogous situation in the realm of free speech. Individuals have challenged laws on the theory that regulation of certain types of conduct impermissibly restricts the First Amendment right to free speech. *See*, *e.g.*, *United States v. O'Brien*, 391 U.S. 367, 370, 376-77 (1968) (upholding a statute banning destruction of selective service cards when defendant asserted First Amendment right to protest the draft by doing so). Acts of symbolic speech, or expressive conduct, combine speech and nonspeech elements in the same course of conduct. *See id.* at 376. The restriction on speech implicates fundamental First Amendment rights, even though regulation of nonspeech conduct is ordinarily subject only to rational basis review.

The Supreme Court held that when protected speech is combined with generally unprotected conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* The Court then stated the level of scrutiny to be applied:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. The Supreme Court has referred to this formulation as intermediate scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997). In *Turner*, the Supreme Court, citing *O'Brien*, stated succinctly that an act reviewed under intermediate scrutiny "will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than nec-

essary to further those interests." *Id.* at 189 (citing *O'Brien*, 391 U.S. at 377).

Expressive conduct, which combines elements of a fundamental right with conduct generally subject to regulation reviewed only for a rational basis, is analogous to judicial elections, in that such elections combine representative and nonrepresentative aspects. We therefore apply a similar standard of intermediate scrutiny when considering equal protection challenges to judicial districts. Judicial districts will be sustained if the legislature's formulations advance important governmental interests unrelated to vote dilution and do not weaken voter strength substantially more than necessary to further those interests.

We have already noted several important governmental interests, but decline to fashion an exhaustive list. In addition to compliance with federal voting rights laws, *see Chisom*, 501 U.S. at 404, legitimate factors for the legislature's consideration include geography, population density, convenience, number of citizens in the district eligible to be judges, and number and types of legal proceedings in a given area. On remand, the parties are free to present other interests.

We emphasize that a plaintiff must make a prima facie showing of considerable disparity between similarly situated districts in order to trigger constitutional review. In the instant case, plaintiffs have demonstrated gross disparity in voting power between similarly situated residents of Wake County. In Superior Court District 10A, the voters elect one judge for every 32,199 residents, while the voters of the other districts in Wake County, 10B, 10C, and 10D, elect one judge per every 140,747 residents, 158,812 residents, and 123,143 residents, respectively. Thus, residents of District 10A have a voting power roughly five times greater than residents of District 10C, four and a half times greater than residents of District 10B, and four times greater than residents of District 10D. No other subdivided district in the State comes close to the degree of disproportionality found in District 10. Even comparing District 10A with dissimilar districts throughout the State, the voting strength disparity between District 10A and the other subdivisions of District 10 is unique. According to documents filed with this Court, District 10A has the lowest resident-to-judge ratio of any district in the State, while District 10C has the second highest resident-to-judge ratio.[1] No other districts that divide

1. This information is based on data contained in a document in the record entitled "Plan Statistics—Plan: Superior Courts 2005." The document does not include population numbers from District 12 or District 14.

a county have a voting strength disparity among the districts remotely approaching the ratios found in District 10. In order to make a prima facie showing of significant voting strength disparity, a plaintiff must demonstrate a disparity in voting power closely approaching the gross disparity in District 10 as divided into its four election districts, a phenomenon not currently present in any other judicial district in the State, as evinced by the record before us.

In sum, plaintiffs have made the required prima facie showing, triggering the State's duty to demonstrate significant interests that justify the legislature's subdivisions within District 10 and to show that the disparity in voter strength is not substantially greater than necessary to accommodate those interests. In the event the trial court finds a violation of state equal protection law, it should defer initially to the General Assembly for resolution. *See*, *e.g.*, *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365, 395 (2004) (recognizing "our limitations in providing specific remedies for [constitutional] violations committed by other government branches in service to a subject matter . . . that is within their primary domain").

Accordingly, we remand this case to the Court of Appeals for further remand to the trial court with orders to hold a new hearing and determine whether the State can meet its burden as set forth in this opinion.

Admission of the Reinhartsen Affidavit and Exhibits

[2] Defendants filed the affidavit of Paul Reinhartsen, a Research Specialist for Legal Services for the Administrative Office of the Courts, with the trial court in support of their position. This affidavit states that Reinhartsen "maintain[s] and ha[s] access to previous submissions of the Administrative Office of the Courts" to the United States Department of Justice for preclearance under Section 5 of the Voting Rights Act. Attached to Reinhartsen's affidavit was what is described in the affidavit as "a true and accurate copy of the preclearance submission of 1993 Sess. Laws C. 321, §§ 200.4, 200.5 and 200.6," along with "related responses from the United States Department of Justice."[2]

The Court of Appeals held that the exhibits attached to Reinhartsen's affidavit were admissible under Rule 803(8) of the North Carolina Rules of Evidence, and we agree. Rule 803(8) provides:

2. The affidavit also noted that not all of the approximately 250 page session law was included, but only those portions relevant to the pending litigation.

> Public Records and Reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

N.C.G.S. § 8C-1, Rule 803(8) (2007). It is undisputed that the General Assembly has required the Administrative Office of the Courts to submit to the Attorney General of the United States "all acts of the General Assembly that amend, delete, add to, modify or repeal any provision of Chapter 7A of the General Statutes of North Carolina which constitutes a 'change affecting voting' under Section 5 of the Voting Rights Act of 1965." *Id.* § 120-30.9C (2007).

Thus, the records kept by the Administrative Office of the Courts concerning its submissions to the United States Department of Justice clearly fall within the purview of Rule of Evidence 803(8) as public records. Accordingly, the records are admissible insofar as they are relevant. *See id.* § 8C-1, Rule 402 (2007) ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules.").

After concluding the affidavit and exhibits were admissible under Rule 803(8), the Court of Appeals further determined that the trial court erred by admitting Exhibit A to the affidavit "on only a limited basis." *Blankenship*, 184 N.C. App. at 334, 646 S.E.2d at 589. On this point, we disagree because the trial court transcript does not provide adequate support for this determination.

The transcript reflects that plaintiffs moved the trial court to strike the affidavit and attached exhibits on the grounds that the documents were hearsay and many statements contained in the exhibits were opinions expressed without the declarant's personal knowledge of matters underlying those opinions. Throughout the conversation with counsel for both parties regarding the affidavit and attached exhibits, the trial court indicated at least three times that it was

admitting the evidence. On one of those occasions, the trial court stated: "I'm going to let it in, but I'm going to be very careful, and I want both of you [(referring to counsel)] to make sure I base no findings on anything contained in there that is hearsay or is made without personal knowledge."

Notably, the trial court's ultimate ruling was that the evidence at issue was admitted. In expressing caution over some of the material, the trial court did not admit the evidence only on a limited basis. Rather, the trial court recognized nothing more than what Rule 803(8) acknowledges already in its closing phrase—some "sources of information or other circumstances" may "indicate [a] lack of trustworthiness" in certain public records and reports. N.C.G.S. § 8C-1, Rule 803(8) (2007); *id.* cmt. (stating that "[t]he phrase 'unless the sources of information or other circumstances indicate lack of trustworthiness' applies to all three parts of the [Rule 803(8)] exception"). Pursuant to the last phrase of Rule 803(8), a trial court may decide in its discretion to exclude a public record or report altogether for "lack of trustworthiness." Instead, the trial court in the case *sub judice* admitted the evidence at issue in its discretion and then apparently made findings of fact based on what it considered trustworthy information. There is no inherent error in taking that course of action.

Defendants seem to argue that Rule 803(8) required the trial court to admit the evidence and that the admitted evidence then inexorably compelled the trial court to make findings of fact consistent with defendants' interpretation of that evidence. We disagree. Defendants may attack the trial court's findings of fact as being unsupported by competent evidence or challenge whether those factual findings in turn support the trial court's ultimate conclusions of law, *see*, *e.g.*, *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citations omitted); however, defendants' insistence that the trial court improperly admitted evidence only on a limited basis mischaracterizes the transcript before us.

CONCLUSION

Because the Equal Protection Clause of the North Carolina Constitution requires intermediate scrutiny of districts drawn for the election of superior court judges and because we find that the trial court properly considered the evidence before it, we reverse the decision of the Court of Appeals and remand the case to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice TIMMONS-GOODSON dissenting.

Because I conclude that the election of superior court judges does not implicate the equal protection principle of "one person, one vote," I would hold that the judicial districting plan for Wake County set forth in N.C.G.S. § 7A-41 does not violate the Equal Protection Clause of the North Carolina Constitution. I therefore respectfully dissent.

It should first be noted "that 'this Court gives acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute.' " *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004) (quoting *In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997)). "Accordingly, there is a strong presumption that the statute at issue is constitutional." *Id.* at 168, 594 S.E.2d at 7 (citing *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002)); *see also Pender County v. Bartlett*, 361 N.C. 491, 497, 649 S.E.2d 364, 368 (2007) ("An act of the General Assembly is accorded a 'strong presumption of constitutionality' and is 'presumed valid *unless it conflicts with the Constitution*.' " (emphasis in original) (quoting *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam))).

The majority determines that the Equal Protection Clause of the North Carolina Constitution requires population proportionality in superior court districts. I disagree on several grounds.

First and foremost, superior court judges do not serve in a representative capacity, and their election therefore does not implicate the "one person, one vote" principle of equal protection. Population proportionality is important in legislative elections as it allows all voters to "enjoy the same representational influence or 'clout.' " *Stephenson*, 355 N.C. at 377, 562 S.E.2d at 393. Legislators use their influence to represent voters in a greater legislative body. Accordingly, voters from a district that elects three legislators have more influence than voters in districts with only two representatives. But judges have no similar representational function. Voters do not elect a judge to "represent" them—that is, to serve as their voice in government and advance their interests. *See*, *e.g.*, *New York State Ass'n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148, 153 (S.D.N.Y. 1967) ("The state judiciary, unlike the legislature, is not the organ

responsible for achieving representative government."). Rather, judges serve the public as a whole. *See Holshouser v. Scott*, 335 F. Supp. 928, 932 (M.D.N.C. 1971) (Judges "do not govern nor represent people nor espouse the cause of a particular constituency. They must decide cases exclusively on the basis of law and justice and not upon the popular view prevailing at the time."), *aff'd mem.*, 409 U.S. 807, 34 L. Ed. 2d 68 (1972). The number of judges that voters elect in a given district does not affect the voters' political influences in the state legislature or in the courtroom, nor is a voter guaranteed of appearing before any particular judge.

Because judges serve the general public in a nonrepresentative capacity, there is no unequal protection among the voters of different districts that would trigger equal protection concerns:

> "[T]he one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight."

Holshouser, 335 F. Supp. at 931 (quoting *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964)).

The second ground upon which I dissent is that the plain language of our Constitution, which expressly provides for flexibility in fashioning judicial districts, supports the judicial districting plan set forth in N.C.G.S. § 7A-41. Article IV, section 9 of the North Carolina Constitution provides: "The General Assembly shall, *from time to time*, divide the State into a *convenient* number of Superior Court judicial districts and shall provide for the election of *one or more* Superior Court Judges for each district." N.C. Const. art. IV, § 9(1) (emphasis added). As this Court stated in *State ex rel. Martin v. Preston*, 325 N.C. 438, 460-61, 385 S.E.2d 473, 485 (1989):

> Our Constitution anticipates that the needs of the state will change over time. It specifically provides that "[t]he General

> Assembly shall, *from time to time*, divide the State into a *convenient* number of Superior Court judicial districts . . . ." N.C. Const. art. IV, § 9(1) (emphasis added). Contrary to the plaintiff's argument, there is no prohibition in our Constitution against the splitting of counties when creating superior court districts. Instead, our Constitution only requires that any division of the state into judicial districts be "convenient."

In contrast to the flexibility granted under Article IV, the language in our Constitution regarding the election of representatives and senators is much more specific, *see* N.C. Const. art. II, §§ 3 and 5. Redistricting of legislative elections occurs "at the first regular session convening after the return of every decennial census of population taken by order of Congress," *id.*, as opposed to the general guide of "from time to time," *id.* art. IV, § 9, for the election of superior court judges. The specificity with which the population proportionality is required by our Constitution ("Each [legislator] shall represent, *as nearly as may be*, an *equal number* of inhabitants, the number of inhabitants that each [legislator] represents being determined for this purpose by dividing the population of the district that he represents by the number of [legislators] apportioned to that district . . . ." *id.* art. II, §§ 3(1) and 5(1) (emphasis added)) stands in sharp contrast to the guidelines for creating a "convenient" number of districts within the state for judicial elections. *Id.* art. IV, § 9.

I must also note that the superior court division is a single unified court, having statewide jurisdiction, *see id.* art. IV, § 2, and that under our Constitution, rotation of superior court judges among the districts "shall be observed." *Id.* art. IV, § 11. Thus, requiring proportional representation in this case has the potential to affect other judicial districts in the state. *See New York Ass'n of Trial Lawyers*, 267 F. Supp. at 153 ("Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis.").

Finally, the majority's determination that principles of equal protection require population proportionality in judicial districts is contrary to every other jurisdiction that has considered this issue.

> The numerous courts which have been presented with judicial election cases are in rare unanimity on this point. Judicial officers are not subject to the one person-one vote principle and therefore a state's choice regarding the method of electing its judiciary is not subject to an equal protection challenge.

In re Objections to Nomination Petition of Cavanaugh, 65 Pa. Commw. 620, 638, 444 A.2d 1308, 1312 (1982); *see also Holshouser*, 335 F. Supp. at 930 ("We find no case where the Supreme Court, a Circuit Court, or a District Court has applied the 'one man, one vote' principle or rule to the judiciary."). The refusal of every other jurisdiction to apply population proportionality to judicial elections, including—as the majority acknowledges—the United States Supreme Court, should be highly persuasive to this Court. *See State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960) ("We are not bound by the decisions of the Courts of the other States, but should this Court hold the Act unconstitutional, North Carolina would be the only State to maintain this position. Such overwhelming authority is highly persuasive."). The majority offers little persuasive authority to support or explain why this Court should deviate from the reasoning of every other court in the country, particularly in light of the express flexibility in fashioning judicial districts granted under our Constitution. Instead, the majority engineers an imaginary "tension" and "contradiction" in the jurisprudence in order to disavow the unanimous authority contrary to its position. *See*, *e.g.*, *In re Cavanaugh*, 65 Pa. Commw. at 638, 444 A.2d at 1312 (noting the "rare unanimity" among the "numerous courts which have been presented with judicial election cases" and citing those cases). The majority then selects from an assortment of constitutional analyses to cobble together its own novel approach to the issue of judicial districting. Such strained creativity by the majority is revealing. Moreover, how such an analysis is to be applied in future cases is unsettling.

Given the lack of equal protection concern and the well-established presumption in favor of the constitutionality of legislative acts, I would hold that N.C.G.S. § 7A-41 does not violate the Equal Protection Clause of the North Carolina Constitution and would affirm the Court of Appeals. As I conclude the trial court erred in declaring N.C.G.S. § 7A-41 unconstitutional, I need not address whether the trial court properly excluded evidence. I respectfully dissent.

Chief Justice PARKER and Justice HUDSON join in this dissenting opinion.

STATE OF NORTH CAROLINA v. JOSE JESUS GARCIA LOPEZ

No. 95PA08

(Filed 28 August 2009)

Sentencing— prosecutor's argument—sentencing grid and aggravating factor—relevant but inaccurate

The trial court erred during a sentencing proceeding for involuntary manslaughter and other offenses arising from drunken driving by allowing the prosecutor's argument concerning the sentencing grid, the effect of an aggravating factor, and merger. A jury's understanding that its determination of aggravating factors may have an effect on the sentence is relevant to its role in a sentencing proceeding, but the prosecutor's argument here was inaccurate and misleading. However, there was no likelihood of a different result without the argument and no prejudice.

Justice BRADY concurring in the result only.

Justice TIMMONS-GOODSON joins in the concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 188 N.C. App. 553, 655 S.E.2d 895 (2008), finding no error at trial and no prejudicial error in a sentencing proceeding which resulted in judgments entered on 30 May 2006 by Judge Ola M. Lewis in Superior Court, Columbus County. Heard in the Supreme Court 31 March 2009.

Roy Cooper, Attorney General, by Isaac T. Avery, III, Special Counsel, for the State-appellant/appellee.

Nora Henry Hargrove for defendant-appellee/appellant.

EDMUNDS, Justice.

In this case we consider the extent to which a party in a criminal case may address the jury as to defendant's potential sentence. We conclude that the prosecutor's argument detailing the effect of the jury's finding of an aggravating factor on defendant's sentence was inaccurate and misleading. Therefore, the trial court erred in overruling defendant's objection to this argument. However, because we also find that the error was harmless, we affirm the result reached by the Court of Appeals.

At trial, the State presented evidence that at approximately six o'clock p.m. on 19 December 2004, defendant Jose Jesus Garcia Lopez was driving his Jeep between eighty and one hundred miles per hour when he crossed the highway center line and collided with a Mazda being driven by Natalie Housand. Housand was killed in the collision and her passenger, Adam Melton, was injured. Defendant disappeared into nearby woods, but later emerged a short distance away and was arrested. Retrograde extrapolation indicated that, at the time of the accident, defendant had a blood alcohol concentration of 0.18.

Defendant was indicted for second-degree murder pursuant to N.C.G.S. § 14-17, felony death by vehicle pursuant to N.C.G.S. § 20-141.4, and felony hit and run pursuant to N.C.G.S. § 20-166(a), all relating to the death of Housand. Defendant also was indicted for assault with a deadly weapon inflicting serious injury on Melton pursuant to N.C.G.S. § 14-32(b). The court conducted a bifurcated trial consisting of a guilt-innocence phase followed by a separate sentencing proceeding.

After the parties made their closing arguments at the conclusion of the guilt-innocence phase, the court submitted to the jury separate verdict sheets for each offense. As to the charge of second-degree murder, the verdict sheet permitted the jury to find defendant guilty of second-degree murder, involuntary manslaughter, or misdemeanor death by motor vehicle, or to find defendant not guilty. The jury found defendant guilty of involuntary manslaughter and guilty of the other three crimes. Because involuntary manslaughter is a lesser-included offense of felony death by vehicle, the involuntary manslaughter conviction merged into the conviction of felony death by vehicle. *See State v. Kemmerlin*, 356 N.C. 446, 474-75, 573 S.E.2d 870, 890 (2002) (explaining that a lesser conviction will merge into a greater conviction when all the essential elements of the lesser conviction are also essential elements included in the greater conviction).

During the sentencing proceeding that followed, the State argued to the jury that it should find the aggravating factor that defendant "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C.G.S. § 15A-1340.16(d)(8) (2007). Defendant contends the trial court abused its discretion by overruling his objections and allowing the State to make the following jury argument and accompanying blackboard presentation during the sentencing proceeding:

Folks, I'm going to write up some numbers. These numbers are the—basically, the sentencing grid for the offenses that you found the Defendant guilty of.

([Prosecutor] writes on blackboard.)

This is the involuntary manslaughter. Presumptive range is 13 to 16 months. Assault with a deadly weapon inflicting serious injury, presumptive range is 20 to 25 months. This is the hit and run. The presumptive range, 5 to 6 months. Now, there was a felony death by motor vehicle, and that merged in because it had a lot of the same elements of this manslaughter conviction, so it merges in here. All right. So, that's kind of already in; that's why I didn't put it up here.

The judge sentences within this presumptive range, and that's what I've highlighted for you, unless the State puts up an aggravating factor. Okay? We have to present to you an aggravating factor, and you have to find it beyond a reasonable doubt. Just like anything else that we present to you, you have to make a determination, we have to prove it to you beyond a reasonable doubt.

If we prove aggravators, which I've submitted one to you, then that gives the option for the judge to return a sentence in this range. Okay? It doesn't mean that's where it comes from, it just gives her that option.

Now, the State of North Carolina—I'm going to put a couple more numbers up here for you. We have a minimum and then we have a maximum. Okay. In other words, the minimum, say if the minimum was 13 months, there would be a corresponding maximum sentence that goes with that. All right. If we got up to this range, this aggravator, say we're in the aggravated range of 20, there would be a corresponding maximum that goes with that. And this one would be 24. This one would be 47. And this one would be 10. And these are all in months. Okay?

The jury found the aggravating factor to be present beyond a reasonable doubt. After hearing additional testimony and argument from both defendant and the State, the court found two factors in mitigation, but determined that they were outweighed by the aggravating factor. The court imposed aggravated sentences in each judgment, to be served consecutively, resulting in a total of fifty-nine to eighty-one months incarceration.

Defendant appealed. The Court of Appeals found that the trial court erred in allowing the State to explain merger and sentencing possibilities in its sentencing proceeding argument but concluded that this error was harmless. *State v. Lopez*, 188 N.C. App. 553, 561, 655 S.E.2d 895, 900 (2008). This Court granted petitions for discretionary review filed by the State and by defendant.

Defendant contends that the prosecutor's argument relating to the effect of an aggravating factor on the sentencing grid was irrelevant to the jury's decision whether the aggravating factor was present. Defendant further asserts that the argument had the effect of advising the jury that, because two of the convictions merged, one of its verdicts had no practical effect. The State responds that the argument was proper. While we find that the jury's understanding of aggravating factors is relevant to sentencing, we also find that the prosecutor's argument introduced error into the trial. The State's discussion of the application of the sentencing grids was inaccurate. In addition, the State's argument was misleading because it indicated potential specific sentencing ranges for defendant when defendant's sentencing range had not been, and in this case could not be, determined at the time the argument was made. However, because there is no reasonable possibility that but for the error a different result would have been reached, we affirm the result of the Court of Appeals.

The standard under which we review allegedly "improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). An abuse of discretion occurs only when a ruling " 'could not have been the result of a reasoned decision.' " *Id.* (quoting *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996)). The trial court "has broad discretion to control the scope of closing arguments," *State v. Cummings*, 361 N.C. 438, 465, 648 S.E.2d 788, 804 (2007), *cert. denied*, —— U.S. ——, 170 L. Ed. 2d 760 (2008), and generally, "counsel's argument should not be impaired without good reason," *State v. Price*, 326 N.C. 56, 83, 388 S.E.2d 84, 99, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *cert. denied*, 514 U.S. 1124, 131 L. Ed. 2d 879 (1995). However, argument that misinforms a jury by purporting to present accurate information when that information is misleading is just such a good reason. *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987) (stating that a jury argument is

not improper so long as it does not "travel into the fields of conjecture or personal opinion").

"In jury trials the whole case as well of law as of fact may be argued to the jury." N.C.G.S. § 7A-97 (2007). In interpreting this statute, we have held that the penalty prescribed for a criminal offense is part of the law of the case and that "[i]t is, consequently, permissible for a criminal defendant in argument to inform the jury of *the statutory punishment* provided for the crime for which he is being tried." *State v. McMorris*, 290 N.C. 286, 287-88, 225 S.E.2d 553, 554 (1976) (emphasis added). Thus, "[c]ounsel may . . . in any case, read or state to the jury a statute or other rule of law relevant to such case, *including the statutory provision fixing the punishment for the offense charged*." *State v Britt*, 285 N.C. 256, 273, 204 S.E.2d 817, 829 (1974) (emphasis added).

However, sentencing procedure has changed significantly since this Court decided *Britt* and *McMorris*. *See generally* Stevens H. Clarke, *Law of Sentencing, Probation, and Parole in North Carolina* 46-52 (Inst. of Gov't, Chapel Hill, N.C., 2d ed. 1997) (discussing the history and effect of indeterminate sentencing, Fair Sentencing, and Structured Sentencing). When this Court considered *Britt* and *McMorris*, the sentencing range ordinarily could be determined simply by reference to the statute defining the offense. *See id.* at 47. Now, under Structured Sentencing, most criminal statutes define an offense as being of a particular class. *See, e.g.*, N.C.G.S. § 14-27.2(b) (2007) (stating that first-degree rape is a Class B1 felony). Except for Class A felonies and other offenses for which a particular punishment is set by statute, the range of sentences that the trial court may impose becomes known only after a series of findings and calculations. After a jury returns its verdict or verdicts, it must then determine whether any submitted aggravating factors exist, thereby permitting a defendant's sentence to be enhanced. *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). In addition, the court independently determines whether any submitted mitigating factors also exist and, if so, whether the factors in aggravation outweigh the factors in mitigation, or the factors in mitigation outweigh the factors in aggravation, or the factors are in equilibrium. N.C.G.S. § 15A-1340.16 (2007). After weighing aggravating factors found by the jury and mitigating factors found by the court, the court decides whether to impose an aggravated, presumptive, or mitigated sentence.

When a defendant is convicted of more than one offense, the court has the option to consolidate offenses or to impose concurrent or consecutive sentences. *Id.* § 15A-1340.15 (2007). The court also calculates a defendant's criminal history category based on the number and gravity of any prior convictions. Only after all these findings are made and calculations completed does the court determine the minimum sentencing range by reference to a statutory grid that takes these factors into account. *Id.* § 15A-1340.17(c) (2007). Once the court decides on a minimum sentence, the corresponding maximum sentence is found in another grid. *Id.* § 15A-1340.17(d), (e) (2007).

Thus, a criminal sentence under Structured Sentencing is determined through numerous interlocking decisions and findings made by the trial court after the jury has completed its work. As a result, even though a jury has returned its verdict in the guilt-innocence proceeding, counsels' jury arguments forecasting the sentence are usually no better than educated estimates.

The perils of attempting to predict a sentence to a jury are amply demonstrated in the case at bar. The prosecutor advised the court before making its sentencing argument that "I'm just putting the numbers up, and I'll have the minimum on the high end, and I'm also going to put up the highest [defendant] could possibly get on the high end." However, while the record on appeal does not contain a copy of the blackboard presentation used during the prosecutor's argument, the transcript indicates that the numbers the prosecutor quoted to the jury were misleading. For instance, the prosecutor told the jury, "This is the involuntary manslaughter. Presumptive range is 13-16 months." Yet, in the sentencing grid set out in section 15A-1340.17(c), thirteen to sixteen months is the presumptive range of *minimum* sentences for a defendant who is convicted of involuntary manslaughter, a Class F offense, and who has no criminal history. A court sentencing such a defendant chooses a minimum sentence in the thirteen to sixteen month range set out in the grid found in section 15A-1340.17(c), then locates the corresponding maximum sentence from the grid found in section 15A-1340.17(d). Thus, the prosecutor's statement that thirteen to sixteen months was the presumptive range for defendant's involuntary manslaughter conviction was inaccurate and misleadingly low. The ranges represented by the prosecutor for defendant's assault and hit and run convictions are similarly problematic.

The rules of procedure and evidence are meant to assure that the evidence a jury hears and considers is reliable. *See Chambers v.*

Mississippi, 410 U.S. 284, 302, 35 L. Ed. 2d 297, 313 (1973) (describing rules of evidence and procedure as "designed to assure both fairness and reliability in the ascertainment of guilt and innocence"); *accord* N.C.G.S. § 8C-1, Rule 102(a) (2007) ("These rules [of evidence] shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined."). Jury arguments should be similarly accurate. However, as the preceding discussion demonstrates, even a well-intentioned argument purporting to forecast a sentence under Structured Sentencing will almost invariably be misleading. If the jury believed from the prosecutor's argument that it understood the exact effect of the decision it was being called upon to make, it was mistaken.[1]

Nevertheless, while attempts to forecast a sentence are fraught with risk, a jury's understanding that its determination of the existence of any aggravating factors may have an effect on the sentence imposed is relevant to its role in a sentencing proceeding. As a result, consistent with section 7A-97, parties may explain to a jury the reasons why it is being asked to consider aggravating factors and may discuss and illustrate the general effect that finding such factors may have, such as the fact that a finding of an aggravating factor may

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1. In fact, an arresting number of sentencing permutations arise from defendant's convictions. Each felony of conviction had a different classification and therefore fell within a different range. Treating the conviction of involuntary manslaughter as Count 1, the conviction of felony hit and run as Count 2, and the conviction of felony assault as Count 3, the trial court could have:

1. Consolidated all three counts and imposed a mitigated sentence;
2. Consolidated all three counts and imposed a presumptive sentence;
3. Consolidated all three counts and imposed an aggravated sentence;
4. Imposed consecutive aggravated sentences on each count (as happened in fact);
5. Imposed consecutive presumptive sentences on each count;
6. Imposed consecutive mitigated sentences on each count;
7. Consolidated Counts 1 and 2 but imposed a consecutive sentence on Count 3;
8. Consolidated Counts 1 and 3 but imposed a consecutive sentence on Count 2;
9. Consolidated Counts 2 and 3 but imposed a consecutive sentence on Count 1;
10. Found that as to Count 1 the mitigating factors outweighed the aggravating factor, but not as to Counts 2 and 3;
11. Found that as to Count 2, the mitigating factors and aggravating factor were in equilibrium, that the aggravating factor outweighed the mitigating factors as to Count 1, and that the mitigating factors outweighed the aggravating factor as to Count 3;
12. Etc.

allow the court to impose a more severe sentence or that the court may find mitigating factors and impose a more lenient sentence. *State v. Chapman*, 359 N.C. 328, 372-73, 611 S.E.2d 794, 826 (2005) (discussing use of hypothetical examples in arguments to the jury).

Accordingly, while we are aware that the capable trial judge could not foresee the analysis we undertake today, we conclude that the trial court abused its discretion in overruling defendant's objection to the State's argument, which argument contained misleading information.

Although the trial court erred, nonconstitutional errors warrant reversal only when "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.* § 15A-1443(a) (2007). "The burden of showing such prejudice under this subsection is upon the defendant." *Id.*; *see, e.g.*, *State v. Rosier*, 322 N.C. 826, 829, 370 S.E.2d 359, 361 (1988). Defendant argues that the jury's realization that one conviction would merge with another, thereby reducing defendant's sentence, may have persuaded jurors to find the aggravating factor. Because the impact of the improper argument cannot be ascertained, defendant contends that a new sentencing hearing is necessary.

Our review of the record reveals that defendant has not met his burden of establishing that, but for the error, there is a reasonable possibility that the jury would have reached a different result. To establish the aggravating factor that defendant "knowingly created a great risk of death to more than one person by means of a . . . device which would normally be hazardous to the lives of more than one person," N.C.G.S. § 15A-1340.16(d)(8), the State must show that defendant used the device in a way that would normally be hazardous to the lives of more than one person and that a great risk of death was knowingly created. *See, e.g.*, *State v. Rose*, 327 N.C. 599, 605-06, 398 S.E.2d 314, 317-18 (1990) (discussing use of a weapon, whereas the case at bar involves a device, i.e., a vehicle).

As to whether defendant's Jeep was hazardous to the lives of more than one person, "[i]t is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner." *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000). The conclusion is unavoidable that a vehicle driven at a high rate of speed by an intoxicated operator is normally hazardous to the lives of more than one person. *See State v. McBride*, 118 N.C. App.

316, 319-20, 454 S.E.2d 840, 842 (1995) (holding that a recklessly operated vehicle "constituted a device which in its normal use is hazardous to the lives of more than one person" and "any reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death to any and all persons who may find themselves in the automobile's path").

As to whether defendant knowingly created a great risk of death, the overwhelming evidence found by the jury beyond a reasonable doubt established that defendant was voluntarily intoxicated and driving between eighty and one hundred miles per hour when he crossed the center line and collided with Housand's Mazda. No reasonable person could fail to know that such behavior creates a great risk of death. Although defendant testified that he did not remember driving, as a general rule "the law does not permit a person who commits a crime in a state of intoxication to use his own vice or weakness as a shelter against the normal legal consequences of his conduct." *State v. Bunn*, 283 N.C. 444, 457, 196 S.E.2d 777, 786 (1973) (citation and internal quotation marks omitted). Defendant cannot shelter behind his own claim that he drank himself into a stupor.

Accordingly, we perceive no likelihood that the result of the trial would have been different if the jury had not heard the improper argument. We affirm the Court of Appeals decision upholding the judgments of the trial court.

AFFIRMED.

Justice BRADY concurring in the result only.

I disagree with the majority's conclusion that the calculation of aggravating factors in a defendant's sentence is relevant to the jury's understanding of the presence of an aggravating factor. I would rule that the trial court abused its discretion by allowing the State to present to the jury any information relating to the effect of an aggravating factor on defendant's sentence. However, because overwhelming evidence in support of the aggravating factor exists, I believe the trial court's error was harmless, and I concur in the majority's result only.

In accordance with the decision of the Supreme Court of the United States in *Blakely v. Washington*, 542 U.S. 296 (2004), the General Assembly enacted N.C.G.S. § 15A-1340.16(a1) in 2005, which provides that absent an admission from the defendant, "only a jury

may determine if an aggravating factor is present in an offense." This is the trial jury's *sole role* under section 15A-1340.16 in a noncapital case. This responsibility is accomplished through a factual evaluation of the evidence presented at the guilt-innocence phase of the trial, unless the court determines that a separate sentencing proceeding is required. N.C.G.S. § 15A-1340.16(a1) (2007). Section 15A-1340.16 further provides that after a jury finds an aggravating factor, it is the trial court's responsibility to determine the defendant's sentence. *See also State v. Ahearn*, 307 N.C. 584, 597, 300 S.E.2d 689, 697 (1983) (stating that a trial judge has " 'discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within [his] sound discretion" (quoting with approval *State v. Davis*, 58 N.C. App. 330, 333, 293 S.E.2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E.2d 482 (1982) (alteration in original))).

In the case *sub judice*, the State's closing argument was an attempt to circumvent the sentencing process set forth in section 15A-1340.16. By discussing the merger doctrine and displaying the presumptive minimum and maximum ranges of possible sentences, the State was enticing the jury to contemplate the duration of defendant's imprisonment. This is wholly improper under the framework of section 15A-1340.16.

Counsel should be given wide latitude when arguing before the jury. *See State v. Price*, 326 N.C. 56, 83, 388 S.E.2d 84, 99, *sentence vacated on other grounds*, 498 U.S. 802 (1990) *cert. denied*, 514 U.S. 1124 (1995) ("[C]ounsel's argument should not be impaired without good reason. . . ."). However, if the arguments counsel advances are irrelevant, they should be limited by the trial court. *Id.* at 83-84, 388 S.E.2d at 99-100 (stating that a "good reason" to limit the scope of counsel's closing argument is irrelevance (citing, *inter alia*, *Watson v. White*, 309 N.C. 498, 507, 308 S.E.2d 268, 274 (1983))). The jury was charged with answering one question: Did the evidence presented support the finding of the aggravating factor? This is purely a factual question, and much like in the guilt-innocence phase of the trial, the jury is asked to evaluate whether the State presented sufficient evidence to prove its case. This Court has ruled that in the guilt-innocence phase, "[t]he amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt. It is, therefore, no concern of the jurors'." *State v. Rhodes*, 275 N.C. 584, 588, 169 S.E.2d 846, 848 (1969) (citations omitted). The same logic applies here. The jury is being asked solely

whether the aggravator is present. Information regarding the effect of the aggravating factor on the trial court's ultimate sentencing decision is irrelevant to this determination.

Therefore, I cannot conclude with the majority that "a jury's understanding that its determination of the existence of any aggravating factors may have an effect on the sentence imposed is relevant to its role in a sentencing proceeding." Furthermore, I disagree that N.C.G.S. § 7A-97 entitles parties to "explain to a jury the reasons why it is being asked to consider aggravating factors and . . . discuss and illustrate the general effect that finding such factors may have, such as the fact that a finding of an aggravating factor may allow the court to impose a more severe sentence." Under section 7A-97, "[i]n jury trials the whole case as well of law as of fact may be argued to the jury." N.C.G.S. § 7A-97 (2007). However, even under section 7A-97, counsel may not argue "principles of law not relevant to the case." *See State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975) (citations omitted); *see also State v. McMorris*, 290 N.C. 286, 287, 225 S.E.2d 553, 554 (1976) (stating that the parties must argue "the law applicable to the facts of the case" and that "[t]he whole *corpus juris* is not fair game"). As explained above, the effect of an aggravating factor on a defendant's sentence is simply not relevant to the jury's determination of the existence of the factor. I would hold that it is error *in any case* for a trial court to allow either party to explain the effect an aggravating factor could have on a defendant's sentence.

While I disagree that the effect of an aggravating factor is ever relevant to a jury's determination of the presence of an aggravating factor, I agree with the majority's ultimate result finding that there was overwhelming evidence to support the existence of the aggravating factor. From the evidence presented in the guilt-innocence phase of the trial, it is clear that defendant knowingly operated his vehicle at a dangerously high rate of speed while he was intoxicated. Any reasonable jury would have made such a determination, even without the State's inappropriate closing argument. Therefore, defendant was not prejudiced by the error of the trial court. I therefore concur in the majority's result only.

Justice TIMMONS-GOODSON joins in this concurring opinion.

BARNEY BRITT v. STATE OF NORTH CAROLINA

No. 488A07

(Filed 28 August 2009)

Firearms and Other Weapons— possession by convicted felon—N.C.G.S. § 14-415.1 as amended in 2004—unreasonable regulation as applied to plaintiff

The Court of Appeals erred to the extent that it determined N.C.G.S. § 14-415.1 as amended in 2004, that makes it "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm," can be constitutionally applied to plaintiff whose right to possess firearms was restored in 1987 by operation of law after he completed his sentence for possession with intent to sell and deliver a controlled substance without incident in 1982, and this case is remanded to the Court of Appeals for further remand to the superior court for further proceedings not inconsistent with this opinion, because: (1) no evidence was presented that would indicate plaintiff was dangerous or has ever misused firearms, either before his crime or in the seventeen years between restoration of his rights and adoption of N.C.G.S. § 14-415.1's complete ban on any possession of a firearm by him; (2) plaintiff sought out advice from his local sheriff following the amendment of N.C.G.S. § 14-415.1 and willingly gave up his weapons when informed that possession would presumably violate the statute; (3) plaintiff, through his uncontested lifelong nonviolence toward other citizens, his thirty years of law-abiding conduct since his crime, his seventeen years of responsible, lawful firearm possession between 1987 and 2004, and his compliance with the 2004 amendment affirmatively demonstrated that he is not among the class of citizens who pose a threat to public peace and safety; and (4) based on the facts of plaintiff's crime, his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation as applied to plaintiff, the 2004 version of N.C.G.S. § 14-451.1 is an unreasonable regulation not fairly related to the preservation of public peace and safety. N.C. Const. art. I, § 30.

Justice HUDSON concurs in result only.

Chief Justice PARKER dissenting.

Justice TIMMONS-GOODSON dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 185 N.C. App. 610, 649 S.E.2d 402 (2007), affirming an order granting summary judgment for defendant and denying summary judgment for plaintiff entered 31 March 2006 by Judge Michael R. Morgan in Superior Court, Wake County. Heard in the Supreme Court 5 May 2008.

Dan L. Hardway Law Office, by Dan L. Hardway, for plaintiff-appellant.

Roy Cooper, Attorney General, by John J. Aldridge, III, Special Deputy Attorney General, for defendant-appellee.

BRADY, Justice.

This case presents an as-applied challenge to the constitutionality of the 2004 amendment to N.C.G.S. § 14-415.1 that makes it "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm." We determine that N.C.G.S. § 14-415.1 is unconstitutional as applied to plaintiff and reverse the decision of the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

In 1979 plaintiff Barney Britt pleaded guilty to felony possession with intent to sell and deliver the controlled substance methaqualone. Plaintiff's crime was nonviolent and did not involve the use of a firearm. Plaintiff was sentenced to two years in the North Carolina Department of Correction, with four months active imprisonment and the remainder suspended for two years, during which plaintiff was on supervised probation. He completed his probation in 1982, and in 1987 his civil rights were fully restored by operation of law, including his right to possess a firearm. At that time, N.C.G.S. § 14-415.1 only prohibited the possession of "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches" by persons convicted of certain felonies, mostly of a violent or rebellious nature, "within five years from the date of such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later." Act of June 26, 1975, ch. 870, sec. 1, 1975 N.C. Sess. Laws 1273.

Subsequently, in 1995 the General Assembly amended N.C.G.S. § 14-415.1 to prohibit the possession of such firearms by all persons convicted of any felony, without regard to the date of conviction or

the completion of the defendant's sentence. Act of July 26, 1995, ch. 487, sec. 3, 1995 N.C. Sess. Laws 1414, 1417. The 1995 amendment did not change the previous provision in N.C.G.S. § 14-415.1 stating that "nothing [therein] would prohibit the right of any person to have possession of a firearm within his own house or on his lawful place of business." However, in 2004 the General Assembly amended N.C.G.S. § 14-415.1 to extend the prohibition on possession to *all* firearms by any person convicted of any felony, even within the convicted felon's own home and place of business. Act of July 15, 2004, ch. 186, sec. 14.1, 2004 N.C. Sess. Laws 716, 737.[1]

Following passage of this amendment, plaintiff had a discussion with the Sheriff of Wake County, who concluded that possession of a firearm by plaintiff would violate the statute as amended in 2004. Plaintiff thereafter divested himself of all firearms, including his sporting rifles and shotguns that he used for game hunting on his own land. In the thirty years since plaintiff's conviction of a nonviolent crime he has not been charged with any other crime nor is there any evidence that he has misused a firearm in any way. Furthermore, no determination has been made by any agency or court that plaintiff is violent, potentially dangerous, or is more likely than the general public to commit a crime involving a firearm.

On 20 September 2005, plaintiff initiated a civil action against the State of North Carolina, alleging that N.C.G.S. § 14-415.1 as amended

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1. This statute was later amended in 2006 to exempt "antique firearm[s]," as defined in N.C.G.S. § 14-409.11, from its provisions. N.C.G.S. § 14-409.11 provides:

> (a) The term "antique firearm" means any of the following:
>
> (1) Any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured on or before 1898.
>
> (2) Any replica of any firearm described in subdivision (1) of this subsection if the replica is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition.
>
> (3) Any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder substitute, and which cannot use fixed ammunition.
>
> (b) For purposes of this section, the term "antique firearm" shall not include any weapon which:
>
> (1) Incorporates a firearm frame or receiver.
>
> (2) Is converted into a muzzle loading weapon.
>
> (3) Is a muzzle loading weapon that can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

The 2006 amendment to N.C.G.S. § 14-415.1 is not before the Court.

violates multiple rights he holds under the United States and North Carolina Constitutions. On 31 March 2006, the trial court granted the State's motion for summary judgment, holding that the amended statute is rationally related to a legitimate government interest and is not an unconstitutional ex post facto law or bill of attainder. Plaintiff appealed to the Court of Appeals, and a majority of that court agreed with the trial court that plaintiff's rights had not been violated. The dissent at the Court of Appeals would have held that the 2004 amendment amounted to an ex post facto law and violated plaintiff's rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. On 24 March 2009, this Court retained plaintiff's notice of appeal based upon a substantial constitutional question as to the following issue only: "Whether the application of the 2004 amendment to N.C.G.S. § 14-415.1 to plaintiff violates his rights under N.C. Const. art. I, § 30." Because we agree with plaintiff that the application of N.C.G.S. § 14-415.1 to him violates Article I, Section 30 of the North Carolina Constitution, it is unnecessary for us to address any of plaintiff's remaining arguments, and we express no opinion on their merit.

ANALYSIS

Article I, Section 30 of the North Carolina Constitution provides, in pertinent part: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." This Court has held that regulation of the right to bear arms is a proper exercise of the General Assembly's police power, but that any regulation must be at least "reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety." *State v. Dawson*, 272 N.C. 535, 547, 159 S.E.2d 1, 10 (1968) (quoting with approval *State v. Kerner*, 181 N.C. 574, 579, 107 S.E. 222, 226 (1921) (Allen, J., concurring)). Accordingly, this Court must determine whether, as applied to plaintiff, N.C.G.S. § 14-415.1 is a reasonable regulation.[2]

Plaintiff pleaded guilty to one felony count of possession with intent to sell and deliver a controlled substance in 1979. The State does not argue that any aspect of plaintiff's crime involved violence or the threat of violence. Plaintiff completed his sentence without

2. Because we hold that application of N.C.G.S. § 14-415.1 to plaintiff is not a reasonable regulation, we need not address plaintiff's argument that the right to keep and bear arms is a fundamental right entitled to a higher level of scrutiny.

incident in 1982. Plaintiff's right to possess firearms was restored in 1987. No evidence has been presented which would indicate that plaintiff is dangerous or has ever misused firearms, either before his crime or in the seventeen years between restoration of his rights and adoption of N.C.G.S. § 14-415.1's complete ban on any possession of a firearm by him. Plaintiff sought out advice from his local Sheriff following the amendment of N.C.G.S. § 14-415.1 and willingly gave up his weapons when informed that possession would presumably violate the statute. Plaintiff, through his uncontested lifelong nonviolence towards other citizens, his thirty years of law-abiding conduct since his crime, his seventeen years of responsible, lawful firearm possession between 1987 and 2004, and his assiduous and proactive compliance with the 2004 amendment, has affirmatively demonstrated that he is not among the class of citizens who pose a threat to public peace and safety. Moreover, the nature of the 2004 amendment is relevant. The statute functioned as a total and permanent prohibition on possession of any type of firearm in any location. *See* N.C.G.S. § 14-415.1 (2004).

Based on the facts of plaintiff's crime, his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation, as applied to plaintiff, the 2004 version of N.C.G.S. § 14-451.1 is an unreasonable regulation, not fairly related to the preservation of public peace and safety. In particular, it is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety.

We conclude that N.C.G.S. § 14-415.1 is an unconstitutional violation of Article I, Section 30 of the North Carolina Constitution as applied to this plaintiff. As discussed above, pursuant to N.C.G.S. § 14-415.1, the State unreasonably divested plaintiff of his right to own a firearm. Such action violates plaintiff's right to keep and bear arms under Article I, Section 30 of the North Carolina Constitution. For that reason, we reverse the decision of the Court of Appeals to the extent that court determined N.C.G.S. § 14-415.1 can be constitutionally applied to plaintiff. This case is remanded to the Court of Appeals for further remand to the Superior Court, Wake County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice HUDSON concurs in the result only.

Chief Justice PARKER dissenting.

In my view N.C.G.S. § 14-415.1 as applied to plaintiff does not violate Article I, Section 30 of the North Carolina Constitution. Accordingly, I respectfully dissent.

Justice TIMMONS-GOODSON dissenting.

Because the majority has crafted an individualized exception for a sympathetic plaintiff, thereby placing North Carolina in the unique position of being the first jurisdiction, either federal or state, to hold that the inherent police power of the State must yield to a convicted felon's right to own a firearm, I respectfully dissent. Plaintiff's right to possess a firearm is not absolute, but subject to regulation. The Felony Firearms Act at issue is a reasonable regulation of the right to bear arms, both facially and as applied to plaintiff.

I note initially that "there is a strong presumption that enactments of the General Assembly are constitutional." *Town of Spruce Pine v. Avery Cty.*, 346 N.C. 787, 792, 488 S.E.2d 144, 147 (1997) (citing *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs*, 328 N.C. 24, 399 S.E.2d 311 (1991). Moreover, it is well settled that " '[a]cting for the public good, the state, in the exercise of its police power, may impose reasonable restrictions upon the natural and constitutional rights of its citizens.' " *In re Moore*, 289 N.C. 95, 103, 221 S.E.2d 307, 312 (1976) (quoting *In re Cavitt*, 182 Neb. 712, 715, 157 N.W.2d 171, 175 (1968)). Indeed, this Court recently noted that the State may properly exercise its police power to enact laws protecting or promoting the safety and general welfare of society. *Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008). With regard to the right to bear arms, this Court has "consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation." *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968). To pass constitutional muster, the regulation must be (1) reasonable; and (2) related to preserving public peace and safety. *See id.* at 546-47, 159 S.E.2d at 9-10 (citing *State v. Kerner*, 181 N.C. 574, 579, 107 S.E. 222, 226 (1921) (Allen, J., concurring), for the proposition that the right to bear arms is subject to regulation by the General Assembly in the exercise of its inherent police power, but the regulation must be reasonable and related to the preservation of public peace and safety).

In addition to regulating the place and manner in which an individual may exercise his right to bear arms, the General Assembly may

also properly regulate—to the point of absolute restriction—certain *classes* of persons reasonably deemed by the legislature to pose a threat to public peace and safety.[3] *See District of Columbia v. Heller*, 554 U.S. ––, 171 L. Ed. 2d 637, 678 (2008) (affirming that the "longstanding prohibitions on the possession of firearms by felons and the mentally ill" survive Second Amendment scrutiny); *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (stating that "it is clear that felons, infants, and those of unsound mind may be prohibited from possessing firearms"), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002); *cf. In re Moore*, 289 N.C. at 102-03, 221 S.E.2d at 311-12 (stating that, although the right to procreate is a fundamental right, the state may limit a class of citizens in this right). Thus, in addition to convicted felons, our statutes unequivocally prohibit incompetents, persons acquitted by reason of insanity of *any* crime (whether violent or non-violent), and persons subject to domestic violence orders from purchasing, owning, or possessing firearms. *See* N.C.G.S. §§ 14-269.8, 415.3 (2007). The majority's reasoning casts serious doubts upon the constitutionality of these statutes and invites individual challenges to not only the Felony Firearms Act, but these other statutory provisions as well.

The General Assembly's prohibition of firearm use by convicted felons is both reasonable and related to preserving public peace and safety. Felonies constitute our most serious offenses. One who has committed a felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person. As this Court stated in *State v. Jackson*, 353 N.C. 495, 546 S.E.2d 570 (2001):

> Just as there is heightened risk and public concern associated with firearms on educational property, which the legislature addressed through N.C.G.S. § 14-269.2, *there is also heightened risk and public concern associated with convicted felons possessing firearms*, which the legislature addressed through N.C.G.S. § 14-415.1. Both are exceptional situations, which have been addressed through dedicated statutory law.

Id. at 501, 546 S.E.2d at 573-74 (emphasis added); *see also Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6, 74 L. Ed. 2d 845, 854

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3. Plaintiff has not brought an equal protection challenge, nor has the majority addressed any equal protection concerns with the Felony Firearms Act. I therefore do not comment upon this issue.

n.6 (1983) (stating that Congress's intent in enacting 18 U.S.C. 922(g), which prohibits firearm possession by convicted felons, was to "keep firearms out of the hands of presumptively risky people"), *superseded on other grounds by statute*, Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449, *as recognized in Logan v. United States*, 552 U.S. 23, ——, 169 L. Ed. 2d 432, 438 (2007). The Felony Firearms Act is moreover limited in scope: the prohibition on firearm possession does not apply to *all* persons convicted of crimes—only those convicted of our most serious offenses, felonies. And convicted felons are not barred from possessing *all* weapons—only firearms.

The General Assembly, acting upon its compelling interest in the public welfare and safety, determined that, like the mentally insane, those convicted of felonies pose an unacceptable risk with regard to firearm possession. In so doing, the legislature has properly fulfilled its duty to reasonably regulate firearms: " 'The preservation of the public peace, and the protection of the people against violence, are constitutional duties of the legislature, and the guarantee of the right to keep and bear arms is to be understood and construed in connection and in harmony, with these constitutional duties.' " *Dawson*, 272 N.C. at 548, 159 S.E.2d at 11 (quoting *Hill v. State*, 53 Ga. 472, 477 (1874)). Thus, because I conclude that N.C.G.S. § 14-415.1 is reasonable and related to preserving public peace and safety, both in general and to Mr. Britt in particular as a convicted drug offender, the Felony Firearms Act is constitutional on its face and as applied to Mr. Britt.

This case is difficult and poses a temptation for the Court to depart from established case law in order to accommodate Mr. Britt. However, as the Chief Justice of the United States Supreme Court recently articulated:

> Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: "Hard cases make bad law."

Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. ——, ——, 173 L. Ed. 2d 1208, 1232 (2009) (Roberts, C.J., dissenting). Although Mr. Britt may be a sympathetic plaintiff, in that he made a huge mistake early in his life, he is nevertheless a convicted drug offender and a felon and as such, belongs to a class of persons deemed by the

General Assembly and recognized by this Court to pose "heightened risk and public concern" with regard to firearm possession. Other state supreme courts have avoided the temptation to craft individualized exceptions for particular plaintiffs. *See State v. Smith*, 132 N.H. 756, 758, 571 A.2d 279, 281 (1990) (holding that the state's felon-in-possession statute narrowly served a significant governmental interest in protecting the general public and was therefore constitutional under the New Hampshire Constitution, even though the New Hampshire Supreme Court recognized that some felons falling within the statute's reach were not potentially dangerous). Today's decision opens the floodgates wide before an inevitable wave of individual challenges to not only the Felony Firearms Act, but to our statutory provisions prohibiting firearm possession by incompetents and the mentally insane. The majority has not cited any direct authority from this Court or any other jurisdiction in support of its position that the legislature may not prohibit convicted felons like Mr. Britt from possessing firearms. Plaintiff does not cite any such case, and I have found none, all authority being to the contrary.

Although the majority stands up for Mr. Britt and other convicted felons who will now undoubtedly seek judicial exemption from N.C.G.S. § 14-415.1, this is a policy matter and determination best left to the executive or legislative branches. Mr. Britt may seek relief from the General Assembly through contact with individual legislators or from the Governor by way of a conditional or unconditional pardon. *See* N.C. Const. art. III, § 5, cl. 6; N.C.G.S. §§ 13-1 to 13-4. (2007). The majority resists judicial restraint in an effort to fashion an individual exception for Mr. Britt. I believe this Court should properly resist such temptation and affirm the decision of the Court of Appeals.

HARRIETT HURST TURNER AND JOHN HENRY HURST v. THE HAMMOCKS BEACH CORPORATION, NANCY SHARPE CAIRD, SETH DICKMAN SHARPE, SUSAN SPEAR SHARPE, WILLIAM AUGUST SHARPE, NORTH CAROLINA STATE BOARD OF EDUCATION, AND ROY A. COOPER, III, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 450A08

(Filed 28 August 2009)

1. Appeal and Error— appealability—interlocutory denial of motion to dismiss—collateral estoppel

An appeal from the denial of a motion to dismiss involved a substantial right and was immediately appealable where the opposing party raised collateral estoppel from a prior settlement.

2. Trusts— impractical purpose—termination—prior settlement—more than one interpretation

The trial court properly denied defendants' motion to dismiss an action arising from the termination of a trust where the purpose of the trust had become impossible and a prior consent judgment dealt with the distribution of assets. The consent judgment is reasonably susceptible to a reading that would preserve plaintiffs' future interests, and collateral estoppel does not bar litigation of the question of whether the consent judgment was intended to foreclose all of plaintiffs' rights in the land.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 192 N.C. App. ——, 664 S.E.2d 634 (2008), reversing an order denying defendant's motion to dismiss entered on 23 August 2007 by Judge R. Allen Baddour, Jr. in Superior Court, Wake County, and remanding to the trial court with instructions to grant defendant's motion. Heard in the Supreme Court on 25 February 2009.

The Francis Law Firm, PLLC, by Charles T. Francis, for plaintiff-appellants.

Hunton & Williams LLP, by Frank E. Emory, Jr., for defendant-appellee The Hammocks Beach Corporation.

NEWBY, Justice.

This case presents two issues. First we must determine whether the trial court's interlocutory order denying defendant's motion to

dismiss is suitable for immediate appellate review. If that order is immediately appealable, we must then decide whether the trial court erred in denying defendant's motion to dismiss. We hold that the interlocutory order at issue affects a substantial right of defendant, and we therefore affirm the Court of Appeals' conclusion that the order is immediately appealable. We further hold that the allegations of the complaint are sufficient to state a claim upon which relief might be granted, and thus the trial court properly denied the motion to dismiss.

The controversy at hand arises out of the creation of a trust, which accompanied a real estate transaction that took place in 1950. Dr. William Sharpe owned 810 acres of property in Onslow County known as "The Hammocks," and he intended to devise The Hammocks to his friends John and Gertrude Hurst. Upon learning of Dr. Sharpe's intentions, Ms. Hurst, who had formerly been a teacher in the then-racially-segregated public school system, requested that Dr. Sharpe instead make a charitable gift of the property for the benefit of African-American educators and youth organizations. In accordance with Ms. Hurst's wishes, Dr. Sharpe deeded The Hammocks to the nonprofit Hammocks Beach Corporation "in trust for recreational and educational purposes for the use and benefit of the members of The North Carolina Teachers Association, Inc. and such others as are provided for in the Charter of the Hammocks Beach Corporation, Inc." That charter stated that the corporation's purpose was to administer The Hammocks "primarily for the teachers in public and private elementary, secondary and collegiate institutions for Negroes in North Carolina . . . and for such other groups as are hereinafter set forth."

Anticipating that circumstances might arise making it impossible or impracticable to use The Hammocks for the trust purposes, the 1950 deed stated:

> IT IS FURTHER PROVIDED AND DIRECTED by the said grantors, parties of the first part, that if at any time in the future it becomes impossible or impractical to use said property and land for the use as herein specified and if such impossibility or impracticability shall have been declared to exist by a vote of the Majority of the directors of the Hammocks Beach Corporation, Inc., the property conveyed herein may be transferred to The North Carolina State Board of Education, to be held in trust for the purpose herein set forth, and if the North Carolina State Board of Education shall refuse to accept such property for the

> purpose of continuing the trust herein declared, all of the property herein conveyed shall be deeded by said Hammocks Beach Corporation, Inc. to Dr. William Sharpe, his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants; The Hurst family shall have the mainland property and the Sharpe family shall have the beach property . . . .

As of 1987, the North Carolina Attorney General had advised that the State Board of Education had "no interest in succeeding Hammocks Beach Corporation as trustee and would not agree to do so." The Attorney General and the State Board of Education thus moved to be dismissed as parties from the present action, and the trial court entered an order granting that motion on 24 August 2007.

In 1986 the Hammocks Beach Corporation filed a declaratory judgment action seeking to quiet title to The Hammocks and ensure fulfillment of the purposes of the trust created by Dr. Sharpe. According to the complaint in the instant case, in response to the 1986 request for declaratory relief,

> the Sharpe and Hurst heirs contended that fulfillment of the trust terms had become impossible or impracticable, that The Hammocks Beach Corporation had acted capriciously and contrary to the intent of the settlor in not declaring its recognition of such, and that the court should declare the trust terminated and either mandate a conveyance of all of the property to the Sharpe and Hurst families or adjudicate title in their names.

Prior to trial in the 1986 action, the parties reached a settlement and signed a consent judgment, which was entered by the trial court on 29 October 1987 ("the 1987 consent judgment" or "the consent judgment").

Plaintiffs brought this action in December 2006, alleging that "fulfillment of the trust terms has become impossible or impracticable" and seeking an accounting, termination of the trust, and damages for breach of fiduciary duty. On 5 July 2007, before any discovery in the case, defendant filed a motion under N.C.G.S. § 1A-1, Rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted, asserting that the issue of plaintiffs' rights to the property now in question (a portion of The Hammocks) had already been determined by the 1987 consent judgment and that relitigation is barred by collateral estoppel. The trial court entered an order denying defendant's motion to dismiss on 23 August 2007. Defendant sought review, and

the Court of Appeals concluded the order was immediately appealable. The Court of Appeals went on to reverse the trial court's order, holding that defendant's motion to dismiss should have been granted.

[1] We begin our review by determining whether the interlocutory order denying defendant's motion to dismiss is immediately appealable. "Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citing *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). As a general rule, interlocutory orders are not immediately appealable. *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006). However, "immediate appeal of interlocutory orders and judgments is available in at least two instances": when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1). *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999).

The trial court did not certify for immediate review its order denying defendant's motion to dismiss. Defendant's argument in favor of appealability is that the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel. We agree. Under the collateral estoppel doctrine, "parties and parties in privity with them . . . are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (citations omitted). The doctrine is designed to prevent repetitious lawsuits, and parties have a substantial right to avoid litigating issues that have already been determined by a final judgment. We therefore hold that a substantial right was affected by the trial court's denial of defendant's motion to dismiss, and we proceed to the merits of defendant's appeal.

[2] The remaining issue before this Court is whether plaintiffs' claims for relief are, in fact, barred under the collateral estoppel doctrine. To successfully assert collateral estoppel as a bar to plaintiffs' claims, defendant

> would need to show that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an

> issue actually litigated and necessary to the judgment, and that both [defendant] and [plaintiffs] were either parties to the earlier suit or were in privity with parties.

Thomas M. McInnis & Assocs. v. Hall, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986) (citing *King*, 284 N.C. at 357-60, 200 S.E.2d at 805-08).

We begin our consideration of the merits of defendant's collateral estoppel claim by determining whether the issue of plaintiffs' remaining rights in the contested land is identical to an issue already decided by the 1987 consent judgment. If the consent judgment fully extinguished all of plaintiffs' rights in the land, then collateral estoppel bars litigation of whether plaintiffs retain any rights in the property. We emphasize at the outset that we are reviewing the trial court's ruling on a motion to dismiss under Rule 12(b)(6). When ruling on such a motion to dismiss, the trial court is to treat the plaintiff's factual allegations as true. *See*, *e.g.*, *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 442, 666 S.E.2d 107, 114 (2008) (citing *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006)). Furthermore, "the complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 444, 666 S.E.2d at 116 (internal quotation marks omitted) (quoting *Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997) (citation and brackets omitted)). Thus, in determining whether the consent judgment foreclosed all of plaintiffs' rights in the land at issue here, we view the forecast of evidence in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference that can be drawn therefrom. *See Gossett v. Metro. Life Ins. Co.*, 208 N.C. 152, 157, 179 S.E. 438, 441 (1935).

"A consent judgment is a court-approved contract subject to the rules of contract interpretation." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citing *Yount v. Lowe*, 288 N.C. 90, 96, 215 S.E.2d 563, 567 (1975)).

> [T]he goal of construction is to arrive at the intent of the parties when the [contract] was [executed]. . . . The various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect. . . . [I]f the meaning of the [contract] is clear and only one reasonable interpretation exists, the courts must enforce the contract as written . . . .

Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 505-06, 246 S.E.2d 773, 777 (1978). However, "if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement between the parties." *Root v. Allstate Ins. Co.*, 272 N.C. 580, 590, 158 S.E.2d 829, 837 (1968) (internal quotation marks omitted) (quoting *Hite v. Aydlett*, 192 N.C. 166, 170, 134 S.E. 419, 421 (1926) (citation omitted)). Viewing the evidence in the light most favorable to plaintiffs, we must determine whether the 1987 consent judgment, on its face, can only reasonably be interpreted as fully extinguishing plaintiffs' rights in the land at issue.

As the trial court summarized in the 1987 consent judgment, the parties to the 1986 declaratory judgment action agreed that "Hammocks Beach Corporation as trustee would hold title to an appropriate portion of The Hammocks free of any claims of the Sharpes and Hursts and with broader administrative powers, with the remainder of said property being vested in the Sharpe and Hurst defendants." The land now at issue is the "appropriate portion of The Hammocks" to which defendant holds title under the consent judgment, and defendant argues that the consent judgment fully expunged all of plaintiffs' rights in that land. Defendant relies primarily on the consent judgment's statement that the property vested in the Hammocks Beach Corporation "shall be free and clear of *any* rights of the heirs of Dr. William Sharpe or of Gertrude Hurst or of the heirs of John and Gertrude Hurst." (Emphasis added.) If this were the consent judgment's only provision relevant to the extent of the parties' interest in the land now in question, we would agree with defendant that plaintiffs' future interests were extinguished. However, the consent judgment contains additional language that bears on the issue, and we must strive to give effect to "every word and every provision." *Woods*, 295 N.C. at 506, 246 S.E.2d at 777.

Most notably, the consent judgment consistently refers to defendant as "Hammocks Beach Corporation, trustee," and declares that defendant holds title to the property now at issue "subject to the trust terms set forth in the . . . deed dated August 10, 1950 . . . and in Agreement dated September 6, 1950." In subjecting defendant's title to the terms of the trust, the consent judgment does not exclude the trust terms regarding impossibility or impracticability, and those terms unquestionably grant future interests to "Dr. William Sharpe, his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants." Nor does the consent judgment contain

language that clearly supersedes the terms of the original trust in the event of impossibility or impracticability.

We also note that the Sharpe and Hurst families' rights in the land at issue under the 1950 deed and corresponding agreement were apparently not limited to future interests. According to the complaint in the instant case:

> The terms of the trust Deed from Dr. Sharpe to The Hammocks Beach Corporation, as amplified by the simultaneously executed Agreement, subjected the trust property to numerous rights of use and possession in the Sharpe and Hurst families, including the right to cultivate, to quarry, to raise livestock, to travel over the land incident to taking fin fish and shellfish in adjacent waters, and to reside there.

Although "any" is a strong word, in light of the other peculiarities of the 1987 consent judgment, the provision that the property vested in defendant "shall be free and clear of *any* rights of the heirs of Dr. William Sharpe or of Gertrude Hurst or of the heirs of John and Gertrude Hurst" may reasonably be read as intending only to extinguish plaintiffs' present rights of use and possession. (Emphasis added.)

Finally, as did the Court of Appeals, we observe with curiosity defendant's ability under the consent judgment to encumber the property now at issue and to sell "a portion thereof." It may seem inconsistent with plaintiffs' retention of a future interest in the land in question to allow defendant, without plaintiffs' consent, to convey interests in that land to third parties who would not be bound by the trust terms. We also point out, however, that the consent judgment only allows defendant to encumber or sell the property with the court's approval and only "for the purpose of generating funds for use in furtherance of the terms of the trust." Indeed, whereas the 1987 consent judgment vests the Sharpe and Hurst descendants "with fee simple title" to the portions of land they received under that judgment, the property now at issue is "vested in Hammocks Beach Corporation *as trustee*." (Emphasis added.) Defendant's limited ability to encumber and sell the land, therefore, like the rest of the consent judgment, has ambiguous implications with respect to whether plaintiffs retain future interests in the land.

In summary, when plaintiffs' factual allegations are taken as true and all reasonable inferences are drawn in their favor, it does not

appear "beyond doubt" that plaintiffs are not entitled to relief. *State ex rel. Cooper*, 362 N.C. at 444, 666 S.E.2d at 116 (citations and internal quotation marks omitted). Read as a whole and on its face, the 1987 consent judgment is unclear as to what should happen if adherence to the trust terms becomes impossible or impracticable, and thus the consent judgment does not admit "only one reasonable interpretation" regarding the extent of plaintiffs' interests in the land at issue. *Woods*, 295 N.C. at 506, 246 S.E.2d at 777. Because the consent judgment is reasonably susceptible to a reading that would preserve plaintiffs' future interests in the realty, collateral estoppel does not bar litigation of the question whether the consent judgment was intended to foreclose all of plaintiffs' rights in the land. We therefore hold that the trial court properly denied defendant's motion to dismiss.

We affirm the portion of the Court of Appeals opinion holding that the trial court's order is immediately appealable, and we reverse the Court of Appeals' holding that the trial court erred in denying defendant's motion to dismiss. This case is remanded to the Court of Appeals for further remand to the trial court for proceedings not inconsistent with this opinion.[1]

AFFIRMED IN PART; REVERSED IN PART.

CAROLINA POWER & LIGHT COMPANY, PETITIONER v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA AND HERMAN D. ROBERTS, RESPONDENTS

No. 441A08

(Filed 28 August 2009)

Unemployment Compensation— acceptance of voluntary early retirement package—left employment without good cause attributable to employer

The Court of Appeals erred by concluding that an employee who accepts a Voluntary Early Retirement Package ("VERP"), offered by the employer as part of a company-wide downsizing, is

1. Although the Court of Appeals stated that it did not reach all of defendant's assignments of error, we find the remaining assignments of error to be sufficiently included in the second issue resolved by this opinion. The Court of Appeals is not to consider defendant's remaining assignments of error before remanding this case to the trial court.

eligible for unemployment insurance benefits under N.C.G.S. Ch. 96, and the case is remanded to that court for further remand to the superior court with directions for that court to remand this matter to the Employment Security Commission for further proceedings not inconsistent with this opinion, because under these facts of this case, claimant left his employment without good cause attributable to the employer when: (1) the emphasis placed by the Commission and claimant on the failure of claimant's supervisor to tell claimant whether he would have a job after a downsizing was completed was misplaced since to construe the failure to answer that question as good cause assumes that claimant, who from the record appeared to have been an employee at will, was entitled to an assurance tantamount to a contract guaranteeing him a job after the downsizing was completed; (2) claimant presented no evidence, and the Commission made no finding, that the employer knew the answer to claimant's question (concerning whether he would have a job after the downsizing was completed) before the deadline for accepting the VERP had expired; (3) the mere offering of the VERP by the employer as part of its efforts to downsize cannot be a good cause entitling claimant to benefits in that claimant had to submit a written application in order to accept the program; (4) if, under N.C.G.S. § 96-14(1), the employee who has been told that he or she will be terminated on a certain date is disqualified from receiving benefits when he or she leaves before the stated date, then permitting the employee who has not been told that he or she will be terminated to leave and obtain unemployment benefits on the basis that the employee accepted the offer of enhanced early retirement would create an inconsistency and inequity in the law; and (5) an employee can leave work for "good cause" under circumstances which make continued work logistically impractical including scheduling and transportation problems that outweigh the benefits of employment, or an employee can leave work for "good cause" when the work or work environment itself is intolerable, but neither situation was applicable in the instant case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 192 N.C. App. ——, 665 S.E.2d 141 (2008), affirming a judgment entered 28 August 2006 by Judge A. Leon Stanback, Jr. and an order entered 19 July 2007 by Judge Paul G. Gessner, both in Superior Court, Wake County. Heard in the Supreme Court 25 February 2009.

Cranfill Sumner & Hartzog LLP, by Norwood P. Blanchard, III, for petitioner-appellant.

Thomas S. Whitaker, Chief Counsel, and Thomas H. Hodges, Jr. for respondent-appellee Employment Security Commission of North Carolina.

PARKER, Chief Justice.

The sole issue on this appeal is whether an employee who accepts a Voluntary Early Retirement Package ("VERP"), offered by the employer as part of a company-wide downsizing, is eligible for unemployment insurance benefits under Chapter 96 of the North Carolina General Statutes. We reverse the Court of Appeals and hold that the employee is ineligible for benefits.

Herman D. Roberts (claimant) was employed by Carolina Power & Light Company ("CP&L") as a field service representative. In January 2005 CP&L offered voluntary early retirement to several employees, including claimant. Claimant accepted the VERP, and his last day of work with CP&L was 31 May 2005.

After retiring, claimant filed an initial claim for unemployment insurance benefits effective the week beginning 24 July 2005. His claim was denied by the Employment Security Commission ("Commission") adjudicator. The appeals referee reversed the adjudicator. CP&L appealed to the Commission which upheld the decision of the appeals referee. CP&L next appealed to Superior Court, Wake County, which affirmed the decision of the Commission awarding benefits. CP&L gave notice of appeal to the Court of Appeals, which, in a divided opinion, affirmed the decision of the Superior Court. Based on the dissenting opinion in the Court of Appeals, CP&L appealed to this Court.

Inasmuch as CP&L has not challenged the Commission's findings of fact, this Court is bound by those findings, and the only question is whether the findings of fact support the conclusions of law. *See, e.g.*, *State ex rel. Employment Sec. Comm'n v. Jarrell*, 231 N.C. 381, 384, 57 S.E.2d 403, 405 (1950). We review the Commission's conclusions of law de novo.

The Commission made the following findings of fact:

> 2[.] The claimant began working for the employer on March 21, 1981[.] He last worked for the employer on May 31, 2005, as a field service representative[.]

> 3[.] The employer began downsizing its field service representative positions in January 2005[.] During this time, the claimant was informed that his position as field service representative had been eliminated and he was going to be assigned to a temporary position in Clinton, North Carolina[.] The claimant was told that he would be in Clinton until the downsizing was completed[.]
>
> 4[.] The claimant asked his supervisor and operations manager if he was going to be transferred back to his field service representative position in Whiteville, North Carolina, or if he was going to Wilmington, North Carolina. The claimant was never given an answer[.]
>
> 5[.] In January 2005, the employer offered several employees, including the claimant, an early retirement package[.] The claimant asked his supervisors if he would still have a job if he did not accept the early retirement package[.] The claimant's question was never answered so he accepted the early retirement package.

Based on these findings, the Commission concluded as a matter of law that claimant "left work within the meaning of the law" and that he did so for "good cause attributable to the employer."

The statutory provisions applicable to this appeal are N.C.G.S. § 96-14(1) and (1a). A claimant is disqualified from receiving benefits if the claimant is "at the time such claim is filed, unemployed because he left work without good cause attributable to the employer." N.C.G.S. § 96-14(1) (2007). Further, "[w]here an individual leaves work, the burden of showing good cause attributable to the employer rests on said individual, and the burden shall not be shifted to the employer." N.C.G.S. § 96-14(1a) (2007).

In this case the Commission's conclusion that claimant left work is undisputed. Thus, to resolve this appeal we must determine whether claimant's acceptance of the VERP which triggered his departure amounted to good cause for leaving his employment and if so, whether the good cause was attributable to CP&L. This Court has defined "good cause" as "a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E.2d 357, 359 (1982) (citing *In re Watson*, 273 N.C. 629, 161 S.E.2d 1 (1968)). A separation is attributable to the employer if it was " 'produced, caused, created or as a result of actions by the employer.' "

Couch v. Employment Sec. Comm'n, 89 N.C. App. 405, 409-10, 366 S.E.2d 574, 577 (quoting *In re Vinson*, 42 N.C. App. 28, 31, 255 S.E.2d 644, 646 (1979) (internal quotation marks omitted)), *aff'd per curiam*, 323 N.C 472, 373 S.E.2d 440 (1988). Within the framework of these definitions, the Commission's findings of fact point to three possible actions attributable to the employer that could have been factors in claimant's acceptance of the VERP, namely, (i) the downsizing of the workforce, (ii) the supervisor's failure to answer claimant's question about his future employment, and (iii) the employer's offering of the VERP. The question then becomes whether any one of these actions as a matter of law constituted good cause for claimant to accept the VERP and leave his employment. We conclude that none of them does.

Downsizing of the workforce is a recognized means by which corporations and businesses maintain their productivity and profitability. Although downsizing may ultimately lead to the loss of some jobs, downsizing to a desired number of employees is often achieved through attrition. Downsizing or a reduction in force does not automatically trigger layoffs. In fact, the evidence in this case and the findings by the Commission based thereon would suggest that CP&L was utilizing this process, a part of which was the offering of an enhanced early retirement package. When claimant's position in Whiteville, North Carolina, was eliminated, claimant was moved to Clinton, North Carolina, and, as the Commission found, was told that he would be there until the downsizing was completed. Nothing in that process suggests that claimant was to be terminated. The emphasis placed by the Commission and claimant on the failure of claimant's supervisor to tell claimant whether he would have a job after the downsizing was completed is misplaced. To construe the failure to answer that question as good cause assumes that claimant, who from the record appears to have been an employee at will, was entitled to an assurance tantamount to a contract guaranteeing him a job after the downsizing was completed. An employee who has no such guarantee of a job before the employer begins downsizing certainly has no legal basis to use the failure of the employer to give such assurances as good cause entitling him to unemployment benefits when he voluntarily accepts an enhanced early retirement package. Moreover, claimant presented no evidence, and the Commission made no finding, that CP&L knew the answer to claimant's question before the deadline for accepting the VERP had expired. Finally, the mere offering of the VERP by CP&L as part of its efforts to downsize

cannot be a good cause entitling claimant to benefits in that claimant had to submit a written application in order to accept the program. The Commission made no finding that CP&L forced claimant or any other employee to accept the VERP.

While this case appears to be one of first impression in this jurisdiction, our conclusion that claimant is disqualified from receiving benefits is consistent with the policy enunciated by our General Assembly and the holdings of this Court. Under N.C.G.S. Chapter 96, section 14:

> Where an employee is notified by the employer that such employee will be separated from employment on some future date and the employee leaves work prior to this date because of the impending separation, the employee shall be deemed to have left work voluntarily and the leaving shall be without good cause attributable to the employer.

N.C.G.S. § 96-14(1). If, under this statute, the employee who has been told that he or she will be terminated on a certain date is disqualified from receiving benefits when he or she leaves before the stated date, then permitting the employee who has not been told that he or she will be terminated to leave and obtain unemployment benefits on the basis that the employee accepted the offer of enhanced early retirement would create an inconsistency and inequity in the law. *See Poteat v. Employment Sec. Comm'n*, 319 N.C. 201, 202, 353 S.E.2d 219, 220 (1987) (noting the enactment of this statutory provision and holding that the employee was not entitled to benefits for the period of time she was unemployed before the termination would have become effective).

Although not necessarily in the context of applying N.C.G.S. § 96-14(1), an examination of our jurisprudence as to what constitutes "good cause" reveals two broad categories. First, an employee can leave work for "good cause" under circumstances which make continued work logistically impractical. Such circumstances include scheduling and transportation problems that outweigh the benefits of employment. *See Barnes v. Singer Co.*, 324 N.C. 213, 217-18, 376 S.E.2d 756, 758-59 (1989) (finding that the employee still qualified for benefits after quitting her job because the employer moved and the employee did not have transportation to the new location); *Intercraft Indus. Corp. v. Morrison*, 305 N.C. at 377, 289 S.E.2d at 360 (accepting that the inability to find child care could constitute "good cause" for missing scheduled work days); *Couch v. Employment Sec.*

Comm'n, 89 N.C. App. at 412, 366 S.E.2d at 578 (finding that when the employer reduced the employee's hours so that the commute was no longer worth the wages, the employee had good cause to quit); *Milliken & Co. v. Griffin*, 65 N.C. App. 492, 497, 309 S.E.2d 733, 736 (1983) (finding that an employee quit with "good cause" when health reasons prevented her from working shifts of the length required in her particular position), *disc. rev. denied*, 311 N.C. 402, 319 S.E.2d 272 (1984).

Second, an employee can leave work for "good cause" when the work or work environment itself is intolerable. Examples of circumstances making work environments intolerable include racial discrimination, tensions following an offensive confrontation, and assignments that violate professional ethics. *See Poteat v. Employment Sec. Comm'n*, 319 N.C. at 204, 353 S.E.2d at 221 (holding that an employee did not have "good cause" to leave before a scheduled termination date when nothing "suggest[ed] that notice of impending termination was so offensive as to embarrass or humiliate the claimant"); *In re Bolden*, 47 N.C. App. 468, 471-72, 267 S.E.2d 397, 399 (1980) (remanding for findings as to whether claimant left her job on account of racial discrimination which would constitute good cause); *In re Clark*, 47 N.C. App. 163, 167, 266 S.E.2d 854, 856 (1980) (holding claimant had good cause to quit when she "felt that she could no longer ethically continue her employment").

In the case at bar, claimant left work even though continued work was neither logistically impractical nor intolerable. CP&L eliminated claimant's original position and moved him to a new position in a new location. However, the Commission made no finding of fact that this change made claimant's ability to report for work each day logistically impractical. From the record, we can only conclude that he reported to work in Clinton each day without difficulty and that nothing would have prevented his continued attendance beyond his eventual retirement date. Even if some logistical difficulty beyond the scope of the record were introduced, it would be hard to show how such difficulty resulted from CP&L's decision to offer enhanced retirement packages.

Further, claimant left the job even though continued work was in no way intolerable. While claimant's position had changed, nothing in the Commission's findings of fact suggests that the new position was in any way disagreeable, even though it was in a new location and was temporary in nature. Further, CP&L's offer of an early retirement package did not in any way affect the quality of the position claimant

occupied when he left work. Claimant presented no evidence that the program's existence created a hostile or unpleasant work environment, or somehow negatively affected the quality of the work itself. Thus, the retirement program does not constitute "good cause" for the separation.

Moreover, the conclusion we reach today is consistent with decisions from other jurisdictions that have addressed this issue. While not binding on this Court, the decision in *Anheuser Busch, Inc. v. Goewert*, 82 Wash. App. 753, 919 P.2d 106 (1996), *disc. rev. denied*, 131 Wash. 2d 1005, 932 P.2d 644 (1997), is instructive. In *Goewert* the employer set a goal of a ten percent reduction in force and offered an early retirement package to employees over age fifty-three. *Id.* at 755, 919 P.2d at 108. The employer stated that if the goal was not achieved by late 1994, the employer would institute involuntary terminations. *Id.* Goewert attempted to ascertain whether he would be laid off, but the employer could not guarantee Goewert a job before the deadline for accepting early retirement. *Id.* at 755-56, 919 P.2d at 108. The court held that Goewert had voluntarily brought about his own unemployment and was not entitled to benefits. The court stated: "While Goewert's fears about the possibility of future involuntary terminations were understandable, these fears are personal reasons for leaving work, not 'work connected factors.' In order to qualify for benefits, the reasons for quitting must be work related and must be external and separate from the claimant." *Id.* at 761-62, 919 P.2d at 111 (footnote omitted); *see also Shields v. Proctor & Gamble Paper Prods. Co.*, 164 S.W.3d 540, 544-45 (Mo. Ct. App. 2005) (holding that when the employer had no plans to implement involuntary layoffs if its retirement packages did not achieve the desired reduction in the workforce, the claimant did not have good cause for leaving his employment by accepting the offer of early retirement); *In re Claim of Joseph*, 246 A.D.2d 944, 944-45, 667 N.Y.S.2d 849, 849 (App. Div. 1998) (mem.) (holding that participating in an early retirement program when continuing work is available does not constitute good cause for leaving one's employment even though the employee testified that he opted for early retirement "because he thought he would be laid off"); *George v. Unemployment Comp. Bd. of Review*, 767 A.2d 1124, 1129 (Pa. Commw. Ct. 2001) (holding that a claimant's speculation that he would possibly be laid off as part of a reduction in force did not establish "necessitous and compelling reasons for accepting the early retirement incentive and voluntarily terminating his employment"). *But see White v. Dir. of Div. of Employment Sec.*,

382 Mass. 596, 598-99, 416 N.E.2d 962, 964 (1981) (remanding to the division to determine if the claimant "reasonably believed his discharge was imminent" when he accepted the early retirement).

The Commission made no finding of fact that CP&L had announced layoffs. Claimant had a job. Claimant, a twenty-four year veteran employee, elected to accept the VERP and thereby terminate his employment. The Commission made no finding that claimant would not have continued to have a job. Under these facts, for the reasons stated above, we conclude that claimant left his employment without good cause attributable to the employer and is, therefore, disqualified from receiving unemployment insurance benefits. N.C.G.S. § 96-14(1).

The decision of the Court of Appeals is reversed, and the case is remanded to that court for further remand to the Superior Court, Wake County, with directions that that court remand this matter to the Employment Security Commission for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN THE MATTER OF M.G., M.B., K.R., J.R.

No. 36PA08

(Filed 28 August 2009)

Child Abuse and Neglect— amendment to juvenile petition— sexual abuse allegation—nature of conditions of petition

The trial court did not err by allowing the Department of Social Services's motion to amend a juvenile petition to add sexual abuse allegations relating to the minor child M.B. because: (1) the conditions upon which the petition was based included abuse, neglect, and dependency, and the additional allegations did not change the nature of the conditions upon which the petition was based; (2) the nature of abuse, based upon its statutory definition under N.C.G.S. § 7B-101(1), was the existence or serious risk of some nonaccidental harm inflicted or allowed by one's caretaker, and the additional facts still fell within the nature of the abuse condition that was initially alleged as they related to

harm inflicted upon M.B. by a parent or caretaker; and (3) respondents had sufficient notice of the amendment well before the adjudicatory hearing, thus giving them time to prepare to answer the additional allegations. The case is remanded to the Court of Appeals for consideration of any assignments of error not addressed by that court in its previous opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 187 N.C. App. 536, 653 S.E.2d 581 (2007), affirming in part, reversing in part, and remanding in part an order entered on 8 March 2007 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Supreme Court 16 December 2008.

Elizabeth Kennedy-Gurnee, Staff Attorney, for petitioner-appellant Cumberland County Department of Social Services; and Beth A. Hall, Attorney Advocate, for Guardian ad Litem.

Lisa Skinner Lefler for respondent-appellee mother.

Annick Lenoir-Peek, Assistant Appellate Defender, for respondent-appellee father.

MARTIN, Justice.

We allowed discretionary review in this case to consider when an amendment to a juvenile petition "change[s] the nature of the conditions upon which the petition is based." N.C.G.S. § 7B-800 (2007).

On 18 May 2006, the Cumberland County Department of Social Services (DSS) filed a juvenile petition alleging that juveniles M.G., M.B., K.R., and J.R. were each abused, neglected, and dependent. *See* N.C.G.S. § 7B-101(1), (9), (15) (2007). The petition alleged abuse with specific reference to four subdivisions of N.C.G.S. § 7B-101(1): N.C.G.S. § 7B-101(1)(b) (creation or allowance of substantial risk of serious physical injury); N.C.G.S. § 7B-101(1)(d) (commission, permission, or encouragement of any of several enumerated sexual offenses); N.C.G.S. § 7B-101(1)(e) (creation or allowance of serious emotional harm); and N.C.G.S. § 7B-101(1)(f) (encouragement of delinquent acts involving moral turpitude by the juvenile). The petition contained numerous supporting factual allegations. No specific allegations regarding sexual abuse of M.B. appeared, however.

Many of the allegations in the petition referenced respondent-father Felix R. Felix R., who is the biological parent of K.R. and J.R.,

lived with respondent-mother Brandy G. and was a caretaker for all four children. During a medical evaluation on 17 July 2006, M.B. disclosed inappropriate sexual conduct by respondent-father. DSS subsequently moved on 5 December 2006 to amend its petition by adding M.B.'s disclosures of sexual abuse as factual allegations. Following a hearing on 4 January 2007, the trial court entered an order in open court allowing the motion to amend.

The trial court conducted the adjudicatory hearing on 19 and 20 February 2007. The trial court found as fact that M.B. had been subjected to sexual contact by respondent-father, along with other factual findings relating to abuse of M.B. such as respondent-father's commission of domestic violence in front of the children and his driving while drunk with the children in the vehicle. The trial court concluded that M.B. was abused according to the definition of abuse in N.C.G.S. § 7B-101(1). First, the trial court determined that M.B.'s parent or guardian committed, permitted, or encouraged the commission of one or more statutorily enumerated sexual offenses. *See id.* § 7B-101(1)(d). Second, the trial court found that a parent or guardian created or allowed a substantial risk of serious physical injury by nonaccidental means. *See id.* § 7B-101(1)(b).

The Court of Appeals vacated the trial court's order as to the finding that M.B. was abused as defined by N.C.G.S. § 7B-101(1)(d). *In re M.G.*, 187 N.C. App. 536, 548, 653 S.E.2d 581, 588 (2007). The Court of Appeals stated that the sexual abuse allegations relating to M.B. " 'change[d] the nature of the conditions upon which the petition [was] based,' " *id.* at 546-47, 653 S.E.2d at 587 (quoting N.C.G.S. § 7B-800), and thus, the trial court erred in allowing the DSS motion to add the allegations, *id.* at 547-48, 653 S.E.2d at 588. Specifically, the Court of Appeals concluded: "Because the new allegations gave rise to a different status for [M.B.] than alleged in the original petition, they violated N.C. Gen. Stat. § 7B-800 . . . ." *Id.* We disagree.

The dispositive issue is whether the additional allegations changed the "nature of the conditions upon which the petition is based." N.C.G.S. § 7B-800 ("The court may permit a petition to be amended when the amendment does not change the nature of the conditions upon which the petition is based."). In deciding whether the amendments did so, we must determine the meaning of the statutory language in sections 7B-800 and 7B-101(1). *See Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (stating that this Court will give effect to the plain meaning of a statute).

Here, the conditions upon which the petition was based include abuse, neglect, and dependency. With regard to the issue before this Court, only the condition of abuse is relevant. The question is whether the additional allegations changed the nature of the condition alleged: abuse.

Because the relevant condition on which the petition was based is abuse, we must first determine the nature of that condition. Section 7B-101(1) defines the term "abused juvenile[]." N.C.G.S. § 7B-101(1). Six separate parts set out acts or omissions that support a finding of abuse. *Id.* A juvenile is considered "abused" when a "parent, guardian, custodian, or caretaker:"

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;

c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;

d. Commits, permits, or encourages the commission of a violation of [one or more listed sexual offenses] by, with, or upon the juvenile . . . ;

e. Creates or allows to be created serious emotional damage to the juvenile . . . ; or

f. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

Id. There is a commonality present in these criteria. Each definition states that a juvenile is abused when a caretaker harms the juvenile in some way, allows the juvenile to be harmed, or allows a substantial risk of harm. The harm may be physical, *see* N.C.G.S. § 7B-101(1)(a), (b); emotional, *see id.* § 7B-101(1)(e), (f); or some combination thereof, *see id.* § 7B-101(1)(c), (d). Although several criteria are listed, they are both disjunctive and overlapping.[1] Certain

1. This is distinct from, for instance, the "nature of the offense alleged" referenced in determining whether an amendment to a delinquency petition will be allowed. N.C.G.S. § 7B-2400 (2007). The nature of the offense will typically be its elements. *See In re Davis*, 114 N.C. App. 253, 255-56, 441 S.E.2d 696, 698 (1994) (interpreting "nature of the offense" language in a predecessor statute, N.C.G.S. § 7A-627 (1989)). Thus, a department of social services could not amend a delinquency petition to add an offense with different elements.

allegations might justify a finding of abuse under several or even all of the criteria. We therefore hold that the nature of abuse, based upon its statutory definition, is the existence or serious risk of some nonaccidental harm inflicted or allowed by one's caretaker.

Having determined the nature of the condition of abuse, we now consider whether the additional allegations in this case changed the nature of the condition. DSS alleged in its initial petition that M.B. was abused. Specific factual allegations existed to support that finding under multiple criteria, including allowance of a risk of serious injury as well as infliction of emotional harm. The additional factual allegations related to inappropriate sexual contact between M.B. and respondent-father. The allegations supported a finding of abuse under N.C.G.S. § 7B-101(1)(d), but may also have justified that finding under N.C.G.S. § 7B-101(1)(b) (creation of a substantial risk of serious physical injury) or N.C.G.S. § 7B-101(1)(e) (creation of serious emotional harm). Both of the latter criteria were alleged and supported by specific allegations in the original petition. The additional facts still fell within the nature of the abuse condition that was initially alleged, as they related to harm inflicted upon M.B. by a parent or caretaker. Therefore, the allegations of sexual abuse did not change the nature of the condition when DSS had already alleged, with supporting facts, that M.B. was abused.

Often a juvenile may reveal additional incidents supporting a finding of abuse after the initial juvenile petition has been filed. Setting aside requirements of fairness and notice to the respondents, which must be satisfied in every case, the inclusion of these incidents via amendments to a petition alleging abuse will not typically change the nature of the conditions upon which the petition is based. We note that here, respondents had notice of the amendment well before the adjudicatory hearing. DSS filed the motion to amend on 5 December 2006. The trial court allowed the motion to amend following a hearing conducted on 4 January 2007, at which respondents were present and represented by counsel. The trial court specifically noted in its order allowing the amendment that the parties were aware of the additional factual allegations. The hearing on the juveniles' statuses began on 19 February 2007. Thus, respondents had sufficient notice and time to prepare to answer the additional allegations. We do not here address the situation in which a petitioner adds factual allegations at trial or with inadequate notice to a respondent.

The Court of Appeals reasoned that *In re D.C.*, 183 N.C. App. 344, 644 S.E.2d 640 (2007), required reversal in this case. *In re M.G.*, 187

N.C. App. at 547-48, 653 S.E.2d at 587-88. The analysis used by the Court of Appeals in *In re D.C.*, while not binding on this Court, is instructive regarding what constitutes a "change" in the "nature of the conditions" alleged. N.C.G.S. § 7B-800. In that case, the original petition alleged only that the juvenile was dependent as defined in N.C.G.S. § 7B-101(9). *In re D.C.*, 183 N.C. App. at 346, 348-49, 644 S.E.2d at 641-43. At adjudication, however, the petitioner proceeded on a theory of neglect, *id.*, which is defined by a separate subsection, N.C.G.S. § 7B-101(15). The trial court found the juvenile to be neglected. *In re D.C.*, 183 N.C. App. at 348, 644 S.E.2d at 642. Thus, the trial court essentially amended the petition by finding a condition, neglect, that had never been alleged before trial. *Id.* at 349, 644 S.E.2d at 643. The Court of Appeals also noted that, in addition to the absence of a formal allegation of neglect in the petition, the factual allegations supporting the dependency claim failed to clearly give notice that neglect was at issue. *Id.* at 350, 644 S.E.2d at 643. The Court of Appeals therefore reversed the finding of neglect. *Id.*

The amendment of the petition in the present case does not raise problematic issues similar to those in *In re D.C.* As a formal matter, the original petition alleged that each child, including M.B., was abused as defined in N.C.G.S. § 7B-101(1). It alleged in particular that the children were abused as defined in the subdivision referencing sexual abuse. Thus, unlike *In re D.C.*, in which the petition failed to allege the condition ultimately found, the original petition in this case stated that a claim of abuse was at issue with respect to M.B. Moreover, respondents here were aware well before the adjudicatory hearing that the additional factual allegations and a claim of abuse as defined in N.C.G.S. § 7B-101(1)(d) were at issue, unlike the respondent in *In re D.C.*, in which the petitioner proceeded on a different theory at adjudication than had been presented in the petition.

For the reasons stated above, we reverse the opinion of the Court of Appeals as to the issue before us on discretionary review. The remaining issues addressed by the Court of Appeals are not properly before this Court, and its decision as to those matters remains undisturbed. This case is remanded to the Court of Appeals for consideration of any assignments of error not addressed by that court in its previous opinion.

REVERSED IN PART AND REMANDED.

STATE OF NORTH CAROLINA v. CURLEY JACOBS AND BRUCE LEE MCMILLIAN

No. 617PA05-2

(Filed 28 August 2009)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 193 N.C. App. ——, 668 S.E.2d 346 (2008), remanding defendant's case for resentencing following defendant's appeal from judgments entered on 29 September 2003 by Judge Gary L. Locklear in Superior Court, Robeson County. The Court of Appeals reconsidered this case following this Court's opinion reported at 361 N.C. 565, 648 S.E.2d 841 (2007), vacating in part and reversing in part and remanding a decision by the Court of Appeals reported at 174 N.C. App. 1, 620 S.E.2d 204 (2005). Heard in the Supreme Court 5 May 2009.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

C. Scott Holmes for defendant-appellee Curley Jacobs.

PER CURIAM.

Both parties have conceded that *State v. Tucker*, 357 N.C. 633, 588 S.E.2d 853 (2003), is controlling and was incorrectly applied by the Court of Appeals in this case. Accordingly, the decision of the Court of Appeals is vacated and the case is remanded to that court for reconsideration of the issue of harmless error consistent with *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, 550 U.S. 948 (2007).

VACATED AND REMANDED.

Justice TIMMONS-GOODSON took no part in the consideration or decision of this case.

SANDY MUSH PROPERTIES, INC. AND FLORIDA ROCK INDUSTRIES, INC. v. RUTHERFORD COUNTY, BY AND THROUGH THE RUTHERFORD COUNTY BOARD OF COMMISSIONERS

No. 67PA07-2

(Filed 28 August 2009)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 187 N.C. App. 809, 654 S.E.2d 253 (2007), affirming an order granting summary judgment entered 7 December 2005 by Judge Forrest Donald Bridges in Superior Court, Rutherford County, following this Court's remand of this case to the Court of Appeals on 23 August 2007 for reconsideration of its decision reported at 181 N.C. App. 224, 638 S.E.2d 557 (2007), affirming the same order. Heard in the Supreme Court 14 October 2008.

K & L Gates LLP, by Roy H. Michaux, Jr., for plaintiff-appellant Sandy Mush Properties, Inc.

Sigmon, Clark, Mackie, Hutton, Hanvey, & Ferrell, P.A., by Warren A. Hutton, Forrest A. Ferrell, and Stephen L. Palmer, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. SIZEMORE

[363 N.C. 578 (2009)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JAMES DAVID SIZEMORE	)	

No. 402PA08

The Court allows defendant's petition for discretionary review for the limited purpose of remanding to the Court of Appeals, for reconsideration in light of the United States Supreme Court's decision if *Melendez-Diaz v. Massachusetts*, 557 U.S. ——, 129 S. Ct. 2527, —— L. Ed. —— (2009), defendant's issue Number 3:

> (3) Whether the trial court violated the defendant's Confrontation Clause rights by admitting testimonial evidence where the defendant had not had a prior opportunity to cross examine the witness.

Defendant's petition for discretionary review as to the remaining issues is denied.

By order of the Court in Conference, this 27th day of August 2009.

Hudson, J.
For the Court

STANFORD v. PARIS

[363 N.C. 579 (2009)]

CHARLES A. STANFORD, ET AL	)	
	)	
v.	)	ORDER
	)	
OLIVER JOHNSON PARIS, ET AL	)	

No. 208PA09

The plaintiffs' Petition for Writ of Certiorari is allowed on the following issue only: "Did plaintiffs waive their right to appeal the trial court's 16 February 2007 order allowing respondents' motion to dismiss by waiting to appeal until after entry of the trial court's final judgment?"

By order of the Court in Conference, this 27th day of August, 2009.

Hudson, J.
For the Court

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

Azalea Garden Bd. & Care, Inc. v. Vanhoy Case below: 196 N.C. App. —— (21 April 2009)	No. 209P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-640)	Denied 08/27/09
Barringer v. Wake Forest Univ. Baptist Med. Ctr. Case below: 197 N.C. App. —— (2 June 2009)	No. 251P09	Def's Motion for Temporary Stay (COA08-269)	Allowed 06/23/09
Baxter v. Danny Nicholson, Inc. Case below: 191 N.C. App. 168	No. 351P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-865) 2. Plt's Petition for Writ of Supersedeas	1. Allowed 08/27/09 2. Allowed 08/27/09
Brown, v. Kindred Nursing Ctrs. E., L.L.C. Case below: 196 N.C. App. —— (5 May 2009)	No. 227A09	1. Def s' (Dix, Ferguson & Eastern Carolina Family Practice) Notice of Appeal (Dissent) (COA08-584) 2. Defs' (Dix, Ferguson & Eastern Carolina Family Practice) PDR as to Additional Issues	1. —— 2. Allowed 08/27/09
Bumpers v. Community Bank of N. VA Case below: 196 N.C. App. —— (5 May 2009)	No. 269PA09	1. Plt's (Bumpers) PDR Under N.C.G.S. § 7A-31 (COA08-1135) 2. Plt's (Bumpers) PWC to Review Decision of COA	1. Allowed 08/27/09 2. Dismissed as Moot 08/27/09
Bynum v. Nash-Rocky Mount Bd. of Educ. Case below: 195 N.C. App. 777	No. 172P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-823)	Denied 08/27/09
Charlotte Motor Speedway, Inc. v. Tindall Corp. Case below: 195 N.C. App. 296	No. 104P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-600)	Denied 08/27/09
Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co. Case below: 183 N.C. App. 389	No. 303P07-2	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1073-2)	Denied 08/27/09

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

Ford v. Paddock Case below: 196 N.C. App. —— (7 April 2009)	No. 198P09	Defs' (Wake Co. DHS, Spaulding and Ludwig) PDR Under N.C.G.S. § 7A-31 (COA08-1012)	Denied 08/27/09
Hospira, Inc. v. AlphaGary, Inc. Case below: 194 N.C. App. 695	No. 058P09	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA08-487) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 08/27/09 2. Denied 08/27/09
Hunt v. N.C. State Univ. Case below: 194 N.C. App. 662	No. 138P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1374)	Denied 08/27/09
In re A.A.P., Al. M.P., & An. M.P. Case below: 193 N.C. App. 752	No. 173P09	Guardian ad Litem's PWC to Review Decision of COA (COA08-674)	Denied 08/27/09
In re D.L.H. Case below: 198 N.C. App. —— (21 July 2009)	No. 350P09	Appellant's (State of NC) Motion for Temporary Stay (COA08-1019)	Allowed 08/25/09
In re D.S. Case below: 197 N.C. App. —— (16 June 2009)	No. 273PA09	1. State's Motion for Temporary Stay (COA08-1078) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 07/08/09 2. Allowed 08/27/09 3. Allowed 08/27/09
In re I.T.P-L Case below: 194 N.C. App. 453	No. 034P09	1. Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA08-622) 2. Respondent's (Father) PDR Under N.C.G.S. § 7A-31	1. Denied 08/27/09 2. Denied 08/27/09
In re N.E.L. Case below: 197 N.C. App. —— (2 June 2009)	No. 270P09	Juvenile's PDR Under N.C.G.S. § 7A-31 (COA08-1573)	Allowed for the Limited Purpose of Remanding to COA for Re-consideration in light of *In re K.J.L.*, 363 N.C. 303 (2009)

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In re R.A.E. Case below: 195 N.C. App. 130	No. 077PA09	Petitioner's (Wilkes Co. DSS) PDR Under N.C.G.S. § 7A-31 (COA08-1024)	Allowed for limited purpose of remanding the COA for reconsideration in light of *In re K.J.L.*, 363 N.C. 303 (2009)
Jailall v. N.C. Dep't of Pub. Instruction Case below: 196 N.C. App. ––– (7 April 2009)	No. 197P09	1. Petitioner's (Jailall) PDR Under N.C.G.S. § 7A-31 (COA08-352) 2. Petitioner's PWC to Review the Decision of the COA	1. Denied 08/27/09 2. Denied 08/27/09
Morris v. Dixon Case below: 194 N.C. App. 200	No. 567P08	Defs' PDR Under N.C.G.S. § 7A-31 (COA08-187)	Denied 08/27/09
Nazzaro v. Sagun Case below: 197 N.C. App. ––– (19 May 2009)	No. 264P09	Defs' PDR Under N.C.G.S. § 7A-31 (COA08-691)	Denied 08/27/09
North Iredell Neighbors for Rural Life v. Iredell Cty. Case below: 196 N.C. App. ––– (7 April 2009)	No. 184P09	Defs' (McLain) PDR Under N.C.G.S. § 7A-31 (COA08-1068)	Denied 08/27/09
Norwood v. Village of Sugar Mountain Case below: 193 N.C. App. 293	No. 540P08	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1402) 2. Respondent's Motion to Dismiss PDR	1. Denied 08/27/09 2. Dismissed as Moot 08/27/09
Paul v. Mechworks Mech. Contr'rs, Inc. Case below: 197 N.C. App. ––– (2 June 2009)	No. 271P09	Def's Motion for Temporary Stay (COA08-1245)	Allowed 07/08/09
Pigg v. Massagee Case below: 196 N.C. App. ––– (7 April 2009)	No. 191P09	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA08-1270) 2. Defs' Motion for Sanctions	1. Denied 08/27/09 2. Denied 08/27/09

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Powers v. Tatum Case below: 196 N.C. App. —— (5 May 2009)	No. 268P09	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA08-137) 2. Plt's Motion for Temporary Stay 3. Plt's Petition for Writ of Supersedeas	1. Denied 08/27/09 2. Allowed 08/06/09 Stay Dissolved 08/27/09 3. Denied 08/27/09 **Brady, J., Recused**
Roberts v. Roberts Case below: 197 N.C. App. —— (19 May 2009)	No. 256P09	Def's Motion for Temporary Stay (COA08-404)	Allowed 07/09/09
Shelton v. Steelcase, Inc. Case below: 197 N.C. App. —— (16 June 2009)	No. 292P09	1. Def's (Steelcase, Inc.) PDR Under N.C.G.S. § 7A-31 (COA08-560) 2. Def's (M.B. Haynes Corporation) PDR Under N.C.G.S. § 7A-31	1. Denied 08/27/09 2. Denied 08/27/09
Stanfield v. Metal Beverage Container/Ball Corp. Case below: 194 N.C. App. 820	No. 141P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-513)	Denied 08/27/09
Stanford v. Paris	No. 208PA09	Plt's PWC to Review the Order of the COA (COA09-19)	See Special Order Page 579
State ex rel. Utilities Comm'n v. Town of Kill Devil Hills Case below: 194 N.C. App. 561	No. 068A09	1. Intervenor's Motion for Temporary Stay (COA08-42) 2. Intervenor's Petition for Writ of Supersedeas	1. Allowed 08/07/09 2. Allowed 08/07/09
State v. Austin Case below: 197 N.C. App. —— (2 June 2009)	No. 266P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1382)	Denied 08/27/09
State v. Barnes Case below: 196 N.C. App. —— (21 April 2009)	No. 204P09	Def's PWC to Review Order of Moore County Superior Court (COA08-1096)	Denied 08/27/09

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State v. Bevill Case below: 196 N.C. App. —— (7 April 2009)	No. 179P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-368)	Denied 08/27/09
State v. Boggess Case below: 195 N.C. App. 770	No. 170P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-746)	Denied 08/27/09
State v. Bonds Case below: 197 N.C. App. —— (2 June 2009)	No. 277P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1397)	Denied 08/27/09
State v. Brown Case below: 197 N.C. App. —— (2 June 2009)	No. 282P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1142)	Denied 08/27/09
State v. Burroughs Case below: 196 N.C. App. —— (7 April 2009)	No. 174P09	Def-Appellant's Motion for Temporary Stay (COA08-891)	Allowed 07/20/09
State v. Casey Case below: 195 N.C. App. 460	No. 133P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-183)	Denied 08/27/09
State v. Collins Case below: 198 N.C. App. —— (4 August 2009)	No. 344P09	Def's Motion for Temporary Stay (COA09-87)	Allowed 08/24/09
State v. Corbett Case below: 196 N.C. App. —— (21 April 2009)	No. 214P09	1. Def's NOA Based Upon a Constitutional Question (COA08-1300) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/27/09 3. Denied 08/27/09
State v. Davis Case below: 197 N.C. App. —— (16 June 2009)	No. 289P09	Def's NOA Based Upon a Constitutional Question (COA08-1252)	Dismissed *Ex Mero Motu* 08/27/09
State v. Davis Case below: 194 N.C. App. 373	No. 031P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-414)	Denied 08/27/09

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State v. Dawkins Case below: 196 N.C. App. —— (5 May 2009)	No. 210P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1257)	Denied 08/27/09
State v. Defoe Case below: Richmond County Superior Court	No. 161PA09	Def's PWC to Review Order of Richmond County Superior Court	Allowed 08/27/09
State v. Disroe Case below: 197 N.C. App. —— (2 June 2009)	No. 285P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-1121) 2. State's Motion to Dismiss Def's PDR	1. Denied 2. Dismissed as Moot
State v. Dunn Case below: —— N.C. App. —— (7 July 2009)	No. 333P09	Def's PWC to Review Decision of COA (COA08-1331)	Denied 08/27/09
State v. Ferguson Case below: —— N.C. App. —— (7 July 2009)	No. 057P09-2	1. Def's NOA Based Upon a Constitutional Question (COA08-1568) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/27/09 3. Denied 08/27/09
State v. Harris Case below: 198 N.C. App. —— (21 July 2009)	No. 330P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1086)	Denied 08/27/09
State v. Jackson Case below: 195 N.C. App. 131	No. 089A09	1. Def's Notice of Appeal Based Upon a Constitutional Question N.C.G.S. § 7A-30 (COA07-1351) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 08/27/09
State v. Kingston Case below: 196 N.C. App. —— (21 April 2009)	No. 216P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1201)	Denied 08/27/09

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State v. Kotecki Case below: 196 N.C. App. —— (5 May 2009)	No. 237P09	1. Def's Motion for Temporary Stay (COA08-1070) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 06/10/09 363 N.C. 378 Stay Dissolved 08/27/09 2. Denied 08/27/09 3. Denied 08/27/09
State v. Lilly Case below: 195 N.C. App. 697	No. 154P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-421)	Denied 08/27/09
State v. Lloyd Case below: 187 N.C. App. 174	No. 143P09	Def's PWC to Review Decision of COA (COA06-1514)	Denied 08/27/09
State v. McKoy Case below: 196 N.C. App. —— (5 May 2009)	No. 241P09	1. Def's NOA Based Upon a Constitutional Question (COA08-923) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/27/09 3. Denied 08/27/09
State v. Miller Case below: 197 N.C. App. —— (19 May 2009)	No. 261P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-650)	Denied 08/27/09
State v. Mitchell Case below: 194 N.C. App. 705	No. 158P09	1. Def's Motion for NOA Under N.C.G.S. 7A-30(1) (COA08-666) 2. Def's PWC to Review Decision of COA	1. Dismissed *Ex Mero Motu* 08/27/09 2. Denied 08/27/09
State v. Morgan Case below: Buncombe County Superior Court	No. 182A00-2	1. Def's PWC to Review Order of Buncombe County Superior Court 2. Def's Motion to Strike 3. Def's Alternative Motion to Remand for Additional Proceedings	1. Denied 08/27/09 2. Dismissed as Moot 08/27/09 3. Dismissed as Moot 08/27/09
State v. Morrison Case below: 193 N.C. App. 611	No. 542P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-299)	Denied 08/27/09

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State v. Murphy Case below: 193 N.C. App. 236	No. 506P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-382)	Denied 08/27/09
State v. Norman Case below: 196 N.C. App. —— (5 May 2009)	No. 232P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1165)	Denied 08/27/09
State v. Patterson Case below: 194 N.C. App. 608	No. 063P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-518)	Denied 08/27/09
State v. Peele Case below: 196 N.C. App. —— (5 May 2009)	No. 206P09	1. State's Motion for Temporary Stay (COA08-713) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 05/20/09 363 N.C. 379 Stay Dissolved 08/27/09 2. Denied 08/27/09 3.Denied 08/27/09
State v. Platt Case below: 196 N.C. App. —— (7 April 2009)	No. 205P09	1. Def's NOA Based Upon a Constitutional Question (COA08-926) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 08/27/09 2. Denied 08/27/09
State v. Polk Case below: 197 N.C. App. —— (19 May 2009)	No. 260P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-999)	Denied 08/27/09
State v. Ray Case below: —— N.C. App. —— (7 July 2009)	No. 307P09	State's Motion for Temporary Stay (COA08-1329)	Allowed 07/27/09
State v. Reaves Case below: 196 N.C. App. —— (5 May 2009)	No. 240P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1128)	Denied 08/27/09
State v. Rush Case below: 196 N.C. App. —— (7 April 2009)	No. 195P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-871)	Denied 08/27/09

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State v. Sizemore Case below: 191 N.C. App. 612	No. 402P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1489)	See Special Order Page 578
State v. Smith Case below: 193 N.C. App. 739	No. 534P08	1. State's Motion for Temporary Stay (COA08-533) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 12/05/08 362 N.C. 687 Stay Dissolved 08/27/09 2. Denied 08/27/09 3. Denied 08/27/09
State v. Smith Case below: 196 N.C. App. —— (5 May 2009)	No. 247P09	Def's Motion for "Petition for Discretionary Review N.C.G.S. 7A-31" (COA08-1222)	Denied 08/27/09
State v. Spruiell Case below: 197 N.C. App. —— (19 May 2009)	No. 253P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1244)	Denied 08/27/09
State v. Tomlinson Case below: —— N.C. App. —— (7 July 2009)	No. 310P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-1290) 2. Def's Motion to Appoint Counsel	1. Denied 08/27/09 2. Dismissed as Moot 08/27/09
State v. Trombley Case below: 198 N.C. App. —— (4 August 2009)	No. 345P09	State's Motion for Temporary Stay (COA08-947)	Allowed 08/24/09
State v. Walker Case below: 197 N.C. App. —— (16 June 2009)	No. 287P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1224)	Denied 08/27/09
State v. Ward Case below: Halifax County Superior Court	No. 068A99-3	Def's PWC to Review Order of Halifax Superior Court	Allowed 08/27/09

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State v. Williams Case below: 191 N.C. App. 96	No. 346P08	1. Def's NOA Based Upon a Constitutional Question (COA07-1304) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/27/09 3. Denied 08/27/09
State v. Wilson Case below: 197 N.C. App. —— (19 May 2009)	No. 254P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-782)	Denied 08/27/09
State v. Worley Case below: 198 N.C. App. —— (21 July 2009)	No. 267P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-1532) 2. Def's Motion to Withdraw PDR	1. —— 2. Allowed 08/27/09
State v. Worrell Case below: 190 N.C. App. 387	No. 247P08-2	Def-Appellant's Motion for "Petition for Discretionary Review" (COA07-1120)	Dismissed 08/27/09
White v. Thompson Case below: 196 N.C. App. —— (5 May 2009)	No. 226A09	1. Plt's NOA (Dissent) (COA08-953) 2. Defs' ((Thompson) PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied 08/27/09
Wilfong v. N.C. Dep't of Transp. Case below: 194 N.C. App. 816	No. 064P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-400)	Denied 08/27/09
Williams v. Kane Case below: 197 N.C. App. —— (19 May 2009)	No. 263P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-1369)	Denied 08/27/09

SOUTHEASTERN JURISDICTIONAL ADMINISTRATIVE COUNCIL, INCORPORATED v. GORDON W. EMERSON, DIANE R. EMERSON, PAUL D. HUFFMAN, DONALD N. PATTEN, AND VIRGINIA B. PATTEN

No. 62A08

(Filed 9 October 2009)

1. Deeds— restrictive covenants—amendments—service charges—reasonableness

Restrictive covenant amendments that instituted service charges were reasonable where the community (the Lake Junaluska Assembly Development) has existed for nearly a century, the community has consistently imposed a wide variety of detailed restrictions to purposefully develop its unique, religious character, and the Council acted in a manner the defendants could reasonably have anticipated. Also, all of the defendants purchased property with awareness of the extensive amenities and thus the many sources of potential common expenses.

2. Deeds— restrictive covenants—amendments—service charges—enforceability

Amendments to restrictive covenants to impose service charges were enforceable as written where residents of the community received a list of policies and procedures that explained how property values were determined for the purpose of assessing service charges, and regulations contained an itemized description of the purposes for the assessments, which were limited to common expenses. Limiting provisions for certain properties in the community established that the declaration did not bind property owners outside that section of the development, but did not limit the portion of the development (the Assembly) that could reap the benefits of the covenants.

Justice EDMUNDS concurring.

Justice HUDSON dissenting.

Justice TIMMONS-GOODSON 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, 188 N.C. App. 93, 655 S.E.2d 719 (2008), affirming in part and reversing in part a judgment entered

on 6 June 2006 by Judge W. Erwin Spainhour in Superior Court, Haywood County. Heard in the Supreme Court on 9 September 2008.

Adams Hendon Carson Crow & Saenger, P.A., by George Ward Hendon and Matthew S. Roberson, for plaintiff-appellant.

Brown, Ward and Haynes, PA, by Frank G. Queen, for defendant-appellees Emerson and Huffman; and Brown & Patten, PA, by Donald N. Patten, pro se, and for Virginia B. Patten, defendant-appellees.

NEWBY, Justice.

This case presents the issue of whether community regulations that levy annual service charges on properties in the Lake Junaluska Assembly Development ("the Assembly") impose valid affirmative obligations upon the property owners to pay the fees. In light of the unique character of the Assembly and its long-standing history of covenant-imposed regulations, we uphold the covenants as enforceable and reverse the Court of Appeals.

Plaintiff Southeastern Jurisdictional Administrative Council, Inc. ("the Council") is a nonprofit, non-stock corporation that manages, owns, develops, and sells land in Haywood County known as the Lake Junaluska Assembly Development. In addition, the Council maintains and operates the Assembly by providing such services as street lighting, fire and police protection, and maintenance of roads and common areas. The Council is the successor in interest to the Lake Junaluska Assembly; the Lake Junaluska Methodist Assembly; and ultimately the Southern Assembly of the Methodist Church, which was the Assembly's earliest incarnation. The Council operates the Assembly under the auspices of the Southeastern Jurisdictional Conference of the United Methodist Church in the United States of America.

A brief recitation of the Assembly's history is helpful to an understanding of the issues in this case.[1] The idea for the Assembly first took shape in 1908 during the Laymen's Missionary Conference in Chattanooga, Tennessee, when a resolution was passed calling for the establishment of a Methodist assembly in this region. The

1. In order to give full consideration to "the nature and character of the community" at issue here, *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 548, 633 S.E.2d 78, 81 (2006), we elect, *ex mero motu*, to take judicial notice of certain facts pertaining to the Assembly that do not appear in the record on appeal. *See* N.C.G.S. § 8C-1, Rule 201 (2007).

Southern Assembly was incorporated on 30 June 1910, and soon thereafter, the commissioners chose a location for the assembly and purchased 1200 acres of land for meeting grounds and private residences. By spring of 1913 construction had commenced, and the Southern Assembly began selling lots for private residential use. The Assembly officially welcomed its first visitors on 25 June 1913, when the Second General Missionary Conference of the Methodist Episcopal Church, South was held on the property. In 1929 the Southern Assembly adopted the name of the adjacent lake and officially became the Lake Junaluska Methodist Assembly. In 1948 ownership was transferred to the Southeastern Jurisdiction of the Church.

In addition to being a private residential community and a center for religious conferences and retreats, the Assembly is also the administrative headquarters of the Southeastern Jurisdictional Administrative Council, formed in 1988 when the Lake Junaluska Assembly merged with the Jurisdictional Council of the Southeastern Jurisdictional Conference of the Methodist Church. Today, the Assembly comprises the two hundred acre lake and its adjacent amenities, including meeting facilities and event auditoriums, a campground for recreational vehicles, and rental accommodations such as hotels, apartments, and cottages; as well as more than seven hundred private homes. In its declaration of the protective covenants applicable to certain real property in the Assembly, the Council states that it "is dedicated to the training, edification and inspiration of people who are interested in and concerned with Christian principles and concepts." In furtherance of those purposes, the Assembly offers a variety of family oriented activities for its visitors and year-round residents, such as boat rentals, an aquatic center and outdoor pool, tennis courts, an eighteen hole golf course and a miniature golf course, heritage museums, and historic structures and gardens. Through its many annual events, the Assembly has established itself as a center for religious worship and education, and each year more than 150,000 people visit Lake Junaluska for ministry retreats and other events.

Since the first owners purchased lots in the Assembly nearly one hundred years ago, the development's residential properties have always been subject to restrictive covenants aimed at preserving the unique religious character and heritage of the Assembly. Dating back to 1913, the covenants describe the Assembly's aims as "health, rest, recreation, Christian work and fellowship, missionary and school work, and other operations auxiliary and incidental thereto."

Numerous covenants have been incorporated in all deeds to residential properties in the Assembly and are now included in the recorded declaration for the Assembly's more recently developed Hickory Hill subdivision.[2] A provision included in the original covenants gives the Council authority to fine or penalize property owners for violation of the conditions and restrictions set forth in those covenants. The covenants pertinent to this case state:

> Second: That said lands shall be held, owned, and occupied subject to the provisions of the charter of the Lake Junaluska Assembly, Inc., and all amendments thereto, heretofore, or hereafter enacted, *and to the by-laws and regulations, ordinances and community rules which have been, or hereafter may be, from time to time, adopted by said Lake Junaluska Assembly, Inc., and its successors.*
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> . . . .
>
> Fifth: That it is expressly stipulated and covenanted between [Grantor] and [Grantee and its] heirs and assigns, that *the by-laws, regulations, community rules and ordinances heretofore or hereafter adopted by the said Lake Junaluska Assembly, Inc., shall be binding upon all owners and occupants of said lands* as fully and to the same extent as if the same were fully set forth in this Deed, and that all owners and occupants of said lands and premises shall be bound thereby. (Emphasis added.)

In November 1996 the Council adopted the current Rules and Regulations of the Lake Junaluska Assembly ("the Regulations") pursuant to the authority granted by the foregoing deed covenants. The Regulations require, *inter alia*, that property owners comply with rules that govern landscaping and property appearance, types of structures, livestock and animals, mobile homes and recreational vehicles, gasoline powered boats, alcoholic beverages, inappropriate clothing, and the manner and locations in which roller blades, roller skates, skateboards, and bicycles may be used. The Regulations also implement several fees, including an annual service charge, a grounds fee, and a road impact fee. The subject of this litigation is the annual service charge provision, which states: "Each owner shall pay annually a SERVICE CHARGE in an amount fixed by the SEJ Administrative Council for police protection, street maintenance,

2. The parties have variously referred to the subdivision as "Hickory Hill" and "Hickory Hills." Consistent with the subdivision plat and the recorded declaration, we refer to the subdivision as "Hickory Hill."

street lighting, drainage maintenance, administrative costs and upkeep of the common areas." Owners of property in the Hickory Hill subdivision are obligated to pay the annual service charge through similar protective covenants that are incorporated in the Hickory Hill deeds.

Defendants are landowners in the Assembly who refuse to pay the annual service charges assessed to their properties. Defendant Huffman purchased property in 1970 and 1974, and defendants Emerson purchased property in 1992. The deeds to the Huffman and Emerson properties are virtually identical and contain the original covenants that require compliance with the Regulations. Defendants Patten purchased a lot in Hickory Hill in 1996 and are required to pay the service charges pursuant to the protective covenants contained in the subdivision's recorded declaration.

The Council filed suit against defendant property owners to recover the unpaid assessments with interest. In response, defendants variously contended that their deeds did not provide for the assessment of any fee or charge, did not contain a description of the permissible uses of the assessments, and did not describe the property and facilities to be maintained with the money collected. Further, defendants argued plaintiff is not a homeowners' association and thus that defendants' interests were not adequately represented through elections of directors or officers. Finally, defendants argued the expenditures by plaintiff were primarily for upkeep of its own property and development activities. Plaintiff moved for summary judgment as to all defendants, and in response, defendants Patten made a cross-motion for summary judgment. The trial court granted plaintiff's motion for summary judgment, and in so ruling, considered the following "non-controverted" facts:

> 2. All lots sold by Plaintiff within the Development, other than those within the Hickory Hills subdivision, were conveyed by deeds containing restrictions providing that the properties shall be held, owned and occupied subject to by-laws, regulations, ordinances and community rules adopted from time to time by Plaintiff and its successors, the same to run with the land. Among the rules and regulations adopted by Plaintiff on November 22, 1996 is a requirement that each owner pay an annual service charge for police protection, fire protection, street maintenance, street lighting, drainage maintenance, administrative costs and upkeep of the common areas. Deeds to lots sold within the Hickory Hill area incorporate protective covenants

directly obligating owners to pay an annual service charge for garbage and trash collection, police protection, fire protection, street maintenance, street lighting and upkeep of common areas.

3. Plaintiff has adopted Service Charges, also referred to as Annual General Assessments, for owners of property within the Development, including Hickory Hills, on an annual basis as a millege [sic] rate applied to the real property values of the respective properties as assessed by the Tax Office of Haywood County.

4. Plaintiff, either with its own forces or by means of contractual arrangements with other providers, has provided services and incurred expenses for police protection, fire protection, street maintenance, street lighting, drainage maintenance, administrative costs and upkeep of the common areas in the Lake Junaluska Assembly Development, including Hickory Hills, and Defendant owners of real property have received the benefits of such services and expenses.

Based on these facts, the trial court concluded "that the restrictions, rules and regulations applicable to Defendants' properties provide adequate standards by which to measure the Defendants' liability and that the property to be served and the services to be provided are described with particularity and are sufficiently definite." The trial court then ordered defendants to pay the service charges with accrued interest and dismissed defendants' counterclaims.

A divided panel of the Court of Appeals reversed, holding the Council lacked authority to levy assessments against defendants Huffman and Emerson and that the service charges were unenforceable against defendants Patten. *Se. Jurisdictional Admin. Council, Inc. v. Emerson*, 188 N.C. App. 93, 97-98, 655 S.E.2d 719, 721-22 (2008). The dissent would have affirmed the trial court, noting that "[t]he 1996 Regulations correspond in a legal sense most closely to an amendment to the covenants in the deeds" and that such amendments are evaluated for reasonableness. *Id.* at 100, 655 S.E.2d at 723 (Hunter, Robert C., J., dissenting) (citing *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 548, 633 S.E.2d 78, 81 (2006)).

[1] In *Long v. Branham*, this Court stated that, although real property covenants are typically construed in favor of free use of land, such construction "must be reasonable" and this canon "should not be applied in such a way as to defeat the plain and obvious purposes of a restriction." 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967)

(citation and internal quotation marks omitted). "In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Id.* at 268, 156 S.E.2d at 238 (citing *Callaham v. Arenson*, 239 N.C. 619, 625, 80 S.E.2d 619, 623-24 (1954)).

Dating back to the Assembly's inception, the relevant documents demonstrate that the covenanting parties' original intent was for the governing body to retain significant control over the planning, development, and operation of the Assembly. The Assembly's charter states that the community was established for the benefit of the United Methodist Church as "a resort for religious, charitable, educational and benevolent purposes." Under that charter, the Assembly is empowered to make rules and regulations through the duly elected Council, which "is dedicated to the training, edification and inspiration of people who are interested in and concerned with Christian principles and concepts." The original deed covenants prohibit property owners from knowingly renting or leasing to persons with questionable moral character, require that notice and an option to purchase be given to the Council before any transfer of the land, reserve "the fee in all the avenues, streets and alleys," and provide that "the by-laws and regulations, ordinances and community rules which have been, or hereafter may be, from time to time, adopted" by the governing body are "binding upon all owners and occupants" in the Assembly. Our study, as directed by *Long*, of the deed covenants and other documents creating similar restrictions reveals that the parties' intent was for the Council to retain significant control over minute aspects of the Assembly, including the character of people who may live there, the usage and development of common areas, and the future creation of further governing standards to preserve and maintain the Christian character of the Assembly. With these intentions in mind, we proceed to consider the covenant amendments that are the basis of the contested service charges for defendant Huffman and defendants Emerson.

This Court has held that the enforceability of amendments to real covenants depends on whether the amendments are reasonable. *Armstrong*, 360 N.C. at 548, 633 S.E.2d at 81. In *Armstrong v. Ledges Homeowners Ass'n*, as in the instant case, an incorporated community group exercised its authority to augment original real covenants in order to subject property owners to fees for maintenance of the

community. As here, property owners in *Armstrong* disputed the enforceability of the amended covenants requiring them to pay the maintenance fees. In our opinion, this Court recognized that "[d]eclarations of covenants that are intended to govern communities over long periods of time are necessarily unable to resolve every question or community concern that may arise during the term of years." *Id.* at 557, 633 S.E.2d at 86 (citing 2 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 18-10, at 858 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999)). On the other hand, we cautioned that "[a] covenant represents a meeting of the minds and results in a relationship that is not subject to overreaching by one party or sweeping subsequent change." *Id.* at 554, 633 S.E.2d at 84-85. We thus identified the tension "between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain." *Id.* at 558, 633 S.E.2d at 87 (citations omitted). We resolved this tension by holding that, to be enforceable, "amendments to a declaration of restrictive covenants must be reasonable. Reasonableness may be ascertained from the language of the declaration, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community." *Id.* at 548, 633 S.E.2d at 81. In short, this Court established in *Armstrong* that such amendments are enforceable if they are "reasonable in light of the contracting parties' original intent." *Id.* at 559, 633 S.E.2d at 87 (emphasis omitted).

In considering "the legitimate expectations of [the] lot owners" in *Armstrong*, *id.* at 560, 633 S.E.2d at 88, this Court emphasized that, at the time the plaintiff property owners purchased their lots, the community contained "no common areas or amenities," *id.* at 548-49, 633 S.E.2d at 81, and that "[n]either the Declaration nor the plat shows any source of common expense," *id.* at 560, 633 S.E.2d at 88. The plaintiffs in *Armstrong* professed a specific desire to live in a community lacking amenities for which they did not wish to pay, and they believed at the time of purchase that The Ledges was such a community. *Id.* at 552, 633 S.E.2d at 83. This Court agreed that the plaintiffs "purchased their lots without notice that they would be subjected to additional restrictions on use of the lots and responsible for additional affirmative monetary obligations imposed by a homeowners' association" and therefore, concluded that it would be unreasonable to enforce the amended covenants against them and require them to pay the disputed fees. *Id.* at 561, 633 S.E.2d at 88-89.

The Assembly stands in stark contrast to the community at issue in *Armstrong*. Whereas The Ledges community had only existed for about fifteen years when that controversy arose and was a fairly typical subdivision, the Assembly has existed for nearly a century and has spent that entire time purposefully developing its unique, religious community character. To that end, the Council and its predecessors have subjected the Assembly's residential lots to a wide variety of detailed restrictions, and they have done so consistently since the first lots were sold. Since the Assembly's establishment, all deeds conveying land within the community have included covenants requiring compliance with the bylaws, rules, and regulations periodically adopted by the Council. Indeed, the covenants incorporated in all defendants' deeds are nearly identical to one another. In purchasing property in the Assembly, defendants presumably desired to take advantage of the Assembly's exceptional community atmosphere, and in order to preserve that atmosphere, they were willing to relinquish significant ownership rights and give the Council substantial control over the community. While the current Regulations were not yet in existence at the time of the original conveyances here, the original intent of the parties was to bind all purchasers of property within the Assembly to any rules the Council deemed necessary to preserve the unique religious character and history of the community. In enacting the Regulations, therefore, the Council was acting in a manner that defendant Huffman and defendants Emerson could reasonably have anticipated.

Also, regardless of whether their deeds explicitly required them to pay the annual service charges, all defendants in the case *sub judice* purchased property in the Assembly with knowledge of the development's extensive amenities and were thus aware of many potential sources of common expense. In light of defendants' desire to avail themselves of the Assembly's various facilities and conveniences, and their willingness to subject their property ownership to numerous restrictions aimed at preserving the amenities for residents' continued enjoyment, their "legitimate expectations," *id.* at 560, 633 S.E.2d at 88, should have included an understanding that the Council might amend those covenants to generate the funds necessary for maintenance of the Assembly.

In addition to defendants' expectations, we must also consider the legitimate needs of the Council. *Id.* In that regard, we note that the purposes for the service charges, which include police protection, street maintenance, and upkeep of common areas, are eminently

reasonable community expenses. We are persuaded that it was permissible for the Council to respond to conditions by requiring Assembly residents to contribute financially to the maintenance of their community.

[2] Having concluded that it was reasonable to amend the covenants to institute the disputed service charges, it remains for us to determine whether those amended covenants are enforceable as written. To be enforceable, the covenants imposing the service charges must be subject to standards by which courts can measure the property owners' liability to pay the charges, must identify with particularity the properties to be maintained, and must provide guidance to courts reviewing the Council's decision as to which properties and facilities will be kept up with the proceeds. *See*, *e.g.*, *Beech Mountain Prop. Owner's Ass'n v. Seifart*, 48 N.C. App. 286, 295-96, 269 S.E.2d 178, 183 (1980). Our review of the record reveals that a list of Policies and Procedures distributed to Assembly residents explains how the Council determines property values for purposes of assessing service charges and describes the procedure for establishing the applicable millage rate. Meanwhile, the Regulations (or, in the case of the Hickory Hill subdivision, the deeds) contain an itemized description of the purposes for the assessments, which are limited to common expenses such as police protection, street maintenance, and upkeep of common areas. We hold that the covenants imposing the disputed service charges, in tandem with supporting documentation, provide sufficient guidance to enable courts to enforce the covenants. We therefore hold those covenants enforceable against defendants.

Defendants Patten argue further that the service charges collected pursuant to the declaration of covenants that is incorporated in their deed may only be used for the benefit of the property that is explicitly subject to the terms of that declaration. Clause I of the declaration describes the subject property as "Hickory Hill, section one" ("Section One"). Section One is a portion of the Hickory Hill subdivision containing only four lots. The declaration goes on to state: "No property other than that described above shall be deemed subject to this Declaration, unless specifically made subject thereto." Defendants Patten rely on this provision ("the limiting provision") in contending that the Council has violated the declaration by attempting to use service charges paid by defendants Patten to maintain portions of the Assembly outside Section One.

The declaration's service charge provision reads as follows: "Each owner shall pay annually a SERVICE CHARGE in an amount

fixed by the SEJ Administrative Council for garbage and trash collection, police protection, fire protection, street maintenance, street lighting and upkeep of common areas." This provision contains no language to indicate that the service charge proceeds may only be utilized to benefit the very small section of the Assembly named in the declaration. Moreover, the subdivision plat and the declaration make it abundantly clear that Hickory Hill is part of the greater Assembly. The plat reflects that Section One is part of the "Property of Lake Junaluska Assembly" and shows that all four Section One lots share at least one boundary with "Remaining Property of Lake Junaluska Assembly." The declaration likewise refers to Hickory Hill as part of the Assembly and states that one of the purposes of the covenants is "to enhance Lake Junaluska Assembly as a community of people, families, and homes of the high values in the Hebrew Christian faith." If any inference is to be drawn from the declaration regarding permissible uses of the service charge proceeds, it is that the parties intended the proceeds from Section One landowners to be used for the maintenance of the whole Assembly.

In circumscribing the property that is subject to the declaration, the limiting provision upon which defendants Patten rely merely acknowledges that the Council is binding a limited portion of the Assembly to the declaration's covenants. In no way does this provision limit which portions of the Assembly can reap the covenants' benefits. With respect to the service charges, the limiting provision establishes that the declaration does not bind the owners of any property outside Section One to pay the charges (unless such owners' property is "specifically made subject thereto").[3] The limiting provision does not, however, establish that service charge payments from Section One landowners cannot be used for the maintenance of portions of the Assembly outside Section One. For that reason, and because Hickory Hill is part of the Assembly, it is reasonable for purchasers of lots in Section One to share the Assembly's communal maintenance costs.

By virtue of living in the Lake Junaluska Assembly Development, all defendants have benefitted from the services and protection provided to the entire Assembly from the proceeds of the annual service

3. The paragraph that follows the limiting provision in the declaration reads: "The [Council] may, from time to time, subject additional real property to the conditions, restrictions, covenants, reservations, liens and charges herein set forth by appropriate reference hereto."

charges. Indeed, the safety, protection, and maintenance of the Assembly contribute to the overall atmosphere that induces potential buyers to purchase property there. Invalidating the source of funding for such services would only risk eroding the fundamental nature and character of a community that has existed and flourished since the beginning of the twentieth century. We reiterate that the assessments in this case were initiated for the purpose of paying reasonable and specific expenses associated with upkeep and maintenance of the entire Assembly.

In *Armstrong*, we stated that "broad assessments for the general purposes of promoting the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of [a development] as may be more specifically authorized from time to time by the [development's governing body]" are unreasonable because they grant "practically unlimited power" to the governing body to assess property owners. 360 N.C. at 560-61, 633 S.E.2d at 88 (internal quotation marks omitted). Thus, the proceeds of the service charges must actually be used to fund the particular purposes stated in the restrictions. In their Answers, defendants questioned whether the assessment funds were used for development of the newer parts of the Assembly rather than for the purposes stated in the covenants. If defendants had been able to show that, despite the legitimate purposes stated in the covenants, the Council had in fact used the proceeds for specific, targeted projects such as building roads to develop new parts of the Assembly, the assessments would not be enforceable. However, given that the trial court did not make any determination on this issue before ruling on the motions for summary judgment, it appears that insufficient evidence was presented to the trial court to create a genuine issue of material fact whether the funds were used for improper purposes.

We hold that the amendments instituting the annual service charge assessments are reasonable and that the service charge provisions are enforceable against all defendants. We thus reverse the Court of Appeals' decision that the trial court erred in granting summary judgment to the Council. The remaining issues addressed in the Court of Appeals' opinion are not before this Court and its decision as to those issues remains undisturbed.

REVERSED.

Justice EDMUNDS concurring.

I concur with the majority holding that, in this case, the annual service charge assessments instituted under the restrictive covenants are reasonable and are enforceable against all defendants. I write separately to emphasize that the unique nature of Lake Junaluska is fundamental to that outcome. In the ordinary case, by contrast, a restrictive covenant purporting to bind all owners and occupants to future regulations that a developer might adopt would not be sufficient to make an assessment implemented decades later by the developer reasonable or enforceable.

A "fundamental premise" of real property law is that "[w]hile the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land." *J.T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc.*, 302 N.C. 64, 70, 274 S.E.2d 174, 179 (1981) (citations omitted). As the majority states, rules and regulations created pursuant to a restrictive covenant, like amendments to a declaration of restrictive covenants, must be reasonable. The reasonableness of such rules and regulations "may be ascertained from the language of the declaration, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community." *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 548, 633 S.E.2d 78, 81 (2006). The majority opinion properly highlights the contrast between the "fairly typical" subdivision at issue in *Armstrong* and the "unique, religious community character" of Lake Junaluska. Slip Op. at 12. This distinction is critical to the holding because I believe that, consistent with our analysis in *Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967), in most cases affirmative obligations may not be imputed to real property owners when such obligations could not reasonably be anticipated. In a more typical subdivision where the developer does not retain significant control over minute aspects of the development, affirmative obligations adopted pursuant to a restrictive covenant that purports generally to bind all owners and occupants to rules and regulations that may be adopted at some future time by a developer ordinarily would not be reasonable.

For the reasons above, I concur in the majority opinion.

Justice HUDSON dissenting.

With respect to defendants Emerson and Huffman, the restrictive covenants at issue do not contemplate any affirmative financial assessment on defendants, and I conclude that the service charge contained in the 1996 Rules and Regulations therefore exceeds the scope of the original bargain. As for defendants Patten, the applicable restrictive covenants do explicitly provide for assessment of service charges, but I conclude that the language is not sufficiently definite to be enforceable under North Carolina law. For these reasons, I respectfully dissent.

The majority and concurring opinions emphasize "the unique, religious community character" of the Lake Junaluska Assembly Development (the "Assembly") as "fundamental" to the holding that the amendments to the restrictive covenants here are reasonable, even going so far as to take judicial notice of facts not in the record to support that position. However, the Southeastern Jurisdictional Administrative Council (SEJAC) has advanced no argument for an exception for religious communities, in either its original complaints against defendants or its briefs to the Court of Appeals and this Court. Moreover, neither the majority or dissenting opinions below discussed such an exception. Rather, this dispute has been presented by all parties as an ordinary dispute between a commercial property developer and its property owners, and I can discern no basis for us to treat it otherwise. Indeed, I have found no statutory or case law that would support an expansive reading of restrictive covenants only here, based on the presumably religious nature of the community. I do not believe it is appropriate for us to reach out and resolve this case on grounds not argued, particularly when doing so requires the Court to consider matters not in the record. On this point, I also dissent.

The facts are straightforward and require us to look only at the language of the deeds signed by the parties here, including the applicable restrictive covenants. Given that the language of the deeds and covenants is plain and unambiguous, we have no need to refer to the history of SEJAC or even to the parties' relationship, in order to infer their respective intentions at the times the deeds were signed. *See Long v. Branham*, 271 N.C. 264, 276, 156 S.E.2d 235, 244 (1967) ("The fundamental rule in construing restrictive covenants is that the intention of the parties *as shown by the covenant* governs." (emphasis added) (citation and internal quotation marks omitted))).

As we have previously held, this Court will generally enforce a restrictive covenant in the same manner as any other contract. *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 400-01, 584 S.E.2d 731, 735-36 (2003); *see also Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006) ("Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property." (citations omitted)). As such, "[i]f the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (citation and internal quotation marks omitted).

While the majority speculates as to the reason defendants Emerson and Huffman purchased their respective lots in the Lake Junaluska Assembly Development, our cases show that we must restrict our determination of the "intention of the parties" based only on our "study and consideration of *all* the covenants . . . creating the restrictions." *Long*, 271 N.C. at 268, 156 S.E.2d at 238 (citation omitted); *cf. id.* at 268, 156 S.E.2d at 239 ("Where the meaning of restrictive covenants is doubtful the surrounding circumstances existing at the time of the creation of the restriction are taken into consideration in determining the intention." (citation and internal quotation marks omitted)).

Accordingly, as with any contract, the written words of the parties, not our own theories as to their respective motivations, must underlie our analysis of the bargain they struck. We have also previously held that, because of the unique nature of restrictive covenants:

> Covenants and agreements restricting the free use of property are *strictly construed* against limitations upon such use. Such restrictions *will not be aided or extended* by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of property, . . . and that construction should be embraced which least restricts the free use of the land.
>
> Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restric-

> tions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.

Id. at 268, 156 S.E.2d at 239 (emphases added) (citation and internal quotation marks omitted). Likewise, in *Armstrong* we recently held that an amendment to a declaration of covenants "does not permit amendments of unlimited scope; rather, every amendment must be reasonable in light of the contracting parties' original intent." 360 N.C. at 559, 633 S.E.2d at 87.

The *Armstrong* case is instructive to the analysis of the situation presented here. In *Armstrong*, we considered a challenge by property owners to their homeowners' association's amendment of a declaration of restrictive covenants so as to "authorize[] broad assessments 'for the general purposes of promoting the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of [the subdivision] as may be more specifically authorized from time to time by the Board.' " *Id.* at 548, 633 S.E.2d at 81. There, we noted disapprovingly that the amendment "grants the [homeowners'] Association practically unlimited power to assess lot owners and is contrary to the original intent of the contracting parties," in part because the assessments billed were "unrelated to all other provisions of the deeds, Declaration, and plat." *Id.* at 561, 633 S.E.2d at 88. In finding the amendment to be invalid and unenforceable, we concluded that "[i]n the same way that the powers of a homeowners' association are limited to those powers granted to it by the original declaration, an amendment should not exceed the purpose of the original declaration." *Id.* at 558, 633 S.E.2d at 87.

In *Armstrong*, we also highlighted the unexpected nature of the assessments, observing that "petitioners purchased their lots without notice that they would be subjected to additional restrictions on use of the lots and responsible for additional affirmative monetary obligations imposed by a homeowners' association." *Id.* at 561, 633 S.E.2d at 89. Significantly, we emphasized the importance of respecting the parties' expectations regarding the original bargain struck, stating unequivocally that "[t]his Court will not permit the Association to use the Declaration's amendment provision as a vehicle for imposing a new and different set of covenants, thereby substituting a new obligation for the original bargain of the covenanting parties." *Id.*

Here, defendants Emerson and Huffman agreed to the following restrictive covenants when they signed their respective deeds:

> Second: That said lands shall be held, owned, and occupied subject to the provisions of the charter of the [Lake Junaluska Assembly, Inc.], and all amendments thereto, heretofore, or hereafter enacted, and to the bylaws and regulations, ordinances and community rules which have been, or hereafter may be, from time to time, adopted by [Lake Junaluska Assembly, Inc.], and its successors.
>
> . . . .
>
> Fifth: That it is expressly stipulated and covenanted between the Grantor and the Grantee, his heirs and assigns, that the bylaws, regulations, community rules and ordinances heretofore or hereafter adopted by the [Lake Junaluska Assembly, Inc.] shall be binding upon all owners and occupants of said lands as fully and to the same extent as if the same were fully set forth in this Deed, and that all owners and occupants of said lands and premises shall be bound hereby.

Defendant Huffman purchased his lots in 1970 and 1974; defendants Emerson purchased their lot in 1992. In November 1996, the Assembly enacted Rules and Regulations[4] providing in part: "Each owner shall pay annually a SERVICE CHARGE in an amount fixed by the SEJ Administrative Council for police protection, street maintenance, street lighting, drainage maintenance, administrative costs and upkeep of the common areas." Put simply, years after defendants struck their original bargains with SEJAC—and, in the case of defendant Huffman, decades later—SEJAC amended the restrictive covenants to impose affirmative financial obligations on defendants. Thus, when defendants Emerson and Huffman decided to purchase, and struck their original bargains, they had before them only the language of the original covenants, which make no mention of financial assessments.

Given that the restrictive covenants contain absolutely no reference to even the possibility of assessments or fees to be paid by prop-

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4. I note that the majority opinion does not address defendants' argument that the 1996 Rules and Regulations are not an enforceable amendment to the covenants because they are contained in a private document that has not been recorded. *See Armstrong*, 360 N.C. at 555, 633 S.E.2d at 85 ("An enforceable real covenant is made in writing, properly recorded, and not violative of public policy." (citations omitted)); *Hege v. Sellers*, 241 N.C. 240, 248, 84 S.E.2d 892, 898 (1954) (stating that real covenants must be recorded). Because I would find the service charges to be unenforceable regardless, I have not discussed this point.

erty owners, I disagree that defendants Emerson and Huffman "should have anticipated" this action by the Assembly. Likewise, in light of our holding in *Armstrong* and our case law directing that such covenants be strictly construed against limitations on use of property, I cannot agree with the majority that this amendment is reasonable and within the scope of the original restrictive covenants agreed to by the parties. Indeed, this amendment appears to be precisely the type of "overreaching by one party or sweeping subsequent change" that we cautioned against in *Armstrong*. 360 N.C. at 554, 633 S.E.2d at 84-85. I believe that the majority's holding here today dilutes beyond usefulness the reasonableness standard that we articulated in *Long* and *Armstrong*.

The entire passage from *Armstrong* explaining how "reasonableness" may be determined is informative:

> However, the court may ascertain reasonableness from the language of the original declaration of covenants, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community. For example, it may be relevant that a particular geographic area is known for its resort, retirement, or seasonal "snowbird" population. Thus, it may not be reasonable to retroactively prohibit rentals in a mountain community during ski season or in a beach community during the summer. Similarly, it may not be reasonable to continually raise assessments in a retirement community where residents live primarily on a fixed income. Finally, a homeowners' association cannot unreasonably restrict property rental by implementing a garnishment or "taking" of rents (which is essentially an assessment); although it may be reasonable to restrict the frequency of rentals to prevent rented property from becoming like a motel.
>
> Correspondingly, restrictions are generally enforceable when clearly set forth in the original declaration.

Id. at 559-60, 633 S.E.2d at 88. We made these observations in the context of our concern that, with homeowners' associations in general, "[t]he law . . . not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes in existing covenants." *Id.* at 561, 633 S.E.2d at 89 (citation and internal quotation marks omitted).

Here, that concern is even greater, as SEJAC is the corporate property developer; there is no homeowners' association or other representative vehicle through which defendants and other property owners could vote to approve or strike down amendments to the original covenants. "[R]etaining significant control over minute aspects of the Assembly" is not equivalent to charging property owners monthly assessments, sometimes totaling thousands of dollars a year, that were not contemplated, and therefore, not agreed to, in the original contracts signed by the parties.

The majority opinion distinguishes the facts here from those in *Armstrong* by focusing on the "unique, religious community character" of the Assembly, as opposed to the "fairly typical subdivision" at issue in *Armstrong*. Our analysis in *Armstrong* was based not only on the nature of the community in question, but also in large part on the expectations of the property owners themselves as to future financial obligations at the time they purchased their lots. While it is true that we quoted two of the six petitioners in *Armstrong* regarding their express decision not to live in "a gated community with 'all the amenities,' " *id.* at 552, 633 S.E.2d at 83, we did so to illustrate their opposition to the notion of living in a planned community in light of the homeowners' association's repeated references to North Carolina's Planned Community Act in its attempts to amend the bylaws.

Significantly, the original declaration of covenants in *Armstrong* did, in fact, allow property owners to be assessed for "an equal pro-rata [sic] share of the common expense for electrical street lights and electrical subdivision entrance sign lights and any other common utility expense for various lots within the Subdivision." *Id.* at 550, 633 S.E.2d at 82. Even with that language, which gave property owners notice that they were subject to future financial obligations related to their lots, this Court found an amendment expanding the assessments to be invalid and unenforceable. Here, purchasers of Assembly property had no such notice. Further, I see no distinction between the new affirmative obligations this Court struck down in *Armstrong* for " 'promoting the safety, welfare, recreation, health, common benefit and enjoyment' " of residents, *id.* at 553, 633 S.E.2d at 84, and those that the majority would allow here, as "necessary to preserve the unique religious character and history of the community." Neither the majority nor the concurring opinion articulates a legal basis or cites any authority for the proposition that the development corporation managing this community should be permitted

to infringe upon the individual property rights of its property owners in a manner that would be impermissible for any other developer.

Here, the parties have not argued in their briefs, nor does anything in the record before us give any indication, why defendants Emerson and Huffman elected to purchase property in the Assembly. We do have their sworn affidavits that their deeds contain no reference to "any charges or assessments by Lake Junaluska Assembly, Inc." and that the reference to the " 'bylaws and regulations, ordinances and community rules' " is "too vague to give any notice of an obligation to pay money for anything." Perhaps they purchased their lots because they were attracted to the Assembly's "unique, religious community character" or maybe they did so because they expected that the community would be fully maintained by SEJAC, without any additional financial burden on them as property owners. Neither the briefs nor the record reflect why they made their decisions to purchase, and we simply do not know. In light of well-established principles requiring strict construction of covenants, I do not agree that we should allow speculation as in the majority opinion to form the basis of a decision to expand these covenants.

Although amendments are sometimes necessary, as we recognized in *Armstrong*, they must be reasonable and "preserv[e] the original nature of [the parties'] bargain." *Id.* at 558, 633 S.E.2d at 87 (citations omitted). The majority's holding allows the Assembly to infringe on the individual property rights of defendants Huffman and Emerson by amending the original covenants in a manner that impermissibly "substitute[s] a new obligation for the original bargain of the covenanting parties." *Id.* at 561, 633 S.E.2d at 89. Further, it runs contrary to our long-standing case law directing such covenants to be strictly construed. I would find the amendments to be invalid and unenforceable.

Defendants Patten are differently situated than defendants Emerson and Huffman, as the Pattens purchased their lot in 1996, at which point the covenants included the following language: "Each owner shall pay annually a SERVICE CHARGE in an amount fixed by the SEJ Administrative Council for garbage and trash collection, police protection, fire protection, street maintenance, street lighting, and upkeep of common areas." Thus, defendants Patten had notice that they owed an ongoing financial obligation to the Assembly for those services.

In *Armstrong*, we cited with approval the Court of Appeals holding in *Beech Mountain Property Owner's Ass'n v. Seifart*, 48 N.C. App. 286, 269 S.E.2d 178 (1980), that affirmative covenants are unenforceable "unless the obligation [is] imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application." 360 N.C. at 556, 633 S.E.2d at 85 (quoting *Beech Mountain*, 48 N.C. App. at 295, 269 S.E.2d at 183 (alteration in original)). In *Beech Mountain*, the Court of Appeals articulated a three-part test to determine if an obligation is "sufficiently definite": Does the covenant (1) describe an adequate standard to determine the amount of the assessment; (2) identify with particularity the property to which the assessment applies; and (3) give guidance to the reviewing court regarding the facilities maintained with the assessment funds? 48 N.C. App. at 295-96, 269 S.E.2d at 183-84.

Here, the deed and covenants signed by defendants Patten refer to their subdivision, Hickory Hill, but also include references to the larger Assembly development. Each property owner in the Assembly receives a copy of policies and procedures outlining how the service charges are calculated using property values, and I find that explanation sufficient to meet the first prong of the test.

Turning to the second and third prongs, I find that the language in the covenants gives no guidance on the property or facilities that will be maintained with the assessment funds. Although defendants Pattens' deed specifies that it subjects Section One of the Hickory Hill subdivision to the covenants therein, nothing in the service charge description specifies that the assessment funds will be used for the Assembly Development as a whole, or even limited to use only in the Assembly. From the documents in the record, it is clear that the service charges are being used for maintenance and upkeep throughout the Assembly Development as a whole, which, without operative language to allow for such application, goes beyond what our case law permits. *See Long*, 271 N.C. at 274, 156 S.E.2d at 243 ("It is our opinion, however, that, nothing else appearing, restrictions imposed upon a particular subdivision are for the benefit of that particular development and no other.").

Moreover, although the service charge includes a reference to "common areas," Mitchell Buddy Young, SEJAC's Director of Residential Services at the Assembly, admitted in his deposition that there are no common area fees, a fact which was also admitted in SEJAC's responses to interrogatories. Likewise, defendants Patten

also pay a separate monthly fee for garbage and trash collection and fire protection. Thus, as to at least some of the "eminently reasonable community expenses" highlighted by the majority opinion, defendants are already contributing financially "to the maintenance of their community" through other monthly charges. More troubling, SEJAC in its response to interrogatories, and Mr. Young in his deposition, conceded that the service charge assessed to defendants Patten is also used for administrative costs (including payroll, pension and retirement benefits, and attorney's fees), which are not purposes mentioned explicitly or by implication in the covenants.

As the majority opinion itself observes, "the proceeds of the service charges must actually be used to fund the specific purposes stated in the restrictions." Here, by SEJAC's own admission, they are not. Moreover, the deed contains no language limiting the property or facilities to which the service charge may be applied, again giving SEJAC unfettered discretion to continue to expand the streets, lighting, and other areas that might be maintained using the service charges. If this language is sufficiently definite to be enforceable, defendants Pattens' liability could be virtually unlimited. Similarly, the covenants struck down in *Beech Mountain* required an assessment for "road maintenance and maintenance of the trails and recreational areas," "road maintenance, recreational fees, and other charges assessed by the Association," and "all dues, fees, charges, and assessments made by that organization, but not limited to charges for road maintenance, fire protection, and security services," without specifying which roads, trails, or areas in the development were covered. 48 N.C. App. at 288, 269 S.E.2d at 179-80. I find the language here to be at least as vague and would affirm the Court of Appeals in reversing summary judgment against defendants Patten.

For the foregoing reasons, I would hold that the restrictive covenants and the 1996 Rules and Regulations at issue here impermissibly infringe on the property rights of defendants. I therefore respectfully dissent.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

IN RE SUMMONS OF ERNST & YOUNG

[363 N.C. 612 (2009)]

IN THE MATTER OF THE SUMMONS ISSUED TO ERNST & YOUNG, LLP AND ALL SUBSIDIARIES, AFFILIATED AND ASSOCIATED ENTITIES

No. 424PA08

(Filed 9 October 2009)

Taxation— summons from Secretary of Revenue for information—enforcement—Rules of Civil Procedure not applicable

The Rules of Civil Procedure do not apply to summons enforcement proceedings under N.C.G.S. § 105-258(a) because that statute prescribes a civil proceeding with its own specialized procedure that supplants the Rules.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 191 N.C. App. 668, 663 S.E.2d 921 (2008), affirming an order denying a motion to dismiss entered on 21 June 2007 and remanding an order to comply entered on 15 June 2007, both by Judge Donald W. Stephens in Superior Court, Wake County. On 5 February 2009, the Supreme Court allowed intervenor's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court 5 May 2009.

Roy Cooper, Attorney General, by Gregory P. Roney, Assistant Attorney General, for petitioner-appellant/appellee Secretary of the North Carolina Department of Revenue.

Alston & Bird LLP, by Jasper L. Cummings, Jr., for intervenor-appellee/appellant Wal-Mart Stores, Inc.

TIMMONS-GOODSON, Justice.

The dispositive issue in this appeal is whether the Rules of Civil Procedure apply to summons enforcement proceedings under N.C.G.S. § 105-258(a). We hold that the Rules of Civil Procedure do not apply to such proceedings, and we therefore modify, affirm in part, and remand the decision of the Court of Appeals.

I. Background

Beginning in 1995 Ernst & Young, LLP ("Ernst & Young"), a global professional-services firm, sold to Wal-Mart Stores, Inc. ("Wal-Mart") a number of tax shelters designed to reduce Wal-Mart's income tax

liability to various states, including North Carolina. In 1996, with the assistance of Ernst & Young, Wal-Mart underwent corporate restructuring to implement these tax shelters and placed substantially all of its real estate interests in real estate investment trusts ("REITs"). In 2001 Ernst & Young assisted Wal-Mart in restructuring to implement additional tax shelters.

On 6 February 2007, pursuant to N.C.G.S. § 105-258,[1] the Secretary of Revenue ("the Secretary") issued a summons directing a representative of Ernst & Young to appear before the Secretary or his designee to provide testimony under oath and produce books, papers, records, and other data relevant to the Secretary's inquiry regarding Wal-Mart. The Secretary requested, *inter alia*, the following: (1) all documents regarding the creation or existence of certain subsidiaries and affiliated companies, including certain REITs; (2) all documents created between 1 January 1990 and 31 December 2000 "which either are not directed to a specific client or involve Wal[-]Mart discussing the . . . tax savings of [REITs], regulated investment companies, trusts, and/or holding companies owning trusts"; and (3) all documents created between 1 January 1990 and 31 January 2005 relating to "the creation, elimination, and/or restructuring of entities within Wal[-]Mart . . . that would produce federal and/or state tax savings." The summons also directed that if Ernst & Young withheld any documents on the basis of a claim of privilege, Ernst & Young must provide a complete list of documents withheld and a statement of the grounds upon which each document was considered privileged.

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1. Section 105-258 states in pertinent part:

> (a) Secretary May Examine Data and Summon Persons.—The Secretary of Revenue, for the purpose of . . . determining the liability of any person for a tax, or collecting any such tax, shall have the power to examine . . . any books, papers, records, or other data which may be relevant or material to such inquiry, and the Secretary may summon the person liable for the tax . . . or any person having possession, custody, care or control of books of account containing entries relevant or material to the income and expenditures of the person liable for the tax . . . to appear before the Secretary, or his agent, at a time and place named in the summons, and to produce such books, papers, records or other data, and to give such testimony under oath as may be relevant or material to such inquiry . . . . If any person so summoned refuses to obey such summons or to give testimony when summoned, the Secretary may apply to the Superior Court of Wake County for an order requiring such person or persons to comply with the summons of the Secretary, and the failure to comply with such court order shall be punished as for contempt.

N.C.G.S. § 105-258(a) (2007).

Although it partially complied with the summons, Ernst & Young withheld thousands of pages of documents. Moreover, Ernst & Young produced an incomplete list of the withheld documents, asserting only that the withheld documents were "work product."

On 11 April 2007, the Secretary filed in the Superior Court, Wake County, a verified "Application for an Order for the Production of Certain Books, Papers, Records, and Other Data" ("the application"). The Secretary sought a court order compelling Ernst & Young to withdraw all objections and fully comply with the summons. The Secretary asserted that Ernst & Young and Wal-Mart failed "to establish the applicability of the work product privilege" to the withheld documents and therefore waived the privilege. In the alternative, the Secretary sought a court order directing Ernst & Young "to produce a complete and detailed privilege log for all of its withheld documents" and an *in camera* review by the court of the withheld documents to determine the applicability of the work product privilege.

On 11 April 2007, the superior court, Judge Donald W. Stephens presiding, conducted a hearing on the Secretary's application. By an order dated 30 April 2007, the superior court continued the matter until 5 June 2007 and directed the Secretary to give Wal-Mart and its subsidiaries notice of the upcoming hearing. The court ordered Wal-Mart to deliver a complete list of the withheld documents to the Secretary and to support any asserted privileges with details sufficient for the court to evaluate the claims.

On 4 May 2007, Wal-Mart filed motions to intervene and to dismiss the application for failure to comply with the North Carolina Rules of Civil Procedure.[2] Wal-Mart argued that the Secretary violated the Rules of Civil Procedure "in multiple respects, including: (1) fail[ing] to . . . fil[e] a complaint; (2) fail[ing] to identify and serve process upon defending parties; (3) fail[ing] to provide defending parties with an opportunity to answer a complaint; and (4) fail[ing] to provide a mechanism for discovery and proper issue development." Wal-Mart also sought dismissal for failure to state a claim under Rule 12(b)(6). Wal-Mart argued that the Rules of Civil Procedure apply to summons enforcement proceedings and that application of the Rules of Civil Procedure was "the only way to assert its due process rights under the North Carolina and United States

2. While Wal-Mart's 4 May 2007 motion referenced only Rule 12(b)(6), in a 5 June 2007 filing, Wal-Mart clarified that its motion was based on subdivisions (1), (2), (4), (5), and (6) of Rule 12(b).

Constitutions." On 23 May 2007, Wal-Mart filed a brief in support of its work product privilege claim.

Although the superior court allowed Wal-Mart's motion to intervene on 6 June 2007, the court denied Wal-Mart's motion to dismiss pursuant to subdivisions (1), (2), (4), (5), and (6) of Rule 12(b). By order dated 14 June 2007, the superior court rejected Wal-Mart's work product privilege claim and ordered Ernst & Young to comply fully with the summons within thirty days of the order. The superior court stayed execution of the order on the condition that Ernst & Young deposit the contested documents under seal. On 2 July 2007, Wal-Mart filed its notice of appeal.

The Court of Appeals affirmed the trial court's order denying Wal-Mart's motion to dismiss and remanded the trial court's order rejecting Wal-Mart's work product claim. *In re Summons Issued to Ernst & Young, LLP*, 191 N.C. App. 668, ——, 663 S.E.2d 921, 929 (2008). With regard to Wal-Mart's motion to dismiss, the Court of Appeals opined that summons enforcement proceedings under N.C.G.S. § 105-258(a) are civil actions and are therefore subject to the Rules of Civil Procedure. *Id.* at ——, 663 S.E.2d at 926. However, because N.C.G.S. § 105-258(a) confers jurisdiction on the superior court upon application by the Secretary, the Court of Appeals concluded that the Secretary's failure to file and serve a complaint by civil process was a non-jurisdictional defect and did not warrant dismissal. *Id.* at ——, 663 S.E.2d at 927. Further, because the application contained facts sufficient to inform Ernst & Young of the nature of the claim, the Court of Appeals determined that the application stated a claim for relief. *Id.* at ——, 663 S.E.2d at 928.

With regard to Wal-Mart's work product privilege claim, the Court of Appeals concluded that it was unclear from the record on appeal whether the withheld documents were created in anticipation of litigation. *Id.* at ——, 663 S.E.2d at 929. Consequently, the Court of Appeals remanded for the trial court to review the documents *in camera*. *Id.* On 5 February 2009, we allowed the Secretary's petition for discretionary review to determine whether the Rules of Civil Procedure apply to summons enforcement proceedings under N.C.G.S. § 105-258(a) and Wal-Mart's conditional petition for discretionary review to determine whether the Court of Appeals erred in failing to dismiss the Secretary's application pursuant to Rule 12(b).

II. Analysis

On appeal, the Secretary argues that the Court of Appeals erred in holding that the Rules of Civil Procedure apply to summons enforcement proceedings under N.C.G.S. § 105-258(a). According to the Secretary, N.C.G.S. § 105-258(a) establishes an expedited procedure for summons enforcement proceedings and gives the superior court jurisdiction to take any actions reasonably necessary to adjudicate summons enforcement applications. In its response, Wal-Mart contends that the Rules of Civil Procedure apply to summons enforcement proceedings under N.C.G.S. § 105-258(a), because the statute does not prescribe "a 'differing procedure' that completely replaces" the Rules of Civil Procedure.

Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo. *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998) (citing *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 642, 256 S.E.2d 692, 696 (1979)). "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citing *Buck v. U.S. Fid. & Guar. Co.*, 265 N.C. 285, 290, 144 S.E.2d 34, 37 (1965)).

> In interpreting a statute, we first look to the plain meaning of the statute. Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent.

Frye Reg'l Med. Ctr., Inc. v. Hunt, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citations omitted).

With these principles of statutory interpretation in mind, we address whether the Rules of Civil Procedure apply to summons enforcement proceedings under N.C.G.S. § 105-258(a). As set forth in Rule 1, the Rules of Civil Procedure apply "in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C.G.S. § 1A-1, Rule 1 (2007). When the legislature has prescribed specialized procedures to govern a particular proceeding, the Rules of Civil Procedure do not apply. *See id.* § 1A-1, Rule 1; *see also id.* Rule 1 cmt. (2007) ("In general it can be said that to the extent a specialized procedure has heretofore governed, it will continue to do so."). Thus, the dispositive question on this appeal is whether N.C.G.S. § 105-258(a) prescribes a specialized procedure.

On its face, N.C.G.S. § 105-258(a) sets forth the following three-step procedure for summons enforcement proceedings: (1) upon a person's failure to obey a summons, the Secretary applies to the Superior Court, Wake County, for an order requiring compliance; (2) upon a satisfactory showing by the Secretary of a failure to obey the summons, the court issues an order directing the person summoned to comply; and (3) the failure to comply is punishable as for contempt. *Id. §* 105-258(a). In filing an application for the enforcement of an administrative summons, the Secretary seeks merely to question persons and examine records in the course of an investigation. The Secretary's inquiry does not involve filing a civil complaint or otherwise initiating a civil action as defined in the General Statutes governing civil procedure. *See id.* § 1-2. Indeed, it is only after conducting the investigation that the Secretary is able to identify any violations of the tax laws, as well as the persons potentially liable for such violations, and determine whether to pursue civil or criminal penalties. *See id.* §§ 105-236(c) & -236.1(b) (2007) (vesting the Secretary with authority to make civil assessments and issue notices, orders, warrants or demands in criminal law enforcement proceedings).

Notably, the task before the court in a summons enforcement proceeding is summary in nature and relatively uncomplicated. The court does not extensively weigh or resolve any significant conflicts in the evidence. Furthermore, the statute expressly gives the Superior Court of Wake County jurisdiction over summons enforcement proceedings. *Id.* Pursuant to this express grant of jurisdiction, the superior court has the inherent authority to take all actions reasonably necessary to properly administer its duties under N.C.G.S. § 105-258(a). *In re Investigation of Death of Miller*, 357 N.C. 316, 321-22, 584 S.E.2d 772, 778-79 (2003) (" '[I]t has been long held that courts have the inherent power to assume jurisdiction and issue necessary process in order to fulfill their assigned mission of administering justice efficiently and promptly.' " (quoting *In re Albemarle Mental Health Ctr.*, 42 N.C. App. 292, 296, 256 S.E.2d 818, 821 (1979), *disc. rev. denied*, 298 N.C. 297, 259 S.E.2d 298 (1979))). Thus, in rare instances such as the case at bar, the court may rely on its inherent authority to give third parties notice and an opportunity to assert privileges. Accordingly, we conclude that section 105-258(a) prescribes a "proceeding[] of a civil nature" with its own specialized procedure. N.C.G.S. § 1A-1, Rule 1 (2007). This self-contained, specialized procedure supplants the Rules of Civil Procedure.

Engrafting the Rules of Civil Procedure onto N.C.G.S. § 105-258(a) would eviscerate the statute's function. Since the enactment of North Carolina's first income tax laws in 1921, the legislature has expressly authorized the Secretary to take testimony under oath and examine books and records to ensure compliance with the revenue laws. Act of Mar. 8, 1921, ch. 34, sec. 801, 1921 N.C. Sess. Laws 147, 221 (authorizing the Tax Commission to examine books and papers, require attendance of persons, take testimony and administer oaths, and designate "any agent or representative" to conduct such examinations). The procedures for summons enforcement predate enactment of the Rules of Civil Procedure and have remained essentially unchanged for fifty years. These specialized procedures are vital to the effectiveness of the Secretary's summons power. Act of June 27, 1967, ch. 954, sec. 1, 1967 N.C. Sess. Laws 1274 (enacting the North Carolina Rules of Civil Procedure); Act of 1959 Amending and Supplementing "The Revenue Act," being Subchapter 1 of Chapter 105 of the General Statutes, ch. 1259, sec. 8A, 1959 N.C. Sess. Laws 1416, 1452 (rewriting N.C.G.S. § 105-258(a) to include the summons enforcement proceeding). In describing the authority of the Commissioner of Internal Revenue under a similar federal statute, the United States Supreme Court has stated that the summons power is

> "a power of inquisition . . . which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."

United States v. Powell, 379 U.S. 48, 57, 13 L. Ed. 2d 112, 119 (1964) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43, 94 L. Ed. 401, 411 (1950)). This description applies with equal force to the Secretary's summons power under N.C.G.S. § 105-258(a).

Furthermore, applying the Rules of Civil Procedure to summons enforcement proceedings under N.C.G.S. § 105-258(a) would all but eliminate the Secretary's use of that power. At the earliest possible juncture, the investigative phase, the Secretary would be required to file a complaint and serve process under Rule 4; plead matters with sufficient particularity to survive a Rule 12(b)(6) motion to dismiss; join necessary parties pursuant to Rule 19; and be subject to the deposition and discovery provisions of Article 5. *See* N.C.G.S. § 1A-1, Rules 4, 12(b)(6), 19, 26-37 (2007). Notably, while the Secretary is

entangled in protracted procedural litigation for the purpose of merely conducting the investigation, the applicable statutes of limitations would continue to run. *See id.* § 105-241.8(a) (2007) (stating that the statute of limitations for proposing an assessment is three years); *id.* § 105-241.9(b) (2007) ("The Secretary must propose an assessment within the statute of limitations for proposed assessments unless the taxpayer waives the limitations period in writing."). We therefore hold that the Rules of Civil Procedure do not apply to summons enforcement proceedings under N.C.G.S. § 105-258(a).

In concluding to the contrary, the Court of Appeals relied in part on N.C.G.S. § 105-246, which states that "[a]ll actions or processes brought . . . under provisions of this Subchapter[] shall have precedence over any other civil causes pending in such courts, and the courts shall always be deemed open for trial of any such action or proceeding brought therein." *Id.* § 105-246 (2007); *In re Ernst & Young*, 191 N.C. App. at ——, 663 S.E.2d at 926. The Court of Appeals misapprehended N.C.G.S. § 105-246 in holding that all actions or processes under Subchapter I of Chapter 105 are civil actions. *In re Ernst & Young*, 191 N.C. App. at ——, 663 S.E.2d at 926. Subchapter I encompasses criminal actions, civil actions, and special proceedings. *See*, *e.g.*, N.C.G.S. § 105-236(a)(7)-(10b) (providing criminal penalties for violations of Subchapter I). When interpreting a statute, " '[i]ndividual expressions must be construed as a part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.' " *State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) (quoting *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990)). Section 105-246, which was first enacted nearly thirty years before the Rules of Civil Procedure, provides merely that revenue actions have priority over other matters.

The Court of Appeals also analogized to federal law, under which the Federal Rules of Civil Procedure apply to I.R.S. summons enforcement proceedings. *In re Ernst & Young*, 191 N.C. App. at ——, 663 S.E.2d at 926-27 (citing *Powell*, 379 U.S. at 58 n.18, 13 L. Ed. 2d at 119 n.18). However, Federal Rule 81 expressly states that the Federal Rules of Civil Procedure apply to federal summons enforcement proceedings. Fed. R. Civ. P. 81(a)(5). In contrast, North Carolina's Rules of Civil Procedure, which were modeled after the Federal Rules, *Sutton v. Duke*, 277 N.C. 94, 99, 176 S.E.2d 161, 164 (1970), contain no similar provision. Because "changes in words and phrasing in a statute adopted from another state or country will be presumed

deliberately made with the purpose to limit . . . the adopted rule," *id.* at 101, 176 S.E.2d at 165, the Court of Appeals erred in relying on federal law for its holding.

In sum, we hold that N.C.G.S. § 105-258(a) establishes a proceeding of a civil nature with its own specialized procedure that supplants the Rules of Civil Procedure. Although the Court of Appeals erred in holding to the contrary, it correctly affirmed the order of the trial court denying Wal-Mart's motion to dismiss. Accordingly, we modify and affirm the decision of the Court of Appeals as to this matter. The decision of the Court of Appeals remanding the trial court's order to comply with the administrative summons for an in camera review of the documents at issue is not before this Court and therefore remains undisturbed. This case is remanded to the Court of Appeals for further remand to the Superior Court, Wake County, for additional proceedings not inconsistent with this opinion.

MODIFIED AND AFFIRMED IN PART AND REMANDED.

STATE OF NORTH CAROLINA v. LLYOD GREEN, JR. A/K/A LLOYD GREEN, JR.

No. 71A09

(Filed 9 October 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 194 N.C. App. ——, 670 S.E.2d 635 (2009), affirming judgments entered 4 June 2007 by Judge Jay D. Hockenbury in Superior Court, New Hanover County. Heard in the Supreme Court 9 September 2009.

Roy Cooper, Attorney General, by Joseph Finarelli, Assistant Attorney General, for the State.

Gilda C. Rodriguez for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. BOBBY E. BOWDEN

No. 514PA08

(Filed 9 October 2009)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 193 N.C. App. ——, 668 S.E.2d 107 (2008), reversing an order entered 27 August 2007 by Judge Gary L. Locklear in Superior Court, Cumberland County denying defendant's motion for appropriate relief and remanding for further proceedings. Heard in the Supreme Court 9 September 2009.

Roy Cooper, *Attorney General*, *by William P. Hart*, *Senior Deputy Attorney General*, *and Elizabeth F. Parsons*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Katherine Jane Allen*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. ROGER EARL COLEY

No. 544A08

(Filed 9 October 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 193 N.C. App. ——, 668 S.E.2d 46 (2008), finding no prejudicial error in a judgment imposing a sentence of life imprisonment without parole entered 2 August 2006 by Judge W. Russell Duke, Jr. in Superior Court, Edgecombe County, following a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 8 September 2009.

Roy Cooper, *Attorney General*, *by Joan M. Cunningham*, *Assistant Attorney General*, *for the State.*

M. Gordon Widenhouse Jr. for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. PHILIP MORRIS USA INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION, INDIVIDUALLY AND AS SUCCESSOR BY MERGER TO THE AMERICAN TOBACCO COMPANY; AND LORILLARD TOBACCO COMPANY

No. 2A05-4

(Filed 6 November 2009)

1. Contracts— tobacco settlement—offset provision—legislation ending price support system

Defendant tobacco companies (the Settlors) may offset their financial obligations under the Fair and Equitable Tobacco Reform Act of 2004 (FETRA) against all payments due the National Tobacco Grower Settlement Trust even though growers in states that had not participated in the tobacco price support system (Maryland and Pennsylvania) would not benefit from the FETRA provisions that ended the price support system. The language of the Trust is clear. The parties intended that an offset provision apply to the Settlors' entire obligation under the Trust, not just to that portion designated for those receiving FETRA benefits.

2. Contracts— conflicting court opinions—no ambiguity

Conflicting opinions from the Business Court, the Court of Appeals majority, and the Court of Appeals dissent interpreting a provision of the Tobacco Grower Settlement Trust did not indicate an ambiguity. A contract is ambiguous only when, in the opinion of the court, the language is fairly and reasonably susceptible to either of the constructions contended by the parties. In this case, the language of the Trust is clear.

3. Contracts— tobacco settlement—subsequent legislation—obligations offset—trust promise not illusory

An offset provision in the Tobacco Grower Settlement Trust did not render the promise of the Trust illusory where the offset would allow obligations to the Trust to be reduced by amounts paid pursuant to legislation ending the tobacco price support system, even though not all of the states participating in the Trust participated in the price support system or received the benefit of payments made pursuant to its end. To render a promise illusory, the promisor must reserve an unlimited right to determine the nature or extent of performance. Here, no party has an unlimited

right to determine whether, or to what extent, to perform any obligation resulting in or arising from the Trust.

4. Trusts— tobacco settlement—subsequent legislation ending price supports—offsets—no equitable modification

States that did not participate in the tobacco price support system were not entitled to an equitable modification of the Tobacco Grower Settlement Trust because the Settlors (tobacco companies) were allowed to offset their obligations to the Trust by the amount paid as a part of ending the price support system. The statute ending the price support system, FETRA, was not an unanticipated circumstance.

Justice TIMMONS-GOODSON dissenting.

Justice HUDSON joins 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, 194 N.C. App. ——, 669 S.E.2d 753 (2008), reversing an order and opinion entered on 17 August 2007 by Judge Ben F. Tennille in Superior Court, Wake County, and remanding for entry of summary judgment in defendants' favor. On 19 March 2009, the Supreme Court allowed a petition by plaintiffs State of Maryland and Commonwealth of Pennsylvania for discretionary review of additional issues. Heard in the Supreme Court on 10 September 2009.

Douglas F. Gansler, Attorney General of Maryland, by Marlene Trestman, Special Assistant to the Attorney General, pro hac vice, for plaintiff-appellant State of Maryland Certification Entity; and Thomas W. Corbett, Jr., Attorney General of Pennsylvania, by Joel M. Ressler, Chief Deputy Attorney General, pro hac vice, for plaintiff-appellant Commonwealth of Pennsylvania Certification Entity.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr. and Charles F. Marshall III, for defendant-appellees Philip Morris USA Inc., R.J. Reynolds Tobacco Company, and Lorillard Tobacco Company; and Smith Moore Leatherwood LLP, by Gregory G. Holland, for defendant-appellee Philip Morris USA Inc.

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NEWBY, Justice.

This case requires us to once again review the National Tobacco Grower Settlement Trust. We undertake this review to determine whether defendant tobacco companies may, pursuant to the Tax Offset Adjustment provision of the Trust, offset their financial obligation under the Fair and Equitable Tobacco Reform Act of 2004 against all payments due the Trust. We hold that they may and affirm the Court of Appeals.

I. BACKGROUND

Beginning in 1938 and continuing until the operation of the Fair and Equitable Tobacco Reform Act of 2004 (FETRA), Pub. L. No. 108-357, 118 Stat. 1521 (codified at 7 U.S.C. §§ 518 to 519a (2006)), the United States government largely regulated the production and supply of domestic tobacco through a system of price supports and quotas. This system utilized "price supports [to keep] tobacco prices elevated" and implemented quotas to curtail the amount of tobacco grown and "confine[] [its] cultivation . . . to specific tracts of land." *State v. Philip Morris USA Inc.* (*Philip Morris I*), 359 N.C. 763, 765, 618 S.E.2d 219, 220 (2005). The federal government annually adjusted those quota levels to remain responsive to tobacco companies' demand for domestic tobacco. *Id.* In its final years, the system began collapsing under its own weight. *Id.* The tobacco farmers toiling under this system experienced shrinking quotas due to a lessening demand for artificially high-priced domestic tobacco, a product of the federal price support system. *Id.* Growers in Maryland and Pennsylvania, however, did not fully experience the pressure of this collapse because they had chosen to not participate in the federal quota system, a choice that allowed them to grow unlimited quantities of tobacco, without the attendant federal price supports.

The tobacco processing industry also experienced difficulty during the final years of this system. Every state and several other American jurisdictions sued defendant tobacco companies ("Settlors") during the 1990s. 359 N.C. at 765, 618 S.E.2d at 221. These various lawsuits sought to "recover healthcare costs associated with smoking-related illnesses." *Id.* To dispose of these claims, Settlors entered into individual settlement agreements with four states, 359 N.C. at 765 n.2, 618 S.E.2d at 221 n.2, and into the Master Settlement Agreement ("MSA") with the remaining forty-six states and the six other complaining jurisdictions, *id.* at 765, 618 S.E.2d at 221. The

MSA was then entered as a consent decree and final judgment in each of the party jurisdictions. *Id.*

In addition to settling the pending lawsuits, the MSA imposed certain obligations on Settlors to reduce public demand for tobacco products. As the high cost of managing smoking-related health problems was the basis for the lawsuits settled by the MSA, Settlors were required to engage in various advertising efforts aimed at reducing the consumption of tobacco. 359 N.C. at 765 n.3, 618 S.E.2d at 221 n.3. All parties involved understood and indeed hoped that Settlors' efforts would lead to a decreased demand for tobacco. *Id.* at 765, 618 S.E.2d at 221. However, the parties also comprehended that a decrease in the demand for tobacco would adversely affect the economies of tobacco producing states ("Grower States")[1] and the individual tobacco growers. *Id.* To remedy this situation, the MSA required Settlors to "meet with the political leadership of the [Grower States]" to create a method by which to mitigate these potentially harsh financial consequences. *Id.*

The method resulting from negotiations between Grower States and Settlors was the National Tobacco Grower Settlement Trust ("the Trust").[2] Under the Trust, Grower States released Settlors from any claims Grower States might "bring for economic damages suffered as a result of the MSA." *Id.* at 766, 618 S.E.2d at 221. In exchange, Settlors agreed "to spend approximately $5.15 billion on economic assistance." *Id.* at 765, 618 S.E.2d at 221. More specifically, Settlors agreed to make scheduled payments to the Trust each year, beginning in 1999 and ending in 2010. National Tobacco Grower Settlement Trust at A-1 to A-2 (July 19, 1999) [hereinafter Trust Agreement]. The amount of Settlors' scheduled base payments could be increased or decreased by certain adjustment provisions contained in the Trust. *Philip Morris I*, 359 N.C. at 767, 618 S.E.2d at 222 (citing Trust Agreement at A-1 to A-16). It is one of these adjustment provisions that is at issue in this appeal.

The source of the controversy is the Tax Offset Adjustment ("TOA") provision of the Trust. Trust Agreement at A-5 to A-11.

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1. The Grower States are Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia.

2. The Trust was amended by order of the Business Court entered on 6 April 2004 approving an amendment agreed to by the parties following mediated settlement negotiations. That amendment does not affect our analysis in this case, and all references to the Trust are to the original 19 July 1999 document.

Because the parties "kn[ew] federal and state governments might take additional measures to aid tobacco farmers," *Philip Morris I*, 359 N.C. at 767, 618 S.E.2d at 222, the TOA provision was designed to prevent a situation in which Settlors were simultaneously providing aid to tobacco growers under both the Trust and a governmental obligation. The TOA provision of the Trust reads in pertinent part:

> Tax Offset Adjustment. Except as expressly provided below, the amounts to be paid by the Settlors in each of the years 1999 through and including 2010 shall also be reduced upon the occurrence of any change in a law or regulation or other governmental provision that leads to a new, or an increase in an existing, federal or state excise tax on Cigarettes, or any other tax, fee, assessment, or financial obligation of any kind . . . imposed by any governmental authority ("Governmental Obligation") . . . on the Settlors, to the extent that all or any portion of such Governmental Obligation is used to provide:
>
> (i) direct payments to Tobacco Growers or Tobacco Quota Owners;
>
> (ii) direct or indirect payments, grants or loans under any program designed in whole or in part for the benefit of Tobacco Growers, Tobacco Quota Owners or organizations representing Tobacco Growers or Tobacco Quota Owners (including without limitation the stabilization cooperatives, the Farm Bureau or the Commodity Credit Corporation);
>
> (iii) payments, grants or loans to Grower States to administer programs designed in whole or in part to benefit Tobacco Growers, Tobacco Quota Owners or organizations representing Tobacco Growers or Tobacco Quota Owners (including without limitation the stabilization cooperatives, the Farm[] Bureau or the Commodity Credit Corporation); or
>
> (iv) payments, grants or loans to any individual, organization, or Grower State for use in activities which are designed in whole or in part to obtain commitments from, or provide compensation to, Tobacco Growers or Tobacco Quota Owners to eliminate tobacco production.

> The amount of the Governmental Obligation used for any of the purposes set forth above shall be the "Grower Governmental Obligation."
>
> In the event of such a Governmental Obligation, the amount otherwise required to be paid by each Settlor each year (after taking account of all adjustments or reductions hereunder) shall be reduced by an amount equal to the product of the amount of such Governmental Obligation paid in connection with Cigarettes manufactured by the Settlor (or tobacco or tobacco products used by the Settlor to manufacture Cigarettes) for the same year multiplied by the ratio of the Grower Governmental Obligation divided by the amount of the Governmental Obligation, which reduction amount may be carried forward to subsequent years as necessary to ensure full credit to the Settlor. If the Governmental Obligation results from a law or regulation or other governmental provision adopted by a Grower State, or by a political subdivision within such Grower State, the amount that a Settlor may reduce its payment to the Trust in any one year shall not exceed the product of the amount the Settlor otherwise would have paid to the Trust in that year in the absence of the Tax Offset Adjustment multiplied by the allocation percentage for the pertinent Grower State set forth in Section 1.03.

Trust Agreement at A-5 to A-7.

As the parties anticipated, Congress, by enacting FETRA, placed on Settlors a financial obligation that would allow reduction of their payments to the Trust under the TOA provision. FETRA ended the federal price support and quota system in the United States tobacco market. As we explained in *Philip Morris I*, FETRA "terminated the price control/quota system for U.S. tobacco beginning with the 2005 tobacco crop." 359 N.C. at 769, 618 S.E.2d at 223. To accomplish this, Congress instructed the "U.S. Secretary of Agriculture to offer tobacco farmers annual payments during each of fiscal years 2005 through 2014 in exchange for ending marketing quotas and related price supports." *Id.* at 770, 618 S.E.2d at 223 (citing FETRA §§ 622 to 623). The funding for these payments is provided by "[q]uarterly assessments against tobacco manufacturers and importers," a group that includes Settlors. *Id.* at 770, 618 S.E.2d at 223-24. Moreover, "FETRA payments to tobacco farmers between 2005 and 2014 will approach $9.6 billion." *Id.* at 769, 618 S.E.2d at 223 (citation omitted). As the Court of Appeals correctly noted, "It is undisputed that the amounts Settlors are required to pay to tobacco farmers under

FETRA exceeds" Settlors' remaining obligation to the Trust. *State v. Philip Morris USA Inc.*, —— N.C. App. ——, ——, 669 S.E.2d 753, 755 (2008).

In *Philip Morris I*, this Court examined the TOA provision of the Trust in light of Congress's enactment of FETRA in order to determine exactly when Settlors could offset their obligation under FETRA against amounts due the Trust. There, Settlors claimed that the enactment of FETRA imposed a financial obligation on them, requiring application of the TOA provision and relieving Settlors of their duty to the Trust immediately "upon the occurrence of [the] change in . . . law." Trust Agreement at A-5. The Trustee claimed, however, that Settlors were not entitled to cease payments to the Trust until Settlors actually started making payments under FETRA. The Trustee stated that the change in law was only the first step leading to the later application of the TOA provision. To support this contention, the Trustee pointed to the entire TOA provision, which states in pertinent part:

> In the event of such a Governmental Obligation, the amount otherwise required *to be paid* by each Settlor each year . . . shall be reduced by an amount equal to the product of the amount of such Governmental Obligation *paid* in connection with Cigarettes manufactured by the Settlor . . . for the same year multiplied by the ratio of the Grower Governmental Obligation divided by the amount of the Governmental Obligation, which reduction amount may be carried forward to subsequent years as necessary to ensure full credit to the Settlor.

Id. at A-7 (emphasis added). This language, the Trustee explained, requires, *inter alia*, the amount of the Governmental Obligation "paid" to be known before the amount by which Settlors may reduce their payments under the TOA provision can be determined.

This Court, after examining the language of the Trust and FETRA, decided that the Trustee's construction of the language of the TOA provision embodied the intent of the parties at the time the Trust was executed. Despite the tension created by the TOA provision's express timing statement that "the amounts to be paid by the Settlors . . . shall . . . be reduced *upon the occurrence* of any *change in a law*," *id.* at A-5 (emphasis added), we concluded that reading these words alone to determine the timing of the offset failed to give other words in the TOA provision their ordinary meaning. 359 N.C. at 775, 618 S.E.2d at 227. The TOA provision clearly explained that

Settlors must know the amount they had paid pursuant to a Governmental Obligation before they can determine the amount by which to reduce their payments to the Trust. *Id.* at 775-76, 618 S.E.2d at 227. Finally, using the Trust's purpose to buttress our construction of the conflicting language found in the TOA provision, we said that applying the TOA provision before Settlors began making payments under FETRA could result in a scenario in which all Settlors made no payments, either under FETRA or the Trust, and all Tobacco Growers and Tobacco Quota Owners received no benefits, either from FETRA or the Trustee. *Id.* at 779-80, 618 S.E.2d at 229. Thus, we concluded that the TOA provision was not intended to create a gap in payments and could be applied not when FETRA was signed into law, but when Settlors have "actually assume[d] the burden of FETRA." *Id.* at 781, 618 S.E.2d at 230. Following our decision, Settlors continued funding the Trust until they began making required payments under FETRA. At the time Settlors ceased funding the Trust and began paying FETRA assessments, Settlors had paid nearly $2.7 billion to the Trust, with nearly $25 million of that sum being paid to Maryland and Pennsylvania.

The Maryland Certification Entity and the Pennsylvania Certification Entity ("the States") recognized that FETRA was unlikely to provide benefits to their tobacco growers who were covered by the Trust because those growers had not participated in the federal quota and price support system. The measure originally introduced in the House of Representatives provided no benefits to the States' growers. As the legislation creating FETRA moved through the political process, the bill underwent several revisions. The Senate amended the bill on 15 July 2004 to allow "Tobacco Community Economic Development Grants" of $20 million to Maryland and $14 million to Pennsylvania. Tobacco Market Transition Act of 2004, S. Amend. 3563, amending S. Amend. 3562 to H.R. 4520, 108th Cong. § 380O(c)(1), (2) (2004). The bill signed into law by the President on 22 October 2004, however, did not include those Grants. As a result, on 17 December 2004, the States moved to clarify or modify the Trust so they would continue receiving payments from the Trust for the benefit of their growers. The States supplemented their motion with a Statement of Claim For Continued Payments on 24 June 2005.

The States made two arguments in the Business Court. First, the States claimed that they were entitled to continued benefits from the Trust because none of Settlors' financial obligation under FETRA was being used to benefit their growers. Second, the States claimed that

if the Trust allowed Settlors to discontinue payments to the Trust, then the Trust should be modified to require continued payments for the benefit of growers in the States. In support of their modification argument, the States claimed that the parties did not anticipate a situation in which Congress benefitted some tobacco growers and not others. Settlors responded that their payment obligations under FETRA extinguished their obligation to fund the Trust. In granting summary judgment, the Business Court agreed with the States that the Trust, in light of its stated purpose to benefit tobacco farmers, requires Settlors to continue making payments to the Trust for the benefit of the States.

The Court of Appeals disagreed with the Business Court's reading of the Trust. Basing its opinion on this Court's decision in *Philip Morris I* and on the plain language of the Trust, the Court of Appeals held that the TOA provision allows Settlors to offset the payments made under FETRA against Settlors' obligation to the Trust. *State v. Philip Morris USA Inc.*, —— N.C. App. at ——, 669 S.E.2d at 757. Relying on a dissenting opinion filed at the Court of Appeals, the States appealed as of right to this Court on the issue of whether Settlors are required to continue making payments to the Trust for the benefit of the States. This Court allowed discretionary review on the issue of equitable modification of the Trust and the derivative issue of what evidence could be considered in determining the propriety of any equitable modification.

II. ANALYSIS

[1] As in *Philip Morris I*, this is a case of contract interpretation, and our review is de novo. *Philip Morris I*, 359 N.C. at 773, 618 S.E.2d at 225 (citation omitted).

Further, in our first opinion in this case, we set out the principles of contract interpretation applicable to the Trust:

> Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution. *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) ("A consent judgment is a court-approved contract subject to the rules of contract interpretation."). Intent is derived not from a particular contractual term

> but from the contract as a whole. *Jones v. Casstevens*, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) (" 'Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole.' ") (citation omitted).

Id. (footnote omitted). However, we are also mindful that in reviewing the entire agreement, our task is not "to find discord in differing clauses, but to harmonize all clauses if possible." *Peirson v. Am. Hdwe. Mut. Ins. Co.*, 249 N.C. 580, 583, 107 S.E.2d 137, 139 (1959) (citations omitted). Furthermore, when the terms of a contract "are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written," *Jones*, 222 N.C. at 413, 23 S.E.2d at 305 (citations omitted), and "enforce[d] . . . as the parties have made it," *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (citations omitted).

Here, the disagreement among the parties lies in the portion of the TOA provision determining the amount by which Settlors may reduce their obligation to the Trust: specifically, whether Settlors may offset their FETRA obligation against the amount due the Trust for all Grower States, or whether Settlors are entitled to offset their FETRA obligation against only the amount designated for those Grower States actually receiving FETRA benefits. To resolve this dispute, we first examine the language of the Trust.

The TOA provision contains the formula used in determining the amount by which Settlors may reduce their payments to the Trust following the creation of a Governmental Obligation. That formula provides that the amount of the payments otherwise required of Settlors "shall be reduced by an amount equal to the product of the amount of such Governmental Obligation paid . . . multiplied by the ratio of the Grower Governmental Obligation divided by the amount of the Governmental Obligation." Trust Agreement at A-7.

Before we interpret this formula, we are constrained to mention several other principles of contract interpretation applicable to the provision at issue. If the parties agreed to define a term, and the Trust "contains a definition of a term used in it, this is the meaning which must be given to that term wherever it appears in the [Trust], unless the context clearly requires otherwise." *Wachovia Bank & Tr.*, 276 N.C. at 354, 172 S.E.2d at 522 (citation omitted). Furthermore, any undefined, nontechnical word is "given a meaning consistent with the

sense in which [it is] used in ordinary speech, unless the context clearly requires otherwise." *Id.* (citing *Peirson*, 249 N.C. at 583, 107 S.E.2d at 139). "Where the immediate context in which words are used is not clearly indicative of the meaning intended, resort may be had to other portions of the [Trust] and all clauses of it are to be construed, if possible, so as to bring them into harmony." *Wachovia Bank & Tr.*, 276 N.C. at 355, 172 S.E.2d at 522 (citing *Peirson*, 249 N.C. at 583, 107 S.E.2d at 139).

The TOA provision defines "Governmental Obligation" and "Grower Governmental Obligation." *Id.* at A-6. Accordingly, we must ascribe to these terms the meanings the parties intended. *See, e.g.*, *Wachovia Bank & Tr.*, 276 N.C. at 354, 172 S.E.2d at 522. The parties defined the term "Governmental Obligation" as, *inter alia*, a "change in a law . . . that leads to a new . . . financial obligation of any kind . . . imposed by any governmental authority . . . on the Settlors." Trust Agreement at A-5 to A-6. The parties described a "Grower Governmental Obligation" as a Governmental Obligation that is used for "any" number of specified purposes, including "direct payments to Tobacco Growers ***or*** Tobacco Quota Owners." *Id.* at A-6 (emphasis added). Further, the parties agreed that the words " 'any' " and " 'or' " would be read as having the same meaning, and that meaning is " 'any one or more or all of.' " *Id.* para. 4.09 (stating further that words "in the text of this Agreement shall be read as the singular or plural and as the masculine, feminine or neuter as may be applicable or permissible in the particular context"). Thus, so long as the Governmental Obligation is being used to make payments to Tobacco Growers, Tobacco Quota Owners, both Tobacco Growers and Tobacco Quota Owners, or any subset of Tobacco Growers or Tobacco Quota Owners, the TOA provision allows Settlors to offset the total amount of the Governmental Obligation.[3]

The parties also defined the terms "Tobacco Grower" and "Tobacco Quota Owner." *Id.* para. 4.01. The Trust provides:

> "Tobacco Grower" shall mean an individual or entity who, during a base period established by the Certification Entity for the pertinent Grower State, was ***one or more*** of the following:

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3. Any number divided by itself is 1. Further, any number multiplied by 1 remains the same. Thus, if the Grower Governmental Obligation equals the Governmental Obligation, *i.e.*, Settlors' payments are entirely used for a purpose stated in the TOA provision, then the formula ratio is 1, and Settlors can reduce their payments to the Trust by the amount they pay under FETRA.

(i) the principal producer of tobacco for use in Cigarettes on a farm where tobacco was produced pursuant to a tobacco farm marketing quota or farm acreage allotment established under the Agricultural Adjustment Act of 1938 . . . ;

(ii) a producer who owned a farm that produced tobacco for use in Cigarettes pursuant to a lease and transfer to that farm of all or a part of a tobacco farm marketing quota or farm acreage allotment established under the Agricultural Adjustment Act of 1938;

(iii) a producer who rented farm land to produce tobacco for use in Cigarettes under a tobacco farm marketing quota or farm acreage allotment established under the Agricultural Adjustment Act of 1938;

(iv) an individual or entity in Maryland or Pennsylvania who in connection with the production of Maryland Type 32 tobacco for use in Cigarettes was one of the following:

(a) the principal producer of such tobacco (which may include an operator, tenant, or sharecropper who shared in the risk of producing a crop and who was entitled to share in the revenues derived from marketing the Cigarette tobacco crop from the farm); or

(b) a producer who owned or rented a farm that produced Maryland Type 32 tobacco for use in Cigarettes.

Id. para. 4.01(a) (emphasis added) (internal citations omitted). The Trust further provides: " 'Tobacco Quota Owner' shall mean the owner of record of a tobacco farm marketing quota or farm acreage allotment established under the Agricultural Adjustment Act of 1938 during a base period established by the Certification Entity for the Grower State in which the farm is located." *Id.* para. 4.01(b) (internal citation omitted).

Upon applying these definitions contained in the Trust and the ordinary meaning of nontechnical words, the language of the TOA provision is clear. The TOA provision may be implemented when, for example, a financial obligation on Settlors is used to make payments to "principal producer[s] of tobacco . . . produced pursuant to a tobacco farm marketing quota or farm acreage allotment established under the Agricultural Adjustment Act of 1938." *Id.* para. 4.01(a)(i). The offset is then allowed because the financial obliga-

tion on Settlors is used to make "direct payments to Tobacco Growers." *Id.* at A-6. Similarly, the TOA provision may be applied when Settlors' assessments paid pursuant to a Governmental Obligation are used to pay the "owner[s] of record of . . . tobacco farm marketing quota[s] or farm acreage allotment[s] established under the Agricultural Adjustment Act of 1938," *id.* para. 4.01(b), because the assessments are being used to make "payments to . . . Tobacco Quota Owners," *id.* at A-6. Therefore, and controlling in the case *sub judice*, all financial obligations imposed on and paid by Settlors pursuant to FETRA used to make payments to an individual or entity described in *any* of the four, alternative categories of Tobacco Grower, *or* used to make payments to an individual or entity described in the Trust's definition of Tobacco Quota Owner, can be offset against Settlors' obligation to the Trust. An examination of the Trust as a whole has revealed no text that contradicts the meaning of the plain language of the TOA provision.

Since the language of the Trust is clear, we must infer the intent of the parties "from the words of the contract." *Walton*, 342 N.C. at 881, 467 S.E.2d at 411 (citing *Lane*, 284 N.C. at 410, 200 S.E.2d at 624-25). The TOA provision is firm in its command that Settlors' obligation to the Trust "*shall . . . be reduced*" by the total amount of any financial obligation used to benefit *any one* of the numerous individuals or entities listed in any of the four disjunctive categories by *any method* described in the category in which the benefitted individuals or entities are found, even if it be only one type of individual by only one method. Trust Agreement at A-5 to A-6 (emphasis added). The TOA provision's definition of Grower Governmental Obligation reinforces that *any* benefit flowing from Settlors to *any* of the individuals or entities listed, without regard to geographic location, in *any* of the four disjunctive categories, "*shall be* the 'Grower Governmental Obligation.' " *Id.* (emphasis added). The parties agreed that the words " 'any' " and " 'or' " would each mean " 'any one or more or all of,' " and the language used by the parties indicates that the word "or" as used twice in the definition was given its common, ordinary meaning by the parties. "Given the degree of lawyerly scrutiny each word of the Trust Agreement doubtless underwent, we are not inclined to interpret the terms of Schedule A in a fashion that deviates from the meaning commonly ascribed to them." *Philip Morris I*, 359 N.C. at 775, 618 S.E.2d at 227. Using the appropriate meanings of these words, the amount of the Governmental Obligation on Settlors under FETRA being used to make payments to *any* of the four disjunctive categories of Tobacco Growers, *or* to To-

bacco Quota Owners, constitutes the Grower Governmental Obligation. Consequently, we conclude that the parties intended the TOA provision to offset Settlors' entire obligation to the Trust, not only that portion designated for those now receiving FETRA benefits.

Since the plain language of the TOA provision, after examining the Trust as a whole, is clear and unambiguous, it does not permit construction and our inquiry ends here. *See Wachovia Bank & Tr.*, 276 N.C. at 354, 172 S.E.2d at 522 (explaining that if there is no ambiguity the court does not apply rules of construction); *Jones*, 222 N.C. at 413, 23 S.E.2d at 305 (stating that when contract terms "are plain and unambiguous, there is no room for construction"); *Wallace v. Bellamy*, 199 N.C. 759, 763, 155 S.E. 856, 859 (1930) ("In the interpretation of contracts the general rule is that a court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language . . . ."); *McCain v. Hartford Live Stock Ins. Co.*, 190 N.C. 549, 551, 130 S.E. 186, 187 (1925) ("Rules of construction are only aids in interpreting contracts that are either ambiguous or not clearly plain in meaning, either from the terms of the contract itself, or from the facts to which it is to be applied."). An examination reaching beyond the face of the whole contract to ascertain the parties' intent is necessary only when construing an ambiguous contract term. *Jones*, 222 N.C. at 413-14, 23 S.E.2d at 305; *Simmons v. Groom*, 167 N.C. 271, 275, 83 S.E. 471, 473 (1914) ("It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract . . . ." (citation and internal quotation marks omitted)).

Assuming *arguendo*, however, that the TOA provision is ambiguous, the parties' intent, illustrated by inferences to be made from the Trust as a whole and the Trust's purpose, accords with the express language of the TOA provision. The plain language of the TOA formula is consistent with other portions of the TOA provision. Realizing that the formula created in the TOA provision broadly defined "Governmental Obligation" to include virtually any obligation imposed by any governmental body, the parties included in the TOA provision a method by which to prevent one Grower State from imposing an obligation on Settlors that would result in decreased payments to other Grower States. *See* Trust Agreement at A-7. This portion of the TOA provision allows Settlors to offset amounts paid under any obligation imposed by "a Grower State, or by a political subdivision within such Grower State," only by the amount that Grower State would have otherwise received according to the "allo-

cation percentage for the pertinent Grower State set forth in Section 1.03" of the Trust. *Id.* As the plain language indicates, this portion only applies to obligations imposed at the state or local level. There is no comparable portion of the TOA provision that reduces Settlor payments following a federal Governmental Obligation based on which state is receiving benefits from that Governmental Obligation. As such, like the Court of Appeals, we conclude that the sophisticated parties to the Trust intended to apply the TOA provision to reduce those amounts due the state or states receiving benefits from a Governmental Obligation only when dealing with an obligation created by a state or local government. *State v. Philip Morris USA Inc.*, ––– N.C. App. at –––, 669 S.E.2d at 757 (citing *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) ("It must be presumed the parties intended what the language used clearly expresses and the contract must be construed to mean what on its face it purports to mean." (citations omitted))).

Moreover, the parties understood how to express their intention to have Settlors reduce their payments to the Trust based on which states were receiving benefits from a Governmental Obligation and apparently chose not to do so with respect to an obligation imposed by the federal government. However, the States contend that, for our reading of the TOA provision to be correct, there would need to be additional language in the provision stating that the funds paid by Settlors pursuant to a Governmental Obligation used to benefit individuals or entities "IN ANY ONE OR MORE GROWER STATES" would constitute the Grower Governmental Obligation. In the absence of this additional language allowing Settlors to reduce their payments without reference to which states are receiving governmental benefits, the States contend, Settlors are prohibited from reducing their payments in any manner other than by the percentage of those payments to the Trust originally designated for those states now receiving benefits under a Governmental Obligation.

Section 1.03 of the Trust, however, designates the percentage of Settlors' payments each Grower State is to receive. Trust Agreement para. 1.03. The parties explicitly instructed Settlors to consult Section 1.03 when determining the amount by which to reduce their payments to the Trust in several portions of the TOA provision by including express references to Section 1.03. Significantly, however, the parties instructed Settlors to consult Section 1.03 in the TOA provision only when discussing reductions in Settlor payments following an obligation imposed by a state or local government. *Id.* at A-7 to

A-8. That the TOA provision instructs Settlors to consult Section 1.03 only when referring to a financial obligation imposed by a government other than the federal government is consistent with the plain language of the TOA provision that Settlors may offset payments made pursuant to FETRA against their obligation to the Trust without any reference to which states are receiving FETRA benefits. To read the TOA provision otherwise would impermissibly add an additional requirement to consult Section 1.03 that the parties did not choose to include. *Hartford Accident & Indem.*, 226 N.C. at 710, 40 S.E.2d at 201-02 ("The Court, under the guise of construction, cannot reject what the parties inserted or insert what the parties elected to omit." (citations omitted)).

Furthermore, the organization of the Trust document is consistent with an intention for Settlors to not consult Section 1.03 without an explicit instruction to do so. Schedule A of the Trust contains the Trust's "PAYMENT SCHEDULE." Trust Agreement at A-1. This part of the Trust establishes the amounts *Settlors* must pay to the Trust and the dates by which *Settlors* must make those payments. *Id.* at A-1 to A-18. Generally, Schedule A sets forth Settlors' total base payment figures for each of the years 1999 through 2010. *Id.* at A-2. Schedule A then details various adjustments, including the TOA provision, that must be made to the total base payment figure to determine the actual amount Settlors must pay. *Id.* at A-4 to A-16. Schedule A also provides the method for determining what percentage of the adjusted total amount must be paid by each Settlor. *Id.* at A-2 to A-4. Conversely, Section 1.03 of the Trust commands the *Trustee* to allocate a certain percentage of the Trust funds to each Grower State. *Id.* para. 1.03. Moreover, this command to the Trustee regarding allocation of disbursements from the Trust is contained in a separate part of the Trust. There is neither an instruction to Settlors to look to Section 1.03 nor a reference to Section 1.03 regarding offsetting payments made pursuant to an obligation imposed by the federal government. Thus, the organization of the Trust document is consistent with the plain language of the TOA provision.

The manner in which the Trust operates also precludes the inference that Settlors may offset their FETRA obligation against only those amounts that would have been disbursed from the Trust to those Grower States now receiving FETRA benefits. Once the Trust was executed and began operation, Settlors no longer engaged the other parties to the Trust on a state-specific basis. Settlors made annual payments to the Trust in an amount representing the benefit

all Grower States would receive.[4] *Id.* at A-1 to A-2. After Settlors made payments to the Trust, the Trustee could then set aside expenses incurred or to be incurred in administering the Trust. *Id.* para. 1.03. After the Trustee set aside funds for administrative expenses, the Trustee would then allocate the remaining funds among the accounts of the several Grower States. *Id.* The Trust operated in this manner, with Settlors paying a total sum unaffected by the percentage that any Grower State was to receive, unless the parties provided Settlors a specific contrary instruction. On several occasions, the parties did provide Settlors with a contrary instruction, and Settlors were thus able to reduce the amount of their payment to the Trust by an amount related to a specific Grower State. *E.g.*, Trust Agreement at A-7 (Tax Offset Adjustment) (instructing Settlors to consult Trustee's allocation percentage table following a Grower State-imposed Governmental Obligation); *id.* at A-8 (Tax Offset Adjustment) (allowing Settlors to consult Trustee's allocation percentage table following a Grower State's imposition of an obligation on Settlors to "purchase or use . . . a minimum quantity or percentage of domestically grown tobacco for Cigarettes"); *id.* at A-11 (MSA Finality Adjustment) (enabling Settlors to consult the Trustee's allocation percentage table and to reduce their payments to the Trust by the amount a Grower State would have been allocated by the Trustee if that Grower State had achieved State-Specific Finality under the MSA). The parties did not instruct Settlors to consult the Trustee's allocation percentage table in determining the amount by which to reduce their payments to the Trust following the imposition of a financial obligation by the federal government. Because the Trust operates in such a manner that Settlors would reduce their total payments to the Trust by the total amount of any Governmental

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4. Settlors' total base payment amounts are listed as:

1999	$380,000,000
2000	$280,000,000
2001	$400,000,000
2002	$500,000,000
2003	$500,000,000
2004	$500,000,000
2005	$500,000,000
2006	$500,000,000
2007	$500,000,000
2008	$500,000,000
2009	$295,000,000
2010	$295,000,000

Trust Agreement at A-2.

Obligation, unless Settlors were specifically instructed to reduce their payments on a state-specific basis, Settlors can offset their FETRA obligation against the total amount due the Trust. The parties agreed to apply the offset provisions, including the TOA provision, in this manner, and the manner in which the Trust operates only confirms this agreement between the parties and precludes the States' proposed reading of the TOA provision.

Finally, the TOA provision is consistent with the express purpose of the Trust. In *Philip Morris I*, we noted that "[t]he preamble announces the purpose of the Trust: '[T]o provide aid to Tobacco Growers and Tobacco Quota Owners and thereby to ameliorate potential adverse economic consequences to the Grower States.' " 359 N.C. at 766, 618 S.E.2d at 221 (second alteration in original). The parties, in expressing their purpose, used terms that they defined in the Trust. Trust Agreement para. 4.01. As explained earlier, an "individual or entity" is a Tobacco Grower under the Trust if he, she, or it "was [listed in] *one or more*" of four categories. *Id.* (emphasis added). Three of those four categories appear to fall within the definition of "producer of quota tobacco" under FETRA. *See* 7 U.S.C. § 518(6) (2006). Further, except for a possible difference in the time at which one must own the quota, the Trust's definition of Tobacco Quota Owner accords with the definition of "tobacco quota holder" under FETRA. *See id.* § 518(9) (2006). As such, the TOA provision is consistent with the Trust's express purpose because Tobacco Growers and Tobacco Quota Owners are receiving benefits under FETRA, thus relieving Settlors of their burden under the Trust.

Notably, the parties did not say their purpose was to ensure ***all*** Tobacco Growers and Tobacco Quota Owners received aid. In fact, the parties went to great lengths to ensure that the Trust was not read in such a manner. *See* Trust Agreement paras. 4.01, 4.09; *id.* at A-6. As long as Tobacco Growers and Tobacco Quota Owners are receiving benefits under FETRA, the purpose of the Trust is satisfied. In *Philip Morris I*, we explained, in rejecting Settlors' proposed reading of the TOA provision, that the purpose of the Trust was for Settlors to provide benefits to Tobacco Growers and Tobacco Quota Owners. 359 N.C. at 777, 779, 618 S.E.2d at 228-29. We emphasized the Trust's purpose because Settlors' reading would have allowed Settlors to pay nothing while no Tobacco Grower and no Tobacco Quota Owner received any benefit. Here, the circumstances are such that Settlors are making payments under FETRA, and Tobacco Growers and Tobacco Quota Owners are receiving benefits under FETRA—cir-

cumstances resulting in the fulfillment of the very purpose we examined and protected in *Philip Morris I*.

As the language of the TOA provision is clear and unambiguous, we hold that under the TOA provision, Settlors may offset all of their payments made under FETRA for the benefit of Tobacco Growers or Tobacco Quota Owners without any reference to which states are receiving benefits under FETRA. So long as Settlors' obligation under FETRA exceeds their obligation to the Trust, Settlors owe nothing to the Trust.

[2] The States alternatively contend that the TOA provision is ambiguous and should be construed in their favor. In support of their argument, the States explain that the Business Court and the dissenting opinion at the Court of Appeals interpreted the TOA provision in their favor, while the majority at the Court of Appeals interpreted the provision in Settlors' favor. These facts, however, are not what makes a contract term ambiguous. A contract term is ambiguous only when, "in the opinion of the court, the language of the [contract] is fairly and reasonably susceptible to either of the constructions for which the parties contend." *Wachovia Bank & Tr.*, 276 N.C. at 354, 172 S.E.2d at 522 (citation omitted); *see also Walton*, 342 N.C. at 881-82, 467 S.E.2d at 412 ("Parties can differ as to the interpretation of language without its being ambiguous . . . ."). As we have explained, the language of the TOA provision of the Trust is clear, and a federal government obligation does not result in application of the TOA provision to offset only those amounts to be remitted to those states that receive benefits under that federal obligation. Since the language of the TOA provision is clear, we are unable to, "under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon [Settlors] which [they] did not assume and for which the [States] did not pay." *Wachovia Bank & Tr.*, 276 N.C. at 354, 172 S.E.2d at 522 (citations omitted).

[3] Furthermore, the TOA provision does not render illusory any promise in the Trust or in any release signed in exchange for the execution of the Trust. The States contend that a reading of the TOA provision other than theirs would allow "Settlors to avoid *any* obligation to address the economic concerns of Maryland and Pennsylvania growers if FETRA had gone into effect before the first Trust payment became due." This possibility, however, does not render illusory any promise or release from liability. To render a promise illusory, the promisor must reserve "an unlimited right to determine

the nature or extent of his performance." *Wellington-Sears & Co. v. Dize Awning & Tent Co.*, 196 N.C. 748, 752, 147 S.E. 13, 15 (1929). Here, Settlors agreed to make base payments, subject to certain adjustments contained in the Trust. Trust Agreement at A-1. The TOA provision, which is one of the adjustments contained in the Trust, allows Settlors to offset payments made under FETRA against payments due the Trust. The parties agreed to include the TOA provision in the Trust, and the States executed releases in exchange for Settlors' promise to pay the amount derived after applying all adjustments to the base payment.

To the extent that the States contend they would not have released potentially valuable claims against Settlors for economic damage resulting from the MSA if Settlors' obligation to the Trust could be eliminated without the States receiving commensurate benefits from the Governmental Obligation, the language of the TOA provision is contrary to their contention. The TOA provision allows Settlors to offset all benefits flowing from them to Tobacco Quota Owners via a Governmental Obligation. Maryland and Pennsylvania growers did not participate in the federal tobacco quota and price support system. Thus, any Governmental Obligation providing benefits only to Tobacco Quota Owners would have necessarily excluded those growers in Maryland and Pennsylvania because those growers did not participate in the federal quota system. The States agreed to the inclusion of the provision that allows Settlors' obligation to the Trust to terminate upon the satisfaction of a Governmental Obligation that provides "direct payments to . . . Tobacco Quota Owners." Trust Agreement at A-6. This provision, by the parties' choice, allows the States' benefits from the Trust to end even though the States would not then be receiving any governmental benefits if Congress had chosen to focus its support on only Tobacco Quota Owners.

Moreover, any Governmental Obligation imposed on Settlors is necessarily a result of the political process, which involves representatives of Maryland and Pennsylvania citizens, including growers, at the federal level, and at the state and local levels. While the parties to the Trust may have input in the political process that determines whether a Governmental Obligation is imposed, no party has an unlimited right to determine whether, or to what extent, to perform any obligation resulting in or arising from the Trust. Thus, the TOA provision does not render illusory any promise or release made or executed by the parties.

[4] Finally, the States contend that they are entitled to equitable modification of the Trust to require Settlors to continue making payments for their benefit. The Business Court and the Court of Appeals addressed the States' argument on this point. Though neither cited the section of our General Statutes under which the States make their claim, the Business Court declined to make its decision on equitable grounds, *State v. Philip Morris USA, Inc.*, No. 98 CVS 14377, 2007 WL 2570239, at *6-7 (Wake County Super. Ct. Aug. 17, 2007), and the Court of Appeals rejected the substance of the States' argument on this point, *State v. Philip Morris USA Inc.*, ––– N.C. App. at –––, 669 S.E.2d at 756-57.

The States claim they are entitled to modification of the Trust under N.C.G.S. § 36C-4-412(a). This statute provides that "[t]he court may modify the administrative or dispositive terms of a trust . . . if, because of circumstances not anticipated by the settlor, modification . . . will further the purposes of the trust." N.C.G.S. § 36C-4-412(a) (2007). To obtain relief under this statute, the States must show, *inter alia*, an unanticipated circumstance. FETRA, however, is not such a circumstance. As we said in *Philip Morris I*, "[p]roblems with the tobacco industry prompted members of Congress to introduce more than twenty tobacco buyout bills from 1997 through 2004." 359 N.C. at 769, 618 S.E.2d at 223. Furthermore, the States knew that their tobacco growers did not participate in the federal quota and price support system and thus, may not be included in a federal buyout. Indeed, the portion of the Trust's definition of Tobacco Grower that specifically covers growers in Maryland and Pennsylvania is the only provision that does not include a reference to the Agricultural Adjustment Act of 1938. Trust Agreement para. 4.01(a)(iv). These events indicate that the States knew they were treated differently as a result of their choice to not participate in the federal price control and quota system and knew that they may not be covered by any federal buyout legislation targeting that system. Unfortunately, during the political process resulting in FETRA, the benefits that would have been provided to the States under the Senate amendment to the buyout bill were not included in the final version signed into law. The inclusion of the TOA provision indicates that a federal buyout like FETRA was an anticipated circumstance for which the parties created a plan. Accordingly, the States are not entitled to modification under N.C.G.S. § 36C-4-412(a). Because we hold that the States are not entitled to modification of the Trust, we necessarily do not reach the issue of what evidence may be used in undertaking such a modification.

III. DISPOSITION

The Court of Appeals correctly held that Settlors may, pursuant to the TOA provision, offset all payments made under FETRA against all payments due the Trust, without regard to which states are receiving benefits under FETRA. That decision is therefore affirmed.

AFFIRMED.

Justice TIMMONS-GOODSON dissenting.

After citing rules of contract interpretation that require examining all component parts of a contract to determine the parties' intent, the majority devotes substantially all of its analysis to the "plain language" of the TOA, neglecting other provisions of the Trust Agreement that should inform its reading of the TOA. The majority concludes that, at the time of execution, the parties intended that a federal governmental obligation aiding some Grower States' tobacco farmers would completely discharge Settlors' obligation to fund the Trust to support tobacco farmers receiving no benefit from the federal governmental obligation. By so concluding, the majority does a literal about-face from its analysis in *Philip Morris I* of the very same Trust Agreement and TOA provision. Because I believe the majority disregards other language in the Trust Agreement that necessarily informs the correct interpretation of the TOA, and in doing so departs from its previous interpretation of the same provision, I must respectfully dissent.

"Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution. . . . Intent is derived not from a particular contractual term but from the contract as a whole." *State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (*Philip Morris I*) (citing, *inter alia*, *Jones v. Casstevens*, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) ("Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole." (citation and internal quotation marks omitted))). Therefore, a true assessment of the parties' intent at the moment they executed an agreement requires a searching evaluation of the entire agreement and not merely the component part that lies at the heart of the dispute. Thus, this Court's duty is to diligently examine all relevant language in the Trust Agreement, including the Master Settlement Agree-

ment (MSA) and individual releases referenced in the Trust Agreement, to arrive at the interpretation that best reflects the parties' intent when they executed the TOA. *See Robbins v. C.W. Myers Trading Post, Inc.*, 253 N.C. 474, 477, 117 S.E.2d 438, 440-41 (1960) ("Individual clauses in an agreement and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect.") (citation omitted); *see also Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962); *Westinghouse Elec. Supply Co. v. Burgess*, 223 N.C. 97, 100, 25 S.E.2d 390, 392 (1943).

Consistently with the principles noted above, this Court has previously interpreted a contract term that purported to relieve a defendant of a payment obligation, like the TOA in this case, by examining all relevant language in the contract. In *Burgess*, for example, the Court applied the following rule:

> "Great liberality is allowed in construing releases. The intent is to be sought from the whole and every part of the instrument; and where general words are used, if it appears by other clauses of the instrument, or other documents, definitely referred to, that it was the intent of the parties to limit the discharge to particular claims only, courts, in construing it, will so limit it. . . . In determining the effect of an instrument containing words that taken by themselves would operate as a general release, all the provisions of the instrument must be read together; and if on such reading an intent to limit the scope of the release appears, it will be restricted to conform to such intent."

223 N.C. at 100, 25 S.E.2d at 392 (alteration in original) (citation omitted).

Upon applying the appropriate rule, there is good reason to doubt the majority's interpretation of the parties' intent for the TOA. The first six "WHEREAS" clauses of the Trust Agreement make clear that Settlors' agreement to establish the Trust was a quid pro quo for the Grower States' release of claims for smoking-related health care costs and potential claims resulting from the adverse economic consequences of the MSA. Indeed, the Court acknowledged this quid pro quo in *Philip Morris I*:

> Despite its cost, the Trust appealed to Settlors for financial reasons. Funding the Trust satisfied the requirement of the MSA "to address the economic concerns of the Grower States." In

> other words, Settlors agreed to the Trust because doing so was a condition of the settlement that had relieved them of potentially bankrupting liability for smoking-related healthcare costs. Additionally, the Trust shields Settlors from claims the Grower States might otherwise bring for economic damages suffered as a result of the MSA.

Philip Morris I, 359 N.C. at 766, 618 S.E.2d at 221 (footnote omitted). Thus, at the very beginning of the Trust Agreement, the parties manifested an intention that the Trust should "provide aid to Tobacco Growers" and "Tobacco Quota Owners" in the several Grower States in exchange for those Grower States releasing Settlors from pending and potential tobacco-related claims.

Settlors bargained for separate releases with Maryland and Pennsylvania to achieve the same quid pro quo. Maryland and Pennsylvania's Attorneys General executed the releases "contemporaneously with and as a condition to the creation of the National Tobacco Grower Settlement Trust." As the Business Court noted, "It makes little sense that Maryland and Pennsylvania would execute releases of substantial claims in return for an agreement that payments to their farmers could be eliminated by payments to farmers in other states who were already receiving the benefits from the federal tobacco quota program." *State v. Philip Morris USA, Inc.*, No. 98 CVS 14377, 2007 WL 2570239, at *5 (Wake County Super. Ct. Aug. 17, 2007).

Also highly relevant, but scantily discussed in the majority opinion, are other provisions in the Trust Agreement and the TOA itself that contemplate a state-by-state application of adjustments and disbursements of the Trust funds. First, it is undisputed that Settlors make base payments to the Trust, which the Trustee then distributes to the several Grower States according to the percentages in Section 1.03, for further distribution to Tobacco Growers and Tobacco Quota Owners in each Grower State. This distribution schedule assigns to each Grower State a percentage of Settlor's allotted base payments, which percentage is distinct from that designated for every other Grower State. Thus, each of the beneficiary Grower States has a unique, quantifiable interest in the Trust funds. The majority's holding that Settlors are entitled to a complete offset of all amounts owed to the Trust because tobacco growers and quota holders in some Grower States receive FETRA assistance is therefore contrary to the Trust Agreement's distribution schedule.

Moreover, aside from the TOA, the parties included an MSA Finality Adjustment in the Trust Agreement that allowed Settlors a state-specific offset against amounts paid to the Trust if one or more Grower States failed to achieve eligibility for Trust payments as anticipated. The MSA Finality Adjustment reads as follows:

> MSA Finality Adjustment: In the event that a Grower State that is a Settling State under the MSA does not achieve State-Specific Finality on or before December 31, 2001 (or such later date as extended pursuant to . . . the MSA), or if there is an earlier final, non-appealable judicial determination that has the effect of precluding a Grower State from participating in the MBA [sic] (each event a "Non-Finality Event"), each Settlor shall be entitled to reduce its annual payment to the Trust after all other adjustments have been made for the year in which such a Non-Finality Event occurs, and in each subsequent year, by the same percentage as the pertinent Grower State's percentage allocation in Section 1.03. In addition, each Settl[o]r shall be entitled to reduce its annual payment for the year in which such a Non-Finality Event occurs (and, if necessary to obtain full credit, in subsequent years) by the amount of the Settlor's prior payments to the Trust allocated in the manner prescribed in Section 1.03 to the pertinent Grower State plus interest at the T-Bill Rate from the date the amount was paid to the Trust by the Settlor to the date the Settlor takes the credit for the amount.

Trust Agreement at A-12. So the parties clearly contemplated a state-by-state offset for Settlors should one or more Grower States not become eligible to participate in the Trust due to lack of finality under the MSA.

Finally, the parties included in the TOA a state-specific offset when a Grower State imposes on Settlors a governmental obligation. Upon such a Grower State-imposed governmental obligation, a Settlor may reduce its payment to the Trust by the percentage of the Settlor's base payment that is earmarked to that Grower State. *Id.* at A-8. The omission of a state-by-state offset from the portion of the TOA applying to a federal governmental obligation, however, does not necessarily indicate that the parties did not intend a state-by-state offset to apply to a federal governmental obligation. Particularly in light of other language in the Trust Agreement, the MSA, the individual releases, and the state-by-state application of other offset provisions, the lack of specific language applying a state-by-state offset to a federal governmental obligation only renders that part of the TOA

ambiguous. *See State v. Philip Morris USA Inc.*, —— N.C. App. ——, ——, 669 S.E.2d 753, 760 (2008) (Elmore, J., dissenting) ("The ambiguity, if there is any, arises here only in the context of whether the TOA provision explicitly mandates or prohibits a state-by-state accounting of reductions resulting from Grower Governmental Obligations. When the contract is read *as a whole*, however, it is clear that the parties intent was to protect tobacco farmers from the economic harm caused by the MSA.").

This Court's analysis of the very same TOA provision in *Philip Morris I* underscores the ambiguity in the federal component of the TOA. This Court rejected Settlors' argument that the TOA "is triggered whenever a change in law includes a financial obligation on Settlors earmarked to aid tobacco farmers." *Philip Morris I*, 359 N.C. at 777, 618 S.E.2d at 228. The Court observed that Settlors' argument

> "would allow a Tax Offset Adjustment even if the government never collects the assessments due under a qualifying change of law and hence never spends them for the benefit of tobacco farmers. Under those circumstances, tobacco farmers would receive reduced distributions (or no distributions) from the Phase II Trust and nothing from the government. The negative financial implications of this scenario for tobacco farmers are obvious."

Id.

Acknowledging that it was duty-bound to look beyond the "plain language" of the TOA, *see* 359 N.C. at 778, 618 S.E.2d at 228 (citing *Jones*, 222 N.C. at 413-14, 23 S.E.2d at 305), the Court rejected a reading of the TOA that was repugnant to the Trust's express purpose. The Court stated:

> Certainly the most compelling reason for rejecting the trial court's holding is that, taken to its logical extreme, it could defeat the express purpose of the Phase II Trust. As previously explained, the Trust was crafted to protect tobacco farmers from economic harm caused by the MSA . . . [through] a steady stream of supplemental income until at least 2010.
>
> . . . .
>
> . . . Interpreting the Trust Agreement in a manner that could leave those individuals without this extra income for years runs squarely counter to the express purpose of the Trust.

Id. at 779-80, 618 S.E.2d at 229.

Yet the majority's interpretation of the Trust Agreement in this case has precisely the result the Court found unacceptable in *Philip Morris I*. Considering all relevant language in the Trust Agreement and the parties' bargain in general, the only reasonable conclusion is that the parties did not intend that a governmental obligation compensating some Grower States' tobacco farmers could cut off Trust payments to tobacco farmers in other Grower States that receive no benefit from that governmental obligation. This outcome is contrary to the express purpose of the Trust and simply not consistent with the quid pro quo negotiated between the parties. To reach this result, the majority examines the TOA in a vacuum, ignoring that Settlors have all along dealt with the Grower States on a state-by-state basis. Accordingly, neither sound contract interpretation nor equity supports leaving tobacco growers in Maryland and Pennsylvania without governmental assistance or "a steady stream of supplemental income" from the Trust. *Id.* at 779, 618 S.E.2d at 229. Therefore, I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION v. DAVID C. BLEVINS

No. 59A09

(Filed 6 November 2009)

Eminent Domain— highway condemnation—traffic median—language in COA opinion disavowed

References in a highway condemnation action to the effect of the creation of a traffic median near the owner's property were de minimis and not prejudicial. However, language in the Court of Appeals opinion stating, "Evidence of the construction of the traffic median near [the owner's] property could have been considered in the context of the purpose and use of the taking as well as generally considered in determining whether the taking rendered [the owner's] property less valuable" is disavowed.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 194 N.C. App. ——, 670 S.E.2d 621 (2009), affirming a judgment entered on 17 September 2007 by

Judge J. Marlene Hyatt in Superior Court, Haywood County, and dismissing defendant's cross-appeal from that judgment. Heard in the Supreme Court 9 September 2009.

Roy Cooper, Attorney General, by Martin T. McCracken, Assistant Attorney General, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Jones P. Byrd and Matthew W. Kitchens, for defendant-appellee.

PER CURIAM.

As to the issue of whether the trial court abused its discretion by allowing evidence of the effect of the creation of a traffic median, which is an exercise of police power, we believe after reviewing the evidence presented at trial that the references were de minimis and thus not prejudicial. We affirm the decision of the Court of Appeals except that, in accordance with *Barnes v. North Carolina State Highway Commission*, 257 N.C. 507, 126 S.E.2d 732 (1962), we disavow the following language in the Court of Appeals opinion:

> Evidence of the construction of the traffic median near Blevins' property could have been considered in the context of the purpose and use of the taking as well as generally considered in determining whether the taking rendered Blevins' property less valuable. *E.g.*, *DOT v. M.M. Fowler, Inc.*, 361 N.C. 1, 14, 637 S.E.2d 885, 895 (2006) (a jury may consider the adverse effects of a condemnation on a business, not as a separate item of damage but rather a circumstance tending to show the diminution in the over-all fair market value of the property).

DOT v. Blevins, ––– N.C. App. –––, –––, 670 S.E.2d 621, 625 (2009).

MODIFIED AND AFFIRMED.

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

Baccus v. N. C. Dep't of Crime Control & Pub. Safety Case below: 195 N.C. App. —— (20 January 2009)	No. 091P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-204)	Denied 10/08/09
Barringer v. Wake Forest Univ. Baptist Med. Ctr. Case below: 197 N.C. App. —— (2 June 2009)	No. 251P09	1. Def's Motion for Temporary Stay (COA08-269) 2. Def's Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 06/23/09 363 N.C. 580 Stay dissolved 10/08/09 2. Denied 10/08/09 3. Denied 10/08/09
Boyce & Isley, PLLC v. Cooper Case below: 195 N.C. App. 625	No. 598P02-3	1. Plt (Eugene Boyce) PDR Under N.C.G.S. § 7A-31 (COA08-313) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 11/05/09 2. Dismissed as Moot 11/05/09 **Parker, C.J., Recused** **Timmons-Goodson, J., Recused** **Hudson, J., Recused**
Citibank, SD, N.A. v. Bowen Case below: 194 N.C. App. 371	No. 010P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-392)	Denied 10/08/09
City of Durham v. Safety Nat'l Cas. Corp. Case below: 196 N.C. App. —— (5 May 2009)	No. 236P09	Def's (Safety National Cas. Corp.) PDR Under N.C.G.S. § 7A-31 (COA08-1149)	Denied 11/05/09
Coucoulas/Knight Props., LLC v. Town of Hillsborough Case below: 199 N.C. App. —— (1 September 2009)	No. 404A09	1. Plt's NOA (Dissent) (COA08-1087) 2. Plt's PDR as to Additional Issues	1. —— 2. Denied 11/05/09

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

Department of Transp. v. Haywood Oil Co. Case below: 195 N.C. App. 668	No. 163P09	1. Def's NOA Based Upon a Constitutional Question (COA08-420) 2. Plt's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/08/09 3. Denied 10/08/09
Eagle Eng'g, Inc. v. Continental Cas. Co. 191 N.C. App. 593	No. 423P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1537)	Denied 10/08/09
Fairway Outdoor Adver. v. Edwards Case below: —— N.C. App. —— (7 July 2009)	No. 328P09	Defs' PDR Under N.C.G.S. § 7A-31 (COA08-1172)	Denied 10/08/09
Fipps v. Babson & Smith Trucking Case below: 191 N.C. App. 399	No. 357P08	Defs' PDR Under N.C.G.S. § 7A-31 (COA07-1361)	Denied 10/08/09
Ford v. Rodriguez Case below: —— N.C. App. —— (7 July 2009)	No. 358P09	Plt's PDR under N.C.G.S. § 7A-31 (COA08-1266)	Denied 11/05/09
Fulford v. Jenkins Case below: 195 N.C. App. 402	No. 127P09	Defs' (Duplin County, et al.) PDR Under N.C.G.S. § 7A-31 (COA08-675)	Denied 10/08/09
Fussell v. N.C. Farm Bureau Mut. Ins. Co. Case below: 198 N.C. App. —— (4 August 2009)	No. 369A09	1. Def's (Town of Apex) NOA (Dissent) (COA08-597) 2. Def's (Town of Apex) PDR as to Additional Issues	1. —— 2. Denied 10/08/09
Guilford Cty. ex rel. Hill v. Holbrook Case below: 190 N.C. App. 188	No. 328P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1165)	Denied 10/08/09
Harrell v. Sagebrush of N.C., LLC 191 N.C. App. 381	No. 433P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1264)	Denied 10/08/09

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Hinceman v. Food Lion Case below: 194 N.C. App. 371	No. 004P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-538)	Denied 11/05/09
Hoke Cty. Bd. of Educ. v. State Case below: 198 N.C. App. ––– (21 July 2009)	No. 354P09	Plts' (Hoke Cty. Bd. of Ed., et al.) PDR Under N.C.G.S. § 7A-31 (COA08-1036)	Denied 11/05/09
Holmes v. CSX Transp., Inc. Case below: 193 N.C. App. 752	No. 552P08	Plt's PDR Under N.C.G.S. § 7A-31 (COA07-1571)	Denied 10/08/09
In re A.G., K.Y., J.G., N.S., M.S. Case below: 198 N.C. App. ––– (4 August 2009)	No. 377P09	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA09-276)	Denied 11/05/09
In re D.L.H. Case below: 198 N.C. App. ––– (21 July 2009)	No. 350P09	1. Appellant's (State of NC) Motion for Temporary Stay (COA08-1019) 2. Appellant's (State of NC) Petition for Writ of Supersedeas 3. Appellant's (State of NC) PDR Under N.C.G.S. § 7A-31	1. Allowed 08/25/09 2. Allowed 11/05/09 3. Allowed 11/05/09
In re F.A.C. Case below: ––– N.C. App. ––– (7 July 2009)	No. 306P09	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA09-258)	Denied 10/08/09
In re Hayes Case below: 199 N.C. App. ––– (18 August 2009)	No. 367P09	State's Motion for Temporary Stay (COA08-894)	Allowed 09/04/09
In re J.D., D.D., J.D., T.D. Case below: 196 N.C. App. ––– (5 May 2009)	No. 239P09	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA08-1401)	Denied 10/08/09
In re L.M.S.L. Case below: 195 N.C. App. 130	No. 085P09	Respondent's PDR as to Additional Issues Under N.C.G.S. 7A-31 (COA08-1056)	Denied 10/08/09

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In re L.S.C.-W. Case below: 197 N.C. App. —— (2 June 2009)	No. 258P09	Respondent's PDR Under N.C.G.S. § 7A-31 (COA09-54)	Denied 10/08/09
In re S.C.R. Case below: 198 N.C. App. —— (4 August 2009)	No. 372A09	1. Respondent's (Father) NOA Based Upon a Constitutional Question (COA09-368) 2. Guardian ad Litem's Motion to Dismiss Appeal	1. —— 2. Allowed 11/05/09
In re V.S.W. Case below: 191 N.C. App. 251	No. 090P09	Petitioner's (Father) PWC to Review Decision of COA (COA08-126)	Denied 10/08/09
Insulation Sys., Inc. v. Fisher Case below: 197 N.C. App. —— (2 June 2009)	No. 279P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-915)	Denied 10/08/09
Jennings v. City of Fayetteville, N.C. Case below: 198 N.C. App. —— (4 August 2009)	No. 339P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-92)	Denied 10/08/09
Johnson v. Lucas Case below: 191 N.C. App. 610	No. 158A05-2	Def's (Virginia Lucas as Administratix of the Estate of Lynwood Lucas) PDR Under N.C.G.S. § 7A-31 (COA07-1084)	Denied 10/08/09 **Hudson, J., Recused**
Keystone Builders Res. Grp., Inc. v. Town of Indian Trail Case below: 191 N.C. App. 399	No. 387P08	Def's PDR Under N.C.G.S. § 7A-31 (COA07-1416)	Denied 10/08/09
Lane v. American Nat'l Can Co. Case below: 195 N.C. App. 460	No. 120P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-835)	Denied 10/08/09
Lawson v. White Case below: —— N.C. App. —— (7 July 2009)	No. 069P08-2	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA07-296-2) 2. Defs' Motion to Dismiss PDR	1. —— 2. Allowed 11/05/09

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Livesay v. Carolina First Bank Case below: 192 N.C. App. 234	No. 472P08	1. Plt's NOA Based Upon a Constitutional Question (COA07-1578) 2. Defs' Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 11/05/09 3. Denied 11/05/09 4. Dismissed as Moot 11/05/09
Lumamba v. Technocom Bus. Sys. Case below: 193 N.C. App. 247	No. 117P09	Plt's PWC to Review Decision of COA (COA08-61)	Denied 10/08/09
Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings Case below: 196 N.C. App. —— (5 May 2009)	No. 235P09	Def's and Third Party Plts' (Hemmings & Stevens) PDR Under N.C.G.S. § 7A-31 (COA08-1333)	Denied 11/05/09
Moses H. Cone Mem'l Hosp. Operating Corp. v. Hawley Case below: 195 N.C. App. 455	No. 121P09	1. Def's (Audrey Hawley) NOA Based Upon a Constitutional Question (COA08-712) 2. Def's (Audrey Hawley) PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 10/08/09 2. Denied 10/08/09
N.C. Dep't of Revenue v. Von Nicolai Case below: 199 N.C. App. —— (18 August 2009)	No. 386P09	Respondent's (Von Nicolai) PDR Under N.C.G.S. § 7A-31 (COA08-1356)	Denied 11/05/09
Parker v. Hyatt Case below: 196 N.C. App. —— (21 April 2009)	No. 223P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-907)	Denied 10/08/09

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Paul v. Mechworks Mech. Contr'rs, Inc. Case below: 197 N.C. App. —— (2 June 2009)	No. 271P09	1. Def's Motion for Temporary Stay (COA08-1245) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Withdraw PDR	1. Allowed 07/08/09 Stay Dissolved 11/05/09 2. Dismissed as Moot 11/05/09 3. —— 4. Allowed 11/05/09
Proctor v. Local Government Employees' Ret. Sys. Case below: 196 N.C. App. —— (7 April 2009)	No. 193A09	1. Plt's NOA Based Upon a Constitutional Question (COA08-976) 2. Defs' Motion to Dismiss Appeal	1. —— 2. Allowed 11/05/09
Reese v. Charlotte-Mecklenburg Bd. of Educ. Case below: 196 N.C. App. —— (5 May 2009)	No. 225P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-397)	Denied 10/08/09
Reese v. City of Charlotte Case below: 196 N.C. App. —— (5 May 2009)	No. 224P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-398)	Denied 10/08/09
Roberts v. Roberts Case below: 197 N.C. App. —— (19 May 2009)	No. 256P09	Def's Motion for Temporary Stay (COA08-404)	Allowed 07/09/09
Ross v. Ross Case below: 193 N.C. App. —— (7 October 2008)	No. 508P08	1. Def's PDR Under N.C.G.S. § 7A-31 (COA07-981) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/08/09 2. Dismissed as Moot 10/08/09
Schaefer v. Town of Hillsborough Case below: 198 N.C. App. —— (4 August 2009)	No. 374P09	1. Respondent's (Town of Hillsborough) PDR Under N.C.G.S. § 7A-31 (COA08-796) 2. Petitioners' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 11/05/09 2. Dismissed as Moot 11/05/09

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State v. Bailey Case below: 193 N.C. App. 753	No. 039P09	Def's PWC to Review Decision of COA (COA08-307)	Denied 10/08/09
State v. Beavers Case below: 196 N.C. App. —— (5 May 2009)	No. 212P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-550)	Denied 10/08/09
State v. Bell Case below: 196 N.C. App. —— (5 May 2009)	No. 233P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-959)	Denied 10/08/09
State v. Black Case below: —— N.C. App. —— (7 July 2009)	No. 329A09	1. Def's NOA Based Upon a Constitutional Question (COA08-1180) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 10/08/09
State v. Bowden Case below: 363 N.C. 621	No. 514P08-2	Rick Ehrhart's Motion for Stay and Review (COA08-372)	Dismissed Without Prejudice to Refile in Superior Court 10/28/09
State v. Bowie Case below: 340 N.C. 199 Catawba County Superior Court	No. 050A93-4	Def's PWC to Review Order of Catawba County Superior Court	Denied 10/08/09
State v. Bowman Case below: 193 N.C. App. 104	No. 073P09	Def's PWC to Review Decision of COA (COA07-1518)	Denied 10/08/09
State v. Brito Case below: 194 N.C. App. 372	No. 029P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-330)	Denied 10/08/09

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State v. Burroughs Case below: 196 N.C. App. —— (7 April 2009)	No. 174P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-891) 2. Def's NOA Based Upon a Constitutional Question 3. Def-Appellant's Motion for Temporary Stay (COA08-891)	1. Denied 10/08/09 2. Dismissed *Ex Mero Motu* 10/08/09 3. Allowed 07/20/09 363 N.C. 584 Stay Dissolved 10/15/09
State v. Catoe Case below: 197 N.C. App. —— (16 June 2009)	No. 294P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1541)	Denied 10/08/09
State v. Charles Case below: 194 N.C. App. 500	No. 084P09	1. Def's PWC to Review Decision of COA (COA08-601) 2. Def's PWC to Review Order of Wake County Superior Court	1. Denied 10/08/09 2. Dismissed 10/08/09
State v. Cole Case below: 199 N.C. App. —— (18 August 2009)	No. 378P09	1. State's Motion for Temporary Stay (COA08-1304) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's (Kawamie Cole) PDR Under N.C.G.S. § 7A-31	1. Allowed 09/14/09 Stay Dissolved 11/05/09 2. Denied 11/05/09 3. Denied 11/05/09 4. Denied 11/05/09
State v. Collins Case below: 198 N.C. App. —— (4 August 2009)	No. 344P09	1. Def's Motion for Temporary Stay (COA09-87) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 08/24/09 363 N.C. 584 Stay Dissolved 10/08/09 2. Denied 10/08/09 3. Denied 10/08/09
State v. Crockett Case below: 199 N.C. App. —— (1 September 2009)	No. 409P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1161)	Denied 11/05/09

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State v. Davis Case below: —— N.C. App. —— (7 July 2009)	No. 320P09	1. Def's NOA Based Upon a Constitutional Question (COA08-1318) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/08/09 3. Allowed as to Issue #3 Only 10/08/09
State v. Flores Case below: —— N.C. App. —— (15 September 2009)	No. 400P09	Def's NOA (COA09-272)	Dismissed *Ex Mero Motu* 11/05/09
State v. Ford Case below: 195 N.C. App. 321	No. 102P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-936)	Denied 11/05/09
State v. Fulton Case below: 197 N.C. App. —— (2 June 2009)	No. 272P09	1. Def's NOA Based Upon a Constitutional Question (COA08-1210) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 11/05/09 2. Denied 11/05/09
State v. Gattison Case below: 196 N.C. App. —— (5 May 2009)	No. 229P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1361)	Denied 11/05/09
State v. Giddens Case below: 199 N.C. App. —— (18 August 2009)	No. 363A09	1. State's NOA (Dissent) (COA08-1385) 2. State's Motion for Temporary Stay 3. State's Petition for Writ of Supersedeas	1. —— 2. Allowed 09/03/09 3. Allowed 09/03/09
State v. Goldston Case below: 194 N.C. App. 373	No. 041P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-340)	Denied 10/08/09
State v. Kittrell Case below: 197 N.C. App. —— (2 June 2009)	No. 276P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-988)	Denied 10/08/09

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State v. Locklear Case below: 363 N.C. 438	No. 578A05	State's Motion for Clarification of Court's Opinion	Denied 09/09/09
State v. Louis Case below: 199 N.C. App. —— (18 August 2009)	No. 394A09	1. Def's NOA Based Upon a Constitutional Question (COA08-1502) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 11/05/09
State v. Lowry Case below: 198 N.C. App. —— (4 August 2009)	No. 436P09	Def's PWC to Review Decision of COA (COA08-845)	Denied 11/05/09
State v. Mann Case below: 190 N.C. App. 675	No. 377P08	Def's PWC to Review Decision of COA (COA06-1693)	Denied 10/08/09
State v. Marengo Case below: 199 N.C. App. —— (18 August 2009)	No. 398P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1104)	Denied 11/05/09
State v. McNeill Case below: 360 N.C. 231 Scotland County Superior Court	No. 615A03-2	State's PWC to Review the Order of Scotland County Superior Court	Denied 10/08/09
State v. Melvin Case below: 199 N.C. App. —— (1 September 2009)	No. 382P09	State's Motion for Temporary Stay (COA09-62)	Allowed 09/18/09
State v. Newsome Case below: 197 N.C. App. —— (2 June 2009)	No. 252P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1430)	Denied 10/08/09
State v. Payne Case below: 194 N.C. App. 201	No. 011P09	1. Def's NOA Based Upon a Constitutional Question (COA08-563) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 10/08/09 2. Denied 10/08/09
State v. Poole Case below: 197 N.C. App. —— (16 June 2009)	No. 296P09	Def-Appellant's PDR (COA08-876)	Denied 10/08/09

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State v. Rainey Case below: 198 N.C. App. —— (4 August 2009)	No. 371P09	1. Def's NOA Based Upon a Constitutional Question (COA08-1466) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 11/05/09 3. Denied 11/05/09
State v. Ray Case below: —— N.C. App. —— (7 July 2009)	No. 307P09	State's Motion for Temporary Stay (COA08-1329)	Allowed 07/27/09
State v. Rice Case below: 198 N.C. App. —— (4 August 2009)	No. 356P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1282)	Denied 11/05/09
State v. Rivera Case below: —— N.C. App. —— (15 September 2009)	No. 407P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-159)	Denied 11/05/09
State v. Sapp Case below: 190 N.C. App. 698	No. 322P08	1. Def's NOA Based Upon a Constitutional Question (COA07-1135) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/08/09 3. Denied 10/08/09
State v. Simpson Case below: 198 N.C. App. —— (4 August 2009)	No. 368P09	1. Def's Petition for Writ of Mandamus (COA08-1059) 2. Def's NOA Based Upon a Constitutional Question	1. Denied 09/15/09 2. Dismissed *Ex Mero Motu* 10/08/09
State v. Smith Case below: 194 N.C. App. 120	No. 008P09	1. Def's (Thompson) PDR Under N.C.G.S. § 7A-31 (COA07-812) 2. Def's (Smith) PDR Under N.C.G.S. § 7A-31	1. Denied 11/05/09 2. Denied 11/05/09
State v. Streater Case below: —— N.C. App. —— (7 July 2009)	No. 305P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-961) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 11/05/09 2. Dismissed as Moot 11/05/09

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State v. Tanner Case below: 193 N.C. App. 150	No. 474P08	1. State's Motion for Temporary Stay (COA08-251) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 10/20/08 2. Allowed 11/05/09 3. Allowed 11/05/09
State v. Thomas Case below: 195 N.C. App. 593	No. 113P09	1. State's Motion for Temporary Stay (COA08-599) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 03/19/09 363 N.C. 138 Stay dissolved 10/08/09 2. Denied 10/08/09 3. Denied 10/08/09
State v. Thomas Case below: 199 N.C. App. —— (18 August 2009)	No. 388P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1449)	Denied 11/05/09
State v. Trombley Case below: 198 N.C. App. —— (4 August 2009)	No. 345P09	State's Motion for Temporary Stay (COA08-947)	Allowed 08/24/09
State v. Wade Case below: 198 N.C. App. —— (21 July 2009)	No. 340P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1414)	Denied 10/08/09
State v. Ward Case below: 195 N.C. App. 786	No. 164P09	1. Def's NOA Based Upon a Constitutional Question (COA08-524) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/08/09 3. Denied 10/08/09
State v. Ward Case below: 199 N.C. App. —— (18 August 2009)	No. 365P09	1. State's Motion for Temporary Stay (COA08-978) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 09/04/09 2. Allowed 10/08/09 3. Allowed 10/08/09

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State v. White Case below: 198 N.C. App. —— (21 July 2009)	No. 353P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1558)	Denied 11/05/09
State v. Williams Case below: 191 N.C. App. 254	No. 327P08	1. Def-Appellant's NOA Under N.C.G.S. § 7A-30 (COA07-1117) 2. Def-Appellant's PDR Under N.C.G.S. § 7A-31	1. Dismissed ***Ex Mero Motu*** 10/08/09 2. Denied 10/08/09
State ex rel. Ross v. Overcash Case below: 192 N.C. App. 734	No. 476P08	Def's PDR Under N.C.G.S. § 7A-31 (COA08-127)	Denied 10/08/09
Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ. Case below: 195 N.C. App. 348	No. 122P09	1. Defs' NOA Based Upon a Constitutional Question (COA08-516) 2. Plts' Motion to Dismiss Appeal 3. Defs' PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied 11/05/09 3. Allowed 11/05/09
Tonter Invs., Inc. v. Pasquotank Cty. Case below: 199 N.C. App. —— (1 September 2009)	No. 402P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-1057)	Denied 11/05/09
Williams v. Craft Dev., LLC Case below: 199 N.C. App. —— (1 September 2009)	No. 446P09	Def's & Third-Party Plts' Motion for Temporary Stay (COA09-3)	Allowed 11/05/09

PETITION TO REHEAR

Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs Case below: 363 N.C. 500	No. 106PA08-2	Plt's Petition for Rehearing	Denied 10/08/09

IN RE J.D.B.

[363 N.C. 664 (2009)]

IN THE MATTER OF J.D.B.

No. 190A09

(Filed 11 December 2009)

Juveniles— questioning at school—not custodial

A thirteen-year old special education student being questioned at school about a breaking and entering and larceny in a subdivision was not in custody and was not entitled to Miranda protections as applied to juveniles in N.C.G.S. § 7B-2101(a), and the denial of his motion to suppress was affirmed. The custody inquiry is designed to give police clear guidance and is an objective test about whether a reasonable person believes himself to be under the equivalent of arrest; consideration of individual characteristics, including age, would create a subjective inquiry.

Justice BRADY dissenting.

Justice HUDSON dissenting.

Justice TIMMONS-GOODSON 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, 196 N.C. App. ——, 674 S.E.2d 795 (2009), affirming an order entered on 16 October 2007, *nunc pro tunc*, 13 December 2005, by Judge Joseph Moody Buckner in District Court, Orange County. Heard in the Supreme Court on 10 September 2009.

Roy Cooper, Attorney General, by LaToya B. Powell, Assistant Attorney General, for the State.

Lisa Skinner Lefler for juvenile-appellant.

S. Hannah Demeritt, Barbara Fedders, and Mark Dorosin for the University of North Carolina School of Law Center for Civil Rights, University of North Carolina School of Law Juvenile Justice Clinic, Office of the Juvenile Defender, and Advocates for Children's Services, Legal Aid of North Carolina, amici curiae.

NEWBY, Justice.

This case presents the issue of whether a juvenile who made incriminating revelations to law enforcement officers was in police custody such that the officers should have afforded him the protections of N.C.G.S. § 7B-2101(a), which codifies and expands for the juvenile context the safeguards set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Because we hold that the Court of Appeals properly concluded that the juvenile was not in custody when he incriminated himself, we affirm the decision of that court.

Two juvenile petitions were filed against the juvenile J.D.B. on 19 October 2005, each alleging one count of breaking and entering and one count of larceny. On 1 December 2005, counsel for J.D.B. filed a motion to suppress certain statements and evidence. After a hearing, the trial court entered an order denying the motion to suppress on 13 December 2005. The trial court did not make findings of fact or conclusions of law at that time. In a transcript of admission filed on 24 January 2006, J.D.B. admitted to all four counts alleged in the juvenile petitions of 19 October 2005, but renewed his objection to the denial of his motion to suppress. Also on 24 January 2006, the trial court entered an order adjudicating J.D.B. delinquent. J.D.B. appealed, *inter alia*, the denial of his motion to suppress.

The Court of Appeals remanded in pertinent part "to allow the trial court to make the findings of fact necessary to support its determination that [J.D.B.] was not in custody at the time he was questioned." *In re J.B.*, 183 N.C. App. 299, 644 S.E.2d 270, 2007 WL 1412457, at *5 (2007) (unpublished). On remand, the trial court entered an order on 16 October 2007 in which it made findings of fact and conclusions of law in support of its denial of J.D.B.'s motion to suppress. The trial court found as follows:

1. On September 24, 2005, [two homes in Chapel Hill] were broken into and various items were stolen, including jewelry [and] a digital camera.

2. J.D.B.], at the time 13 years old, was interviewed by police on the same day as the break-ins after he was seen behind a residence in the same neighborhood.

3. It was later that the police were informed that [J.D.B.] had been seen in possession of a digital camera at school, which

camera turned out to be the camera stolen [on September 24, 2005].

4. Investigator Joseph DiCostanzo of the Chapel Hill Police Department was assigned the investigation and went to the juvenile's school to speak with him.

5. [J.D.B.] is in the seventh grade and enrolled in special education classes.

6. [J.D.B.] was escorted from his class and into a conference room to be interviewed. Present in the room were Investigator DiCostanzo, Assistant Principal David Lyons, a school resource officer and an intern. The door was closed, but not locked.

7. [J.D.B.] was not administered Miranda warning[s] and was not offered the opportunity to speak to a parent or guardian prior to the commencement of questioning. Additionally, no parent or guardian was contacted prior to [J.D.B.]'s removal from class.

8. Investigator DiCostanzo asked [J.D.B.] if he would agree to answer questions about recent break-ins. [J.D.B.] consented.

9. [J.D.B.] stated that he had been in the neighborhood looking for work mowing lawns and initially denied any criminal activity.

10. Lyons then encouraged [J.D.B.] to "do the right thing" and tell the truth.

11. The investigator questioned him further and confronted him with the fact that the camera had been found.

12. Upon [J.D.B.]'s inquiry as to whether he would still be in trouble if he gave the items back, the investigator responded that it would be helpful, but that the matter was still going to court and that he may have to seek a secure custody order.

13. [J.D.B.] then confessed to entering the houses and taking certain items together with another juvenile.

14. The investigator informed [J.D.B.] that he did not have to speak with him and that he was free to leave. He asked him if [he] understood that he was not under arrest and did not have to talk with the investigator.

15. [J.D.B.] indicated by nodding "yes" that he understood that he did not have to talk to the officer and that he was free to leave. He continued to provide more details regarding where certain items could be located.

16. [J.D.B.] wrote a statement regarding his involvement in the crime.

17. The bell rang signaling the end of the day and [J.D.B.] was allowed to leave to catch his bus home.

18. The interview lasted from 30 to 45 minutes.

19. The investigator had informed [J.D.B.] that he would see him later and would be speaking to his grandmother and aunt.

20. Investigator DiCostanzo and Officer Hunter went to the home of [J.D.B.], but found no one home. When [J.D.B.] arrived, he told the officers they could look around and he would show them where the jewelry was located.

21. Investigator DiCostanzo informed [J.D.B.] that he needed to obtain a search warrant and left Officer Hunter to wait outside [J.D.B.]'s home.

22. While awaiting the search warrant, [J.D.B.] brought a ring to the officer from inside the home.

23. Upon the investigator's return with the warrant, [J.D.B.] entered the home with the officers and handed them several stolen items and led the investigator to where other items could be found on the roof of a gas station down the road. During the entire time that the officers were at his residence and travelling with him to the BP station, no parent or guardian was contacted or advised of the situation. [J.D.B.] was not advised of his Miranda warnings or told he had the right to speak to or have a parent or guardian present.

24. Investigator DiCostanzo left his card and a copy of the search warrant at [J.D.B.]'s residence.

25. All of [J.D.B.]'s responses to the officer's questions were appropriately responsive, indicating that he was capable of understanding the fact that he did not have to answer questions.

26. All of [J.D.B.]'s responses to counsel during the suppression hearing were appropriately responsive.

J.D.B. again appealed the denial of his motion to suppress. The Court of Appeals affirmed the decision of the trial court, concluding that "J.D.B. was not in custody during his interactions with officers." *In re J.D.B.*, ––– N.C. App. –––, –––, 674 S.E.2d 795, 800 (2009). J.D.B. then appealed as of right to this Court on the basis of the dissenting opinion in the Court of Appeals, which would have held that J.D.B. was in custody when he incriminated himself to police officers. *Id.* at –––, 674 S.E.2d at 801 (Beasley, J., dissenting). The dissenting judge opined, "[T]hat J.D.B. was a middle school aged child is certainly among the circumstances relevant to" whether J.D.B. was in custody. *Id.* at –––, 674 S.E.2d at 802 (citing *State v. Buchanan*, 353 N.C. 332, 339-40, 543 S.E.2d 823, 828 (2001)).

We begin our review by noting that the trial court's findings of fact are uncontested and therefore, binding on this Court. *E.g.*, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). Our consideration is limited to de novo review of the trial court's conclusions of law. *State v. Wilkerson*, 363 N.C. 382, 430, 683 S.E.2d 174, 203 (2009) (citing *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002), *cert. denied*, 537 U.S. 1133, 123 S. Ct. 916, 154 L. Ed. 2d 823 (2003)).

J.D.B. argues that he was in police custody when he incriminated himself and thus, that his rights were violated when he was interrogated without proper warnings under *Miranda* and N.C.G.S. § 7B-2101(a). The United States Supreme Court held in *Miranda*

> that *when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way* and is subjected to questioning, the [Fifth Amendment] privilege against self-incrimination is jeopardized. . . . [The individual] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 478-79, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726 (emphasis added). For the juvenile setting, our General Statutes codify and enhance the protections required under *Miranda*:

> (a) Any juvenile *in custody* must be advised prior to questioning:
>
> (1) That the juvenile has a right to remain silent;

(2) That any statement the juvenile does make can be and may be used against the juvenile;

(3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and

(4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C.G.S. § 7B-2101(a) (2007) (emphasis added).

The protections of *Miranda* and section 7B-2101(a) apply only to custodial interrogations by law enforcement. " '[I]n determining whether a suspect [is] in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest.' " *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827 (second alteration in original) (quoting *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997)). This inquiry requires application of "an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way." *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992) (citations omitted). Notably, the inquiry as to " 'whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest,' " *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827 (quoting *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405), is not equivalent to the broader "free to leave" test that "has long been used for determining, under the Fourth Amendment, whether a person has been *seized*," *id.* at 339, 543 S.E.2d at 828 (emphasis added) (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980)). "Circumstances supporting an objective showing that one is 'in custody' might include a police officer standing guard at the door, locked doors or application of handcuffs." *Id.* at 339, 543 S.E.2d at 828.

The uniquely structured nature of the school environment inherently deprives students of some freedom of action. However, the typical restrictions of the school setting apply to all students and do not constitute a "significant" deprivation of freedom of action under the

test set forth in *Greene*. 332 N.C. at 577, 422 S.E.2d at 737. For a student in the school setting to be deemed in custody, law enforcement must subject the student to " 'restraint on freedom of movement' " that goes well beyond the limitations that are characteristic of the school environment in general. *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827 (quoting *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405).

In the instant case, J.D.B. was escorted from class to a conference room, where Investigator DiCostanzo was present along with an assistant principal, one of the assistant principal's interns, and the school resource officer. The school resource officer's minimal participation in the questioning of J.D.B. did not render that questioning custodial in nature. *See In re W.R.*, 363 N.C. 244, 248, 675 S.E.2d 342, 344 (2009) (stating in circumstances similar to those in the instant case: "[W]e are not prepared . . . to conclude that the presence and participation of the school resource officer . . . rendered the questioning of respondent juvenile a 'custodial interrogation,' requiring *Miranda* warnings and the protections of N.C.G.S. § 7B-2101."). Moreover, there is no indication in the trial court's findings that J.D.B. was restrained in any way or that anyone stood guard at the conference room door. "The door was closed, but not locked." By asking J.D.B. "if he would agree to answer questions about recent break-ins," Investigator DiCostanzo indicated that J.D.B. was not required to do so. Investigator DiCostanzo began his questions only after J.D.B. said he was willing to answer. After J.D.B. "initially denied any criminal activity," Investigator DiCostanzo informed J.D.B. that the stolen digital camera had been recovered. J.D.B. then asked "whether he would still be in trouble if he gave the items back," and Investigator DiCostanzo responded that, although the matter was "going to court" regardless, J.D.B.'s cooperation "would be helpful." It was then that J.D.B. "confessed to entering the houses and taking certain items together with another juvenile." Upon objective consideration of the totality of the circumstances surrounding J.D.B.'s confession, we determine that there were not sufficient "indicia of formal arrest" to justify a conclusion that J.D.B. "had been formally arrested or had had his freedom of movement restrained to the degree associated with a formal arrest." *Id.* (citing *Buchanan*, 353 N.C. at 338-40, 543 S.E.2d at 827-28).

Immediately following J.D.B.'s initial confession, Investigator DiCostanzo "informed [J.D.B.] that he did not have to speak with him and that he was free to leave. He asked him if [he] understood that he was not under arrest and did not have to talk with the investigator,"

and J.D.B. "indicated by nodding 'yes' that he understood." After J.D.B. acknowledged that he understood he was not under arrest and was free to leave, J.D.B. continued to provide information about the break-ins and "wrote a statement regarding his involvement in the crime." After the interview, which "lasted from 30 to 45 minutes," J.D.B. left the conference room without hindrance. *See Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714, 719 (1977) (per curiam) (in which the Supreme Court of the United States determined that a suspect was not in custody when his freedom to leave the police station to which he had come voluntarily was not "restricted in any way" and the suspect "did in fact leave the police station without hindrance"). Later that same day, Investigator DiCostanzo and another police officer accompanied J.D.B. as he willingly located and surrendered numerous stolen items. The trial court's findings of fact with respect to this later encounter (numbered 19-24) contain insufficient indicia of " 'restraint on [J.D.B.'s] freedom of movement of the degree associated with a formal arrest' " to support a conclusion that J.D.B. was in police custody. *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827 (quoting *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405).

J.D.B. argues, as did the dissenting judge in the Court of Appeals, that the inquiry into whether he was in custody should take into consideration J.D.B.'s age and his status as a special education student. This Court has not accounted for such matters in conducting the proper custody inquiry in the past. In the recent case of *In re W.R.*, for example, we considered whether the questioning of a fourteen-year-old juvenile was custodial in nature. 363 N.C. at 246-48, 675 S.E.2d at 343-44. In reversing the Court of Appeals' holding that the juvenile was in custody, we applied the objective "reasonable person" standard, *id.* at 248, 675 S.E.2d at 344 (citing *Buchanan*, 353 N.C. at 338-40, 543 S.E.2d at 827-28), and at no point did we consider the juvenile's age.

We reiterate that the custody inquiry is "an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way." *Greene*, 332 N.C. at 577, 422 S.E.2d at 737 (citations omitted). While "[w]e have consistently held that a defendant's subnormal mental capacity is a factor to be considered when determining whether a *knowing and intelligent waiver of rights* has been made," *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) (emphasis added) (citations omitted), subjec-

tive mental characteristics are not relevant regarding whether "*a reasonable person*" would believe he had been placed under the equivalent of a formal arrest, *Greene*, 332 N.C. at 577, 422 S.E.2d at 737 (emphasis added). This Court adheres to the view that "the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry." *Yarborough v. Alvarado*, 541 U.S. 652, 668, 124 S. Ct. 2140, 2151-52, 158 L. Ed. 2d 938, 954 (2004) (citing *Mathiason*, 429 U.S. at 495-96, 97 S. Ct. at 714, 50 L. Ed. 2d at 719).[1] Under the circumstances of the case *sub judice*, we decline to extend the test for custody to include consideration of the age and academic standing of an individual subjected to questioning by police.

Because we conclude that J.D.B. was not in custody when he incriminated himself to the police, we hold that he was not entitled to the protections of N.C.G.S. § 7B-2101(a) and *Miranda v. Arizona*. The Court of Appeals did not err in affirming the trial court's denial of J.D.B.'s motion to suppress. Therefore, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice BRADY dissenting.

The issue in this case is whether J.D.B., a thirteen year old special education student at Smith Middle School in Chapel Hill, North Carolina, was significantly deprived of his freedom of movement and thus entitled to the protections of the Fifth Amendment of the United States Constitution and N.C.G.S. § 7B-2101(a) before being interrogated by law enforcement officers and school officials in a closed conference room of the middle school. The majority's conclusion stands in stark contrast to our State's public policy of aiding, supporting, and protecting juveniles. The manner in which school officials and law enforcement interrogated J.D.B. more resembles hunters carefully and selectively targeting their prey than a fair juvenile investigation consistent with our General Statutes. Because I believe the Juvenile Code affords heightened protections against

1. We are aware that *Alvarado* is not binding on this Court because the Supreme Court of the United States merely held in that case that "[t]he state court considered the proper factors and reached a reasonable conclusion" and, thus, that an application for a writ of habeas corpus under 28 U.S.C. § 2254(d)(1) should not have been granted. 541 U.S. at 669, 124 S. Ct. at 2152, 158 L. Ed. 2d at 954. We nonetheless consider *Alvarado* persuasive.

self-incrimination to juveniles, especially in the restrictive environment of a public middle school, I respectfully dissent.

Tension has long existed between the interests of law enforcement in conducting efficient criminal investigations and the individual's constitutional right against self-incrimination. Throughout American history the "incommunicado" nature of police investigations has led to the use of physical violence and psychological coercion to elicit criminal confessions. *See Miranda v. Arizona*, 384 U.S. 436, 445-46 (1966). In response to these abuses, the Supreme Court of the United States decision in *Miranda v. Arizona* unequivocally established that law enforcement officers must administer specific warnings "to protect an individual's Fifth Amendment right against self-incrimination in the inherently compelling context of custodial interrogations by police officers." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citing *Miranda*, 384 U.S. 436). The North Carolina General Assembly has taken additional steps to protect a juvenile's right against self-incrimination in the North Carolina Juvenile Code, which provides that before custodial questioning, a juvenile must be advised:

(1) That [he] has the right to remain silent;

(2) That any statement [he] does make can be and may be used against [him];

(3) That [he] has a right to have a parent, guardian, or custodian present during questioning; and

(4) That [he] has a right to consult with an attorney and that one will be appointed for [him] if [he] is not represented and wants representation.

N.C.G.S. § 7B-2101(a) (2007).

An individual is entitled to *Miranda* warnings and the protections of N.C.G.S. § 7B-2101 when it is apparent from the "*totality of the circumstances*" that there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *State v. Garcia*, 358 N.C. 382, 399-400, 597 S.E.2d 724, 738 (2004) (citations and internal quotation marks omitted), *cert. denied*, 543 U.S. 1156 (2005). The primary inquiry is " 'whether a *reasonable person in defendant's position*, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest.' " *State v.*

Barden, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002) (emphasis added) (quoting *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828), *cert. denied*, 538 U.S. 1040 (2003).

Ultimately, the analysis in the instant case hinges upon whether defendant's age should be taken into consideration under the reasonable person standard when analyzing the circumstances surrounding the interrogation. The majority contends that *Yarborough v. Alvarado*, 541 U.S. 652 (2004), should persuade this Court to not consider the age of the subject under the reasonable person standard. In *Alvarado*, the Supreme Court of the United States ruled that "[t]he *Miranda* custody inquiry is an objective test," *id.* at 667, and because "consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry," *id.* at 668, age was irrelevant to a reasonable person's belief in a *Miranda* custody analysis. *Id. Alvarado* is not controlling in an analysis of N.C.G.S. § 7B-2101. *See State v. Smith*, 317 N.C. 100, 106, 343 S.E.2d 518, 521 (1986) ("In resolving [issues under N.C.G.S. § 7A-595] . . . cases decided under the fifth and sixth amendments to the United States Constitution are not controlling . . . .") *overruled in part on other grounds by Buchanan*, 353 N.C. at 340, 543 S.E.2d at 828. When analyzing N.C.G.S. § 7A-595, the predecessor provision of the Juvenile Code governing juvenile interrogations, this Court *has* found it appropriate to consider the subject's age under the reasonable person standard of the *Miranda* "in custody" analysis.[2] In *State v. Smith* this Court considered whether a sixteen year old was subjected to a custodial interrogation under N.C.G.S. § 7A-595. *Id.* at 102-08, 343 S.E.2d at 519-22. After considering the totality of the circumstances, including the length of the questioning and the constant presence of armed law enforcement officers, this Court determined that a person of "defendant's age and experience" would have believed he was in custody. *Id.* at 105, 343 S.E.2d at 520. Thus, the age of the defendant was a key consideration in determining whether a reasonable juvenile would have believed he was "in custody" under N.C.G.S. § 7A-595.

By failing to consider age, the majority's reasonable person standard is too rigid to apply to provisions of the Juvenile Code. It is logical that age should be considered as part of the reasonable person standard in a custody analysis under N.C.G.S. § 7B-2101. The many noble goals of the Juvenile Code include "protect[ing] the constitutional rights of juveniles" and their families and

2. N.C.G.S. § 7A-595 formerly governed juvenile interrogations and its provisions are nearly identical to the current N.C.G.S. § 7B-2101. *See* N.C.G.S. § 7A-595 (1986).

"provid[ing] uniform procedures that assure fairness and equity." N.C.G.S. § 7B-1500(4) (2007). The entire Code was created to ensure unique services for juveniles because of the special circumstances inherent in their youth; to ignore age when interpreting any section of the Juvenile Code defies common sense and the very purpose of the Code.

Furthermore, a defendant's age is often considered throughout our jurisprudence and General Statutes. For example, under civil common law, there is a rebuttable presumption that juveniles between the ages of seven and fourteen are incapable of contributory negligence, and children under seven are "conclusively presumed to be incapable of contributory negligence." *See Welch v. Jenkins*, 271 N.C. 138, 142, 155 S.E.2d 763, 766 (1967) (citations omitted). In the criminal context, those under the age of six cannot be charged with a crime. *See* N.C.G.S. § 7B-1501(7) (2007). In North Carolina we have a separate juvenile court for youthful offenders; jurisdiction can be transferred to a superior court only if the juvenile is at least thirteen years old when the alleged felony was committed, if the juvenile has received proper notice and a hearing, and probable cause has been found. *Id.* § 7B-2200 (2007). Additionally, the Supreme Court of the United States has ruled that the Eighth Amendment forbids imposition of the death penalty on offenders under the age of eighteen when their crimes were committed. *Roper v. Simmons*, 543 U.S. 551, 578 (2005). The rationale behind these laws is practical and just. The perceptions, cognitive abilities, and moral development of juveniles are different from those of adults; thus, the law rightly takes this into account when dealing with juvenile offenders. The majority's failure to consider J.D.B.'s juvenile status in its reasonable person standard runs contrary to our established juvenile jurisprudence.

Furthermore, the arguments for excluding consideration of age under the reasonable person standard outlined in *Alvarado* are not present in the instant case. *Alvarado's* rationale for excluding age from a custody inquiry was to "give clear guidance to the police," 541 U.S. at 668, so that law enforcement officers are not forced to "anticipat[e] the frailties or idiosyncra[s]ies of every person whom they question," *id.* at 667 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 n.35 (1984) (alterations in original) (internal quotation marks omitted)). Here, the difficulty of guessing defendant's age is nonexistent. Investigator DiCostanzo sought out J.D.B. at a middle school, where he knew J.D.B. was a seventh-grade student. All seventh graders are juveniles, roughly between the ages of twelve and fourteen, and as

Investigator DiCostanzo testified, he was able to obtain J.D.B.'s exact age from school records. Therefore, defendant's "frailty"—his youth—was evident from the very location Investigator DiCostanzo selected to conduct the interrogation. Additionally, Investigator DiCostanzo was a *juvenile* investigator with the Chapel Hill Police Department, specially trained in dealing with juveniles and educated in laws concerning their rights. The Chapel Hill Police Department Policy Manual explicitly states:

> *Even if the juvenile is not in custody*, it is good practice to have him sign a Miranda Rights waiver form before issuing a statement. If the juvenile does not sign a waiver, the officer must document that the juvenile is told that he is not under arrest and free to leave at any time, and that he agreed to talk.

Chapel Hill Police Dep't, Policy Manual No. 2-12 (*Juvenile Response*), at 4 (Dec. 15, 2006 (revised)) (emphasis added). In order to protect J.D.B.'s rights and fulfill the purpose of the Juvenile Code, Investigator DiCostanzo should have read J.D.B. his rights under N.C.G.S. § 7B-2101 before soliciting any statement, just as the Chapel Hill Police Department Policy Manual advises.

Because consideration of a subject's youth is particularly pertinent in analyzing any provision of the Juvenile Code, especially when doing so creates no undue burden on law enforcement officers, the proper inquiry in the instant case when determining whether defendant was in custody for the purposes of N.C.G.S. § 7B-2101 should be whether, under the totality of the circumstances, a reasonable juvenile in defendant's position would have believed he was under formal arrest or was restrained in his movement to the degree associated with a formal arrest. The majority concludes that there were not sufficient "indicia of formal arrest" to conclude that J.D.B. was in custody because the findings of fact do not indicate that J.D.B. was physically restrained or that the conference room door was guarded or locked. While it is true that handcuffs were never applied to J.D.B. and the closed door of the room where he was detained was not locked, this does not mean he was not restrained. The majority's analysis ignores the Court's obligation to consider the totality of the circumstances and "the unique facts surrounding each incriminating statement." *Garcia*, 358 N.C. at 399, 597 S.E.2d at 738 (citations omitted). An examination of the totality of the circumstances leads to the conclusion that a reasonable juvenile in J.D.B.'s position would have believed he was restrained in his movement to the degree associated with a formal arrest.

First, the location of the interrogation must be considered. In any planned interrogation, law enforcement carefully chooses the location before questioning begins. The gold standard in enhanced interrogation preparation and training, utilized by both the Central Intelligence Agency and the Federal Bureau of Investigation, is the Army Field Manual on Human Intelligence Collector Operations. The Manual states:

> When conducting . . . operations, the location of the questioning will have psychological effects on the source. The questioning location should be chosen and set up to correspond to the effect that the [officer] wants to project and his planned approach techniques. For example, meeting in a social type situation such as a restaurant may place the source at ease. Meeting in an apartment projects informality while meeting in an office projects more formality. Meeting at the source's home normally places him at a psychological advantage, while meeting in the [officer's] work area gives the [officer] a psychological edge.

U.S. Dep't of the Army, Field Manual 2-22.3, *Human Intelligence Collector Operations* para. 7-12 (Sept. 6, 2006). As a trained investigator would know, the location of the interrogation in the instant case certainly would have a psychological effect on a reasonable person in J.D.B.'s position. A middle school is a restrictive environment. Unlike a university campus, where people may freely come and go, middle school students are not free to leave the campus without permission, and visitors to the school, including parents and guardians of students, must upon arrival report their presence and receive permission to be at the facility. Moreover, students at middle schools are instructed to obey the requests and directives of adults. The Student Handbook at Smith Middle School, where J.D.B. attended, instructs students to "[f]ollow directions of all teachers/adults the first time they are given," "[s]top moving when an adult addresses" them, and "[w]alk away only after the adult has dismissed" them.

Law enforcement in the instant case took advantage of the middle school's restrictive environment and its psychological effect by choosing to interrogate J.D.B. there, instead of at his home or in any other public, more neutral location. Certainly, if the larceny J.D.B. was suspected of committing had occurred on school grounds, law enforcement might understandably investigate suspects there, at the scene of the crime. However, the larceny in question occurred in a residential subdivision, not on the school campus. Law enforcement investigators could have first attempted to question J.D.B. at his res-

idence. Instead, the school was selected as the interrogation site, a location where any reasonable juvenile in J.D.B.'s position would not only be at a psychological disadvantage, but where he would be defenseless, without the protection of a parent or guardian. It is troubling that in the instant case a public middle school, which should be an environment where children feel safe and protected, became a place where a law enforcement investigator claimed a tactical advantage over a juvenile.

Not only was J.D.B., or any reasonable juvenile in his position, at a disadvantage because of the location of the interrogation, but also by the manner in which it was conducted. J.D.B. was sitting in a classroom with his peers when the class was suddenly interrupted by Officer Gurley, Smith Middle School's resource officer. Officer Gurley removed J.D.B. from the classroom and escorted him to a school conference room. J.D.B. could have been asked by his teacher or any other school official to report to the conference room; instead, he was escorted by a uniformed, armed police officer. The only logical reason for Officer Gurley to escort J.D.B. was to restrain his freedom of movement; J.D.B. had no choice but to comply with his removal from the classroom and Officer Gurley's instructions to walk to the conference room. If J.D.B. had refused to accompany Officer Gurley he likely would have faced disciplinary action from the school.[3] Therefore, J.D.B.'s freedom of movement was restricted from the moment he was removed from his classroom by Officer Gurley.

When J.D.B. arrived at the conference room, he was met by three other authoritative adults: Mr. Lyons, the school assistant principal; Mr. Benson, an intern with the school; and Investigator DiCostanzo of the Chapel Hill Police Department. J.B.D. was directed to take a seat at a conference table and the door to the office was closed. Investigator DiCostanzo was not in uniform, but dressed in a suit jacket and tie, and he introduced himself to J.D.B. as a juvenile investigator. That a special investigator from the police department, dressed in business attire, was making a special trip to the school would alert any reasonable middle school student that something

3. Additionally, amici argue that refusal to follow an order given by a school official can ultimately lead to criminal charges under N.C.G.S. § 14-288.4, which provides that a person who willfully engages in disorderly conduct by "[d]isrupt[ing], disturb[ing] or interfer[ing] with the teaching of students . . . or disturb[ing] the peace, order or discipline at any . . . educational institution" is "guilty of a Class 2 misdemeanor." N.C.G.S. § 14-288.4(a)(6) (2007). Under N.C.G.S. § 115C-378 (2007) parents can also be prosecuted for violating the Compulsory Attendance Law if their children fail to attend school.

serious was taking place, something more than a casual conversation about joining the Police Athletic League or participating in the Youth Partnership for Crime Prevention.

With these facts alone, there is enough evidence to conclude that a reasonable juvenile in J.D.B.'s position would have believed he was restrained in his movement to the degree associated with a formal arrest. The majority states that "[f]or a student in the school setting to be deemed in custody, law enforcement must subject the student to 'restraint on freedom of movement' that goes well beyond the limitations that are characteristic of the school environment in general." If removal from a middle school classroom and being physically escorted by a uniformed, armed police officer to a closed conference room inhabited by four authoritative adults does not qualify as procedures that go well beyond the "typical restrictions" of a "school environment in general," it is hard to imagine any set of circumstances that the majority would label as a sufficient restraint on movement.

At this point in the interrogation, as noted above, the Chapel Hill Police Department Policy Manual instructs that before any questioning began, Investigator DiCostanzo should have informed J.D.B. of his rights under N.C.G.S. § 7B-2101. Had Investigator DiCostanzo simply followed the Manual, this case likely would not be before us. Instead, Investigator DiCostanzo immediately began the interrogation. J.D.B. was never told he was free to leave or that he was entitled to have a parent, guardian, or attorney present. When Investigator DiCostanzo began questioning J.D.B. about the larceny, J.D.B. denied any involvement. Yet, Assistant Principal Lyons urged J.D.B. to "do the right thing" and tell the truth. Investigator DiCostanzo continued to pressure J.D.B. to talk by confronting him with information that a stolen camera had been found. Still, at this point no one had advised J.D.B. of his rights. When J.D.B. inquired of Investigator DiCostanzo what would happen if the stolen items were returned, Investigator DiCostanzo replied that it would be helpful, but the matter would still have to go to court. Next, Investigator DiCostanzo informed J.D.B. that he might be forced to obtain a secure custody order for J.D.B. unless it was apparent that J.D.B. was not going to steal again. Investigator DiCostanzo explained to J.D.B. that a secure custody order would give law enforcement the right to hold J.D.B. in juvenile detention.[4] To a reasonable person in J.D.B.'s position, this remark

4. A juvenile held under a secure custody order is entitled to far fewer protections than an adult taken into custody. Once an adult defendant is taken into police

certainly qualifies as an indicium of formal arrest. Moreover, Investigator DiCostanzo's statement was nothing short of a veiled threat that J.D.B. would be physically detained unless he confessed. At this point, J.D.B. had already denied any involvement in the larceny, yet he was not permitted to leave; rather, he was encouraged to "do the right thing" and threatened with juvenile detention. A reasonable middle school student in J.D.B.'s position, after being physically escorted by a uniformed, armed officer to a closed conference room with four authoritative adults, would have considered himself to be physically restrained to the point of formal arrest. Moreover, under school policy, J.D.B. was not free to leave until he was dismissed by an adult. Furthermore, Investigator DiCostanzo, a special juvenile investigator with the Chapel Hill Police Department, threatened to hold J.D.B. in juvenile detention unless he divulged all his knowledge of the larceny. The totality of these circumstances leads to no other conclusion than that J.D.B. was "in custody."

Not surprisingly, after Investigator DiCostanzo's threat of a secure custody order, J.D.B. made incriminating statements linking him to the larceny. When J.D.B. made these statements he had not been advised of his rights. Investigator DiCostanzo's subsequent statements informing J.D.B. that he did not have to answer any questions and that he was free to leave are therefore irrelevant to this analysis. What these statements in fact do is exhibit crafty and highly questionable investigative tactics. Investigator DiCostanzo's warning was too little, too late, after J.D.B.'s constitutional rights had been circumvented.

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custody he is required to be brought before a magistrate for a hearing "without unnecessary delay" pursuant to N.C.G.S. § 15A-501 (2007). At this appearance, the magistrate must release the defendant in accordance with Article 26 of Chapter 15A, or commit the defendant to a detention facility pursuant to N.C.G.S. § 15A-521, pending further proceedings in the case. *Id.* § 15A-511(e) (2007). After appearing before a magistrate, an adult criminal defendant must be brought before a district court judge for an initial appearance within 96 hours of being taken into custody to determine the sufficiency of the charges against the defendant and to inform the defendant of his rights, including the right against self-incrimination and the right to counsel. *Id.* §§ 15A-601 to 604 (2007). The district court judge is also required to review the defendant's eligibility for release pursuant to Article 26 Chapter 15A, and to schedule a probable cause hearing for the defendant, unless the right to such hearing waived. *Id.* §§ 15A-605 to 606 (2007). Further, if a grand jury returns a bill of indictment "as not a true bill, the presiding judge must immediately examine the case records to determine if the defendant is in custody or subject to bail or conditions of pretrial release." *Id.* § 15A-629 (2007). Unlike these procedures afforded to adult defendants, which ensure hearings for pretrial release are held immediately, juveniles who are held under secure custody orders can be detained for up to five calendar days before receiving a hearing on the merits to determine the need for continued custody. *See id.* § 7B-1906 (2007).

The Standards Manual of the Law Enforcement Agency Accreditation Program states: "When dealing with juveniles, law enforcement officers should always make use of the least coercive among reasonable alternatives, consistent with preserving public safety, order, and individual liberty." Comm'n on Accreditation for Law Enforcement Agencies, Inc., *Standards for Law Enforcement Agencies* ch. 44 (*Juvenile Operations*), at 44-1 (4th ed. Jan. 1999). The actions of law enforcement in the instant case are inconsistent with these standards and evince a disregard for the protection of juvenile rights. It is disheartening and alarming that today's majority opinion condones the highly coercive actions of law enforcement in the instant case, which will only encourage law enforcement to disregard the provisions and procedures of N.C.G.S. § 7B-2101 in the future. Even radical Muslims suspected of terrorism are afforded broader constitutional protections than the majority wishes to give juveniles in J.D.B.'s position. *Cf. Boumediene v. Bush*, ––– U.S. ––– , 128 S. Ct. 2229 (2008) (holding that alien enemy combatants detained at the U.S. Naval Station in Guantanamo Bay, Cuba, are entitled to certain constitutional privileges). The overriding goal of North Carolina's Juvenile Code is to protect the constitutional rights and best interests of juveniles and their families. Today's majority opinion is inconsistent with this goal. I would hold that because a reasonable person in J.D.B.'s position was in custody for the purposes of N.C.G.S. § 7B-2101, our state laws entitled J.D.B. to be informed of his rights before the interrogation began. Accordingly, I respectfully dissent.

Justice HUDSON dissenting.

Because I believe the trial court's conclusions of law reflect an incorrect application of the law to the facts found, I respectfully dissent. "The determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law. While this conclusion may rest upon factual findings, it is a legal conclusion, fully reviewable, and not a finding of fact." *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992) (citation omitted).

> Accordingly, . . . we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect[] a correct application of [law] to the facts found. In doing so, this Court must look first to the circumstances surrounding the interrogation and second to the effect those circumstances would have on a reasonable person.

State v. Garcia, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004) (second and third alterations in original) (citations and internal quotation marks omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

"In *Miranda*, the Supreme Court defined 'custodial interrogation' as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any *significant* way.' " *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 826 (2001) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966)). "[I]n determining whether a suspect [is] in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (citation omitted), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). "The test for determining whether a person is in custody is an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way." *Greene*, 332 N.C. at 577, 422 S.E.2d at 737 (citations omitted).

Here, the trial court determined that J.D.B. was not subjected to custodial interrogation when he was questioned at Smith Middle School. In doing so, the trial court made the following pertinent conclusions of law, which were challenged on appeal:

1. [J.D.B.] was not in custody when he was brought to the conference room to speak to . . . [I]nvestigator [DiCostanzo].

2. The mere presence of . . . [I]nvestigator [DiCostanzo] and the school resource officer did not convert the meeting into a custodial interrogation.

3. [J.D.B.] was informed that he was free to leave and that he did not have to answer any questions, but chose to stay and volunteer more information.

In my view, the trial court's uncontested and binding findings of fact pertaining to the circumstances surrounding the interrogation lead to the conclusion that "a reasonable person in the position of the defendant would [have] believe[d] himself to be in custody or that he had been deprived of his freedom of action in some significant way." *Id.* As such, I would hold that: (1) J.D.B. was subjected to custodial interrogation at Smith Middle School; (2) J.D.B. should

have been *Mirandized* and provided the enhanced protections for juveniles contained in N.C.G.S. § 7B-2101; and (3) as a result, the trial court erred in denying his motion to suppress. Therefore, I respectfully dissent.

According to the majority, because the school environment "inherently deprives students of some freedom of action," for a juvenile "to be deemed in custody," the restraint that law enforcement imposes on the juvenile's freedom of action or movement while questioning the juvenile at school must go "well beyond the limitations that are characteristic of the school environment in general." I disagree with this reasoning, primarily because of its potential to seriously undermine the enhanced protections afforded to juveniles by the North Carolina General Assembly, for example, as in N.C.G.S. § 7B-2101. *See In re T.E.F.*, 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005) ("Our courts have consistently recognized that '[t]he [S]tate has a *greater* duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution.' " (alterations in original) (citations omitted)); *In re Vinson*, 298 N.C. 640, 652, 260 S.E.2d 591, 599 (1979) (stating this Court's intent "to carefully balance the State's police power interest in preserving order and its *parens patriae* interest in a delinquent child's welfare with the child's constitutional right to due process"). I fear that the majority here actually affords juveniles less protection when questioned by law enforcement officers at school, as compared to elsewhere. In my opinion, in the school environment, where juveniles are faced with a variety of negative consequences—including potential criminal charges—for refusing to comply with the requests or commands of authority figures, the circumstances are inherently more coercive and require more, not less, careful protection of the rights of the juvenile.

> The decision to interview a student at school could be made to take advantage of the student's minority [age]. Questioning the student at school, the officer not only takes advantage of the student's compulsory presence at school and the background norm of submission to authority, but also chooses to interact with the student at a time when the student will not be in the presence of a parent, the figure most likely to have the inclination or ability to either arrange for the presence of counsel or to advise the youth to refuse to answer the officer's questions.

Paul Holland, *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 Loy. L. Rev. 39, 85 n.175 (2006) [hereinafter Holland, *Schooling* Miranda]. I am particularly

concerned about creating an incentive for an investigating police officer to enter a middle school to question a juvenile about crimes that may have occurred away from school grounds and to take advantage of the more restrictive school atmosphere without providing the protections of N.C.G.S. § 7B-2101. I am also concerned about the potential disruption of the learning atmosphere in the school, especially, but not exclusively, for the affected juvenile if this practice became widespread.

Even under the majority's analysis, though, I believe the record here establishes that the restraint on J.D.B.'s freedom of action or movement went "well beyond the limitations that are characteristic of the school environment in general" and thus, subjected J.D.B. to "custodial interrogation." The school resource officer, who was a uniformed police officer, came to thirteen-year-old J.D.B.'s classroom, removed him from class, and "escorted" him to a conference room where two school officials and Investigator DiCostanzo were waiting for him. No effort was made to contact J.D.B.'s parent or guardian before his removal from class or his questioning. For the entire interrogation, which lasted thirty to forty-five minutes, J.D.B. was isolated in a closed-door conference room in the presence of four authority figures, including two law enforcement officers. Contrary to the trial court's conclusion of law, Investigator DiCostanzo, an outside police officer, was not merely present. Rather, it appears that he directed and controlled the interrogation process, which was designed to determine J.D.B.'s role in nonviolent crimes alleged to have occurred outside of school grounds and for which he was a suspect. Despite J.D.B.'s repeated denials of any involvement in the criminal activity, Investigator DiCostanzo continued to question him. At some point during Investigator DiCostanzo's questioning, Assistant Principal David Lyons encouraged J.D.B. to " 'do the right thing' and tell the truth." Thereafter, Officer DiCostanzo continued to question J.D.B., confronted him with the stolen camera, and indicated that others had seen the camera in J.D.B.'s possession. Then, J.D.B. made his first incriminating statement, asking if "he would still be in trouble if he gave the items back," also indicating that J.D.B. believed he was currently "in trouble." Investigator DiCostanzo responded that either way "the matter was still going to court" and that he might "have to seek a secure custody order," explaining to J.D.B. that such an order confines a juvenile to a detention center until his court date. After this sequence of events, J.D.B. confessed. I would conclude that considering all of the above circumstances, "a reasonable person in [J.D.B.'s] position . . . would [have] believe[d] himself to be in custody

or that he had been deprived of his freedom of action in some significant way" by the time Investigator DiCostanzo confronted J.D.B. with the stolen camera. *Greene*, 332 N.C. at 577, 422 S.E.2d at 737.

In reaching the opposite conclusion, the majority emphasizes that: (1) Investigator DiCostanzo told J.D.B. that he was free to leave, asked him if he understood that he was not under arrest and did not have to speak to him, and that J.D.B. nodded his head indicating he understood; and (2) J.D.B. was not subjected to severe or direct physical restraint, such as an officer standing guard at the door. However, Investigator DiCostanzo did not inform J.D.B. that he was free to leave and not under arrest until *after* J.D.B. had incriminated himself in response to the interrogation, without having been informed of his *Miranda* and juvenile statutory rights. I would conclude that this process violated both *Miranda* and N.C.G.S. § 7B-2101 (a) and (b) and that the motion to suppress should have been allowed. *See* N.C.G.S. § 7B-2101 (2007); *Missouri v. Seibert*, 542 U.S. 600, 604, 159 L. Ed. 2d 643, 650 (2004) (plurality) (stating that "midstream recitation of [*Miranda*] warnings after interrogation and unwarned confession" does "not effectively comply with *Miranda's* constitutional requirement"); *see also* N.C.G.S. § 7B-2101(a)(3) (stating that a juvenile who is in custody "must [also] be advised prior to questioning" of his "right to have a parent, guardian, or custodian present during questioning"); *id.* § 7B-2101(b) (stating that for juveniles, such as J.D.B., who are "less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney").

With regard to stronger indicia of physical control, such as handcuffs or an officer standing guard at the door, this Court has never held that one or more of these indicia must be present to support a determination that an individual is in custody. In fact, in *Buchanan* this Court stated: "Circumstances supporting an objective showing that one is 'in custody' *might*[, not must,] include a police officer standing guard at the door, locked doors or application of handcuffs." 353 N.C. at 339, 543 S.E.2d at 828 (emphasis added). Thus, the absence of such forms of restraint, while a relevant consideration in this inquiry, is not dispositive. Furthermore, "[United States Supreme Court] cases establish that, even if the police do not tell a suspect he is under arrest, do not handcuff him, do not lock him in a cell, and do not threaten him, he may nonetheless . . . be in custody for *Miranda* purposes." *Yarborough v. Alvarado*, 541 U.S. 652, 675, 158 L. Ed. 2d

938, 958-59 (2004) (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting) (citing *Stansbury v. California*, 511 U.S. 318, 325-26, 128 L. Ed. 2d 293, 300-01 (1994) (per curiam); *Berkemer v. McCarty*, 468 U.S. 420, 440, 82 L. Ed. 2d 317, 335 (1984)). Here, law enforcement questioned a thirteen-year-old seventh-grader about nonviolent offenses while he was at school, in a closed room, and in the presence of four authority figures, all adults. Taken with the sequence of events in the interrogation itself, I conclude that J.D.B. was subjected to a custodial interrogation.

As support for its determination that J.D.B. was not subjected to custodial interrogation, the majority cites our recent opinion in *In re W.R.*, 363 N.C. 244, 675 S.E.2d 342 (2009). However, that case is both procedurally and factually distinguishable from this one and is of limited to no precedential value in resolving the custody issue here.

In *In re W.R.*, unlike here, the juvenile failed to make a motion to suppress or to object when his incriminatory statements were offered into evidence, and the juvenile did not assert at the trial level that his incriminatory statements were obtained in violation of either the Fifth Amendment or N.C.G.S. § 7B-2101. *Id.* at 247, 675 S.E.2d at 344. As a result, this Court's review was for plain error. *Id.* In addition, because "no evidence was presented and no findings were made as to . . . the school resource officer's actual participation in the questioning of W.R.[,] . . . the custodial or noncustodial nature of the interrogation[,] . . . . [or] whether the statements were freely and voluntarily made," this Court stated:

> After careful review, we are not prepared based on the limited record before this Court to conclude that the presence and participation of the school resource officer at the request of school administrators conducting the investigation rendered the questioning of respondent juvenile a "custodial interrogation," requiring *Miranda* warnings and the protections of N.C.G.S. § 7B-2101.

363 N.C. at 248, 675 S.E.2d at 344. In other words, the record pertaining to law enforcement's role in W.R.'s interrogation was insufficient for this Court to make a determination that the interrogation was custodial.

Also numerous important facts bearing on the custody issue distinguish *In re W.R.* from this case. There, unlike here: (1) the assistant principal and the principal, not a law enforcement officer, took the juvenile out of class and "escorted" him to the principal's office after a concerned parent called the school and stated that the juvenile

had possessed a knife at school and on the school bus the previous day; (2) both school administrators questioned the juvenile about the alleged "in school" incident and not about crimes alleged to have occurred outside of school grounds; (3) the school resource officer apparently was not present at the start of questioning and left the room at various points; (4) no outside police officer participated; and (5) school administrators, not law enforcement, controlled the questioning. *Id.* at 246, 675 S.E.2d at 343.

In further contrast to the majority, I believe J.D.B.'s age, thirteen, (and his status as a middle school student) are relevant considerations in determining "whether a reasonable person in the position of the defendant would [have] believe[d] himself to be in custody or that he had been deprived of his freedom of action in some significant way." *Greene*, 332 N.C. at 577, 422 S.E.2d at 737.[5] In support of its conclusion that a juvenile's age should not be considered as part of the custody analysis, the majority: (1) states that this Court has not previously considered an individual's age in conducting the custody inquiry, citing *In re W.R.* in support; and (2) relies on language from *Yarborough v. Alvarado*, which states that an "argument [exists] that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry." 541 U.S. at 668, 158 L. Ed. 2d at 954 (majority) (citation omitted). I do not find this reasoning persuasive here.[6] The

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5 . J.D.B. also argues, and the dissent in the Court of Appeals appears to suggest, that J.D.B.'s enrollment in "special education classes" is a relevant factor to consider in conducting the custody analysis. *See In re J.D.B.*, —— N.C. App. ——, ——, 674 S.E.2d 795, 802 (2009) (Beasley, J., dissenting). Because the record is silent as to the nature and extent of J.D.B.'s academic status and whether Investigator DiCostanzo knew or reasonably could have known about it, I have not considered J.D.B.'s status as a special education student.

6. In *In re R.H.*, a panel of the Court of Appeals determined that the trial court did not err in denying the juvenile's motion to suppress his confession because the juvenile was not in custody. *In re R.H.*, 171 N.C. App. 514, 615 S.E.2d 738, 2005 N.C. App. LEXIS 1309 (2005) (unpublished). There, the juvenile was questioned by an outside law enforcement officer at school regarding a purported crime away from school grounds. 2005 N.C. App. LEXIS 1309, at *2. Even though that case was unpublished, the differences between how the officer approached his questioning of the juvenile there and here are striking. There, before questioning the juvenile, the officer obtained permission from the fourteen-year-old's mother to talk to him at school and explained to him that "he was not under arrest," that he "could leave and return to class at any time and that regardless of what [the] juvenile told him that day, he would not arrest [him]." *Id.*, at *4. By contrast with what happened here, I believe the approach taken by the officer in that case can be squared with *Miranda* and the enhanced statutory protections for juveniles.

dissent in the Court of Appeals correctly noted that not considering age "would lead to the absurd result that, when required to determine whether a 'reasonable person in the defendant's situation' would consider himself in custody, courts would apply exactly the same analysis, regardless of whether the individual was eight or thirty-eight years old." *In re J.D.B.*, ––– N.C. App. at –––, 674 S.E.2d. at 802 (2009) (Beasley, J. dissenting) (citation omitted).

Neither this Court nor the United States Supreme Court has held squarely that age can never be relevant to the custody inquiry. Nor did we conduct a custody analysis in *In re W.R.* without considering the juvenile's age. Rather, as noted above, this Court simply determined that the record on appeal regarding the role of law enforcement in questioning the juvenile was insufficient on the custody issue. The majority concedes that *Alvarado* is not binding authority on this Court. Furthermore, while the Supreme Court there held that the state court's failure to consider the defendant's age (seventeen) was reasonable in considering custody under *Miranda*, I conclude that the matter is very different when the interrogation is conducted in school. As Justice O'Connor stated in her concurring opinion in *Alvarado*, "There may be cases in which a suspect's age will be relevant to the 'custody' inquiry under *Miranda*." 541 U.S. at 669, 158 L. Ed. 2d at 954-55 (O'Connor, J., concurring) (citation omitted). I share the view expressed by Justice Breyer in his dissenting opinion, that a juvenile's youth "is not a special quality, but rather a widely shared characteristic that generates commonsense conclusions about behavior and perception." *Id.* at 674, 158 L. Ed. 2d at 958 (Breyer, J., dissenting).

It is clear from the enhanced protections given to juveniles that our General Assembly considers age very important under state law, especially when the juvenile is under fourteen, like J.D.B. "To focus on the circumstance of age in a case like this does not complicate the 'in custody' inquiry." *Id.* at 674-75 , 158 L. Ed. 2d at 958 (citation omitted).

> Outside officers conducting interviews at schools are likely doing so only when they are looking for a specific student and thus are likely to already know the student's age. Even if they do not, these officers rely on school staff to assist them in establishing contact with the student. These staff members, of course, have access to the student's records, which will include the age. Seen in this context, courts considering the age of the suspect are not

> imposing an extra burden of intuition or information on officers but are instead seeing the interrogation in its full context, as it is likely seen by those involved.

Holland, *Schooling* Miranda 85 (footnote omitted). Here, Investigator DiCostanzo specifically testified that he had been informed by school administrators that J.D.B. was thirteen years old before questioning him.

In sum, I would hold that, under all these circumstances, including his age, J.D.B. was in custody while being questioned at Smith Middle School; consequently, his constitutional and juvenile statutory rights were violated due to law enforcement's failure to *Mirandize* him or to comply with N.C.G.S. § 7B-2101 and the trial court erred in denying his motion to suppress. Therefore, I respectfully dissent.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. EUGENE JOHNNY WILLIAMS

No. 506A07

(Filed 11 December 2009)

1. Criminal Law— appointed attorneys removed—one of original attorneys reappointed—no error

The trial court did not err in a first-degree murder prosecution by not removing one of defendant's appointed attorneys after a superior court judge ordered that the original attorneys be removed and IDS reappointed one of the original attorneys. The court's order simply allowed defendant's motion to have counsel removed and did not implicitly or explicitly order that neither of the original attorneys be reappointed.

2. Criminal Law— request for substitute counsel—defendant's letter not sufficient

A first-degree murder defendant's letter to the trial court did not clearly constitute a request for substitute counsel and the trial court was not required to conduct a hearing as argued by defendant. Even if a hearing should have been held, there was not a conflict sufficient to remove the attorney from the case.

3. Criminal Law— represented defendant—pro se motions not allowed

The trial court did not err by "summarily denying" a first-degree murder defendant's pro se motions where defendant was represented by appointed counsel and therefore was not allowed to file motions on his own behalf. A statement to the court by counsel that the pro se motions needed to be ruled upon was not an adoption of the motions.

4. Evidence— police officer's opinions—admissibility

The trial court did not err in a first-degree murder prosecution by admitting certain testimony from a police officer where defendant contended that it was an impermissible lay opinion. The testimony explained the officer's observations and was not an opinion, or was rationally based on the officer's perception and experience and was helpful to determination of a key issue.

5. Evidence— testimony by officers—statements made by others—admissible as corroboration

The trial court did not err in a first-degree murder prosecution by admitting certain testimony for corroborative purposes. The testimony of one officer tracked the testimony of the fiancée of a victim about a telephone call received by the victim, and testimony from a detective about defendant's statements to his cellmate generally tracked the testimony given by the cellmate. Any prejudicial effect from the language of the statements was mitigated by the admission of other testimony, and the jury was instructed on corroborative purposes.

6. Homicide— first-degree murder—evidence sufficient—viewed in light most favorable to State

The evidence of first-degree murder was sufficient for a reasonable person to find defendant guilty beyond a reasonable doubt and sufficient for the jury to finding the aggravating circumstance of course of conduct. Defendant on appeal attempted to interpret the evidence in the light most favorable to him, detailing other plausible explanations for the evidence; however, contradictions or conflicts are resolved in favor of the State on a motion to dismiss for insufficient evidence. Evidence not favorable to the State is not considered.

7. Sentencing— capital—jurisdiction—different judges at guilt and penalty phases

The trial court did not lack jurisdiction to enter a judgment sentencing defendant to death for first-degree murder because different judges presided over the guilt and sentencing phases of defendant's murder trial where a mistrial was declared in the original sentencing proceeding because defendant attacked one of his appointed attorneys. The superior court's jurisdiction over the subject matter of defendant's case was established when defendant was indicted for a felony, jurisdiction over the penalty phase was established when defendant was convicted of a capital offense, and the trial court was not divested of its subject matter jurisdiction because the same judge did not preside over the guilt and penalty phases of defendant's capital trial.

8. Sentencing— capital—jurisdiction—different juries at guilt and sentencing phases

The sentencing jury in a capital sentencing proceeding did not lack jurisdiction to recommend a sentence of death because it was not the same jury that returned the guilty verdict in the guilt phase of defendant's first-degree murder trial. N.C.G.S. § 15A-2000(a)(2) sets out procedure, not jurisdiction.

9. Sentencing— capital—second proceeding—judgments out-of-term and out-of-session

Entering judgments imposing a sentence of death out-of-term and out-of-session did not deprive the trial court of jurisdiction over a delayed capital sentencing proceeding where a mistrial was declared in the first sentencing proceeding because defendant attacked one of his appointed attorneys. New counsel needed to be appointed with time for the new counsel to prepare; defendant is not prejudiced by error resulting from his own conduct.

10. Jury— capital trial—right to be present—jury pool selection

A first-degree murder defendant's right to be present at all of the proceedings of his capital trial was not violated when the deputy clerk selected forty-eight prospective jurors from the pool in the jury assembly room, outside of defendant's presence. The random segregation of the entire jury pool so that it could be split among defendant's proceeding and other matters being handled at the courthouse was a preliminary administrative matter at which defendant did not have a right to be present.

11. Sentencing— evidence—possession of victims' property after murders—admissibility

The trial court did not err during a capital sentencing proceeding by admitting evidence that defendant had items that belonged to the victims after the murders even though he had been acquitted of robbery. The evidence was not offered to prove that defendant had robbed his victims, but to prove the course of conduct aggravating factor.

12. Sentencing— death penalty—proportionatity

A death penalty was proportionate where defendant murdered two people, was convicted on the basis of premeditation and deliberation, and the killings appeared to be motivated by revenge for failure to pay for a motorcycle deal, which prevented defendant from being able to make bail during an incarceration.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing a sentence of death entered by Judge Thomas H. Lock on 1 May 2007 in Superior Court, Cumberland County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 8 September 2009.

Roy Cooper, *Attorney General*, *by Daniel P. O'Brien and William B. Crumpler*, *Assistant Attorneys General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender; and Ann B. Petersen for defendant-appellant.*

BRADY, Justice.

On 8 December 2004, defendant Eugene Johnny Williams was convicted of the first-degree murders of Nicholas Gillard and Cedric Leavy. Following these convictions, the trial court declared a mistrial only as to the penalty proceedings. New counsel was appointed for defendant, and on 1 May 2007, a different jury returned a binding recommendation that defendant be sentenced to death for both murders. We find no error in defendant's convictions or sentences.

BACKGROUND

Defendant was detained pursuant to a possession of stolen goods charge from 4 June 2001 until 5 October 2001. Defendant was

unable to raise the bail money to be released. Defendant informed another inmate, Jimmy Locklear, that he could not raise the bail money because an unnamed person had not paid for a motorcycle that defendant had stolen and sold to him. Inmates who spent time with defendant that summer heard defendant say that upon release he was going to "get" the person who owed him money and "f*** him up."

Robin Gillis, an inmate who spent time with defendant in the Cumberland County Detention Center, had worked for Gillard pressure washing houses and trucks. On one occasion, Gillis had observed money passing between defendant and Gillard. Defendant told Gillis that he had been trying to contact Gillard to collect the $1400 owed so that he could make his $1100 bail. Defendant appeared outraged that Gillard would not communicate with him while he was in the detention center. Defendant told Gillis he was going to kill Gillard when he was released.

Upon his release on 5 October 2001, defendant visited Diana Powell. Powell testified that defendant made a telephone call from her residence to Gillard's residence. Telephone records confirm this testimony, and also show that defendant attempted to contact Gillard seven more times over the next several days. A message left by defendant on Gillard's voice mail was retrieved by law enforcement. The message said:

> Hey, Nick, this is J. I got your ZX-12. It's brand new. I got the paperwork and the keys to it. Just call or come by the crib Saturday night. I'll let you check it out. It's still in the "m*****-f******" crate. Come by yourself, and don't bring nobody to my crib.

On Tuesday morning, 9 October 2001, Gillard telephoned his friend Cedric Leavy and drove to Leavy's residence to pick him up. Gillard honked the horn and Leavy went out to meet him, leaving his mobile telephone on the table. Sharon Cogdell, Leavy's fiancée, attempted to contact Leavy by calling Gillard's mobile telephone. Gillard informed her that they were busy and Leavy would call her back. Telephone records indicate that Cogdell's call to Gillard was placed at 10:13 a.m., and that Gillard's mobile phone was within a three-mile radius of the cellular tower closest to defendant's residence. The signal from the tower to Gillard's telephone traveled through the southwest panel of the tower, the quadrant in which defendant's residence was located. Cogdell attempted many other

calls late into the night, but they were not answered. On 10 October 2001, she informed the police that Leavy and Gillard were missing.

Also on 10 October 2001, Esther Locklear noticed an unfamiliar vehicle in her neighborhood in rural Cumberland County. After her son observed a body covered with a blanket in the backseat of the vehicle, Ms. Locklear contacted law enforcement. The vehicle was a burgundy Chevrolet Malibu four-door sedan with a plate registered to Gillard. Law enforcement secured the area and began an investigation. There were no prints on the ground or tire tracks that were thought to be of any evidentiary value; however, a white crystalline substance on the exterior of the vehicle appeared to be dried soap suds.

The body in the backseat was an African-American male who was six feet, two inches tall and weighed 430 pounds. It appeared from ropes tied around his wrists and then tightly secured around the front seat that his body had been winched in the vehicle. The body was determined to be that of Leavy. Law enforcement found Gillard's body in the trunk. The autopsies showed that both men had suffered contact and near-contact bullet wounds to the head. Gillard sustained three gunshot wounds, and Leavy received six. Three projectiles recovered from the bodies were determined to have been fired from the same weapon, a nine millimeter caliber firearm with a barrel containing nine lands and grooves with a left-hand twist. Only one manufacturer made such a firearm, and the murder weapon was either a Hi-Point nine millimeter Model C pistol or a Model 995 carbine rifle.

A search of defendant's residence revealed five spent nine millimeter shell casings in the dirt driveway and yard. In the backyard, near the patio, law enforcement observed two areas of roughly twenty to thirty square feet each where fresh soil had been spread over burned grass. The ground smelled of gasoline and putrid blood. Two blood-stained pieces of concrete were found buried several inches in the ground at the burn sites. Testing revealed the blood to be human.

Investigators also found two spent nine millimeter projectiles in the burned ground. It was determined that the two projectiles had been fired through a barrel with a left-hand twist and with nine lands and grooves; that is, they had been fired from a Hi-Point nine millimeter Model C pistol or Model 995 carbine rifle, as had the projectiles found in the victims' bodies. Luminol spraying revealed two

tracks of blood coming from the burned areas to the right and running through the yard, where they abruptly stopped.

Jerard Vinson testified that in October 2001 defendant asked him to pawn a ring because defendant did not have identification. Vinson pawned the ring, which was gold and had a black onyx stone, on 17 October 2001. Law enforcement later recovered the ring from the pawnshop. Gillard's ex-girlfriend testified the ring looked like the one Gillard wore and was wearing on the morning of his disappearance. The pawnshop manager testified that the retail portion of the store was the area's sole distributor of this brand of ring, and that Gillard had originally bought a gold and onyx ring there on 10 February 2001 for three hundred dollars.

Defendant presented no evidence at the guilt phase of his trial. The jury returned verdicts of guilty of first-degree murder of both Gillard and Leavy, but returned a verdict of not guilty as to defendant's alleged robbery of Gillard. The trial court dismissed the robbery charge as to Leavy.

Following the verdicts, both of defendant's attorneys, Carl Ivarsson and George Franks, were allowed to withdraw as counsel following defendant's physical attack on Franks. The trial court then declared a mistrial as to the penalty proceeding.

In 2007 a new jury was empaneled for the sentencing proceeding of defendant's trial. The State offered substantially the same evidence as it had presented in the guilt phase. In addition, the State offered victim impact evidence from Pamela Leavy, who was Leavy's older sister, and Sharon Cogdell, Leavy's girlfriend. Victim impact evidence as to Gillard's death was presented through testimony of Toni Washington, Gillard's former girlfriend, and Gillard's friends Michael and Vanessa Burden.

Defendant presented mitigation evidence tending to show that he had a difficult childhood. Defendant's father physically abused his children, sexually abused defendant's sisters, and physically abused defendant's mother. On one occasion defendant stood up to his father, who then shot him in the leg. Defendant's ex-girlfriend testified about how defendant was caring, how he took care of his brother and parents, and how he also helped her take care of her infant daughter. Defendant's nephew testified that defendant's mother burned trash and scraps in the yard of the residence. On rebuttal, Detective Sterling McClain testified that investigators had discovered

and examined a conventional burn pile separate and distinct from the two burn piles that smelled of blood and fuel.

Following closing arguments by counsel and the trial court's instructions to the jury, the jury deliberated and returned a binding recommendation that defendant be sentenced to death. As to both murders, the jury found that they were part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person. N.C.G.S. § 15A-2000(e)(11) (2007). One or more jurors found that defendant had no significant history of prior criminal activity, *id.* § 15A-2000(f)(1) (2007), along with several nonstatutory mitigating circumstances. The jury determined that the mitigating circumstances were insufficient to outweigh the aggravating circumstance and that the aggravating circumstance was sufficiently substantial, when considered with the mitigating circumstances, to impose the death penalty. The trial court then entered judgment accordingly.

ANALYSIS

The Reappointment of Attorney George Franks

[1] Defendant's first argument is that the trial court erred in not removing George Franks as his counsel or, in the alternative, by not holding a hearing to determine whether there was a conflict of interest between defendant and Franks. We disagree.

Following defendant's arrest, Ray Colton Vallery was appointed by Indigent Defense Services (IDS) to represent defendant on 22 October 2001. Following a Rule 24 conference held on 16 September 2002, IDS appointed George Franks as second chair on 19 September 2002. On 23 September 2002, defendant filed a *pro se* motion requesting that Vallery be withdrawn as counsel, stating that Vallery had failed to communicate with defendant and had not been diligent in his investigation of the case. The trial court heard argument on the motion on 10 October 2002. After defendant was asked whether he wanted both Vallery and Franks to be removed, the following colloquy took place:

> THE DEFENDANT: I barely know him.
>
> MR. FRANKS: Your Honor, I prefer to be removed as well so if he has counsel, he can have a clean slate, Your Honor. I have worked with Mr. Vallery, known him for years. He is a good attorney.

THE COURT: Yes, sir.

MR. FRANKS: If he's going to have trouble with Mr. Vallery, he's going to have trouble with me. I'm getting too old for trouble.

The trial court allowed defendant's motion and removed both attorneys, stating that IDS would need to make new appointments. IDS appointed Carl Ivarsson on 8 November 2002 and reappointed Franks as second chair on 19 December 2002.

Around the date of defendant's February 2003 arraignment, defendant wrote two letters, one to the clerk of court and the other addressed to Superior Court Judge Weeks. Defendant's 10 February 2003 letter to Judge Weeks stated:

> My name is Eugene Johnny Williams and the reason why I'm writting you is we seem to have a problem. My O.C.A. File record is #2001-14056, and Mr. Williams is charged with two counts of First Degree Murder and in September 2002, Mr. Williams filed a motion for attorney to be withdrawn from his case. In October 2002 Mr. Williams was brought back in front of you and my motion was granted, but now it seems to have another issue, One of two lawyers, "Mr. Franks" was present at Mr. Williams court hearing on 02/02 And he said he was still one of my attorneys. But in October 2002, he stated in front of Mr. Weeks the Judge overlooking the case, and said, "He and protege Mr. Vallery, he wanted to step down from my case since Mr. Williams didn't want Mr. Vallery to represent him." But now he only said three words to me while I was in court a few days ago, and the other attorney, "Judge Weeks" Mr. Williams doesn't even know his name or nothing at all about him. The main reason why Mr. Williams is writting this letter is because this is my life that is on the line. Mr. Williams truly understand that a court-appointed attorney will only go by his guidelines on jailed clients. But at the same time my life is on the line, or another words in someone's elses' hands. But Judge Weeks I never received a copy of any judgement on your ruling for new attorneys, and I am writting to Bar association so Mr. Williams can receive a pair of attorneys that will truly represent Mr. Williams in his case. Mr. Williams will receive the fair shake of the judicial system if attorneys and clients don't work together. Then last but not less none of my attorneys keep in touch no matter that the case may be. . . . [sic]

Defendant's 18 February 2003 letter to the Clerk of Court read:

> I Eugene Johnny Williams, hereby state and request the following. That on or about the 24, day of October 2002, the Honorable Judge Greg Weaks pursuant to GS15A-144, granted Mr. Williams request for removal of counsel. at said hearing Judge Weaks allowed Attorney Raymond Vallery to redraw as counsel for Mr. William, at which point Mr. Williams co counsel Mr. Franks, requested that he also be allowed to withdrawl, This Too was granted.
>
> I hereby contend, that Judge Weaks at this time guranteed Mr. Williams new appiontment of counsel, whereby Mr. Franks was reinstated, as co-counsel aginst Mr. Williams request. Co-counsel along with Mr. Franks was never made knowne To Mr. Williams. It is hereby requested That due To The severity of the charges charged aginst Mr William, it is most important That he contact counsel appointed by This court, whereby Mr. William Respectfully request the name address and phone number, of counsel and co-counsel for Mr. Williams pursuant To File # OCA 2001-14056. Now before This court. [sic]

Judge Weeks wrote defendant, informing him that Ivarsson was appointed as first chair and Franks was reappointed as second chair. Judge Weeks indicated that he had spoken to Ivarsson and Franks and also was providing them a copy of the letter sent by defendant requesting that his attorneys "keep in touch" with him. Defendant asserts the trial court erred by not removing Franks once again or conducting a hearing on whether defendant was entitled to substitute counsel. We disagree.

Defendant argues that two legal principles compel us to rule in his favor. First, defendant argues that "once a Superior Court Judge has issued a ruling in a case, the ruling becomes the law of the case." Thus, defendant asserts that IDS's reappointment of Franks as second chair counsel violated Judge Weeks's order to have IDS appoint new counsel in the case. To the contrary, Judge Weeks's order consisted solely of the following: "All right. Motion is allowed." Judge Weeks simply allowed defendant's motion to have counsel removed from his case. After the order allowing the motion, Judge Weeks began to address who would be appointed to represent defendant, and Franks indicated that the decision would go to IDS. The trial court agreed and simply stated as fact to defendant that "[i]t goes back to IDS which means your case is going to be further delayed which means this case has to go back up to them and they have to

make new appointments." Judge Weeks's order allowing defendant's motion to remove counsel did not, implicitly or explicitly, order that Franks not be reappointed as counsel. Thus, we cannot agree that IDS violated the trial court's order.

[2] Second, defendant argues that "when faced with a request for substitute counsel, a trial court has an obligation to conduct a sufficient inquiry to determine if the defendant is entitled to the appointment of substitute counsel." Defendant relies on *State v. Thacker*, 301 N.C. 348, 271 S.E.2d 252 (1980), for this proposition. In *Thacker* this Court stated: "[W]hen faced with a claim of conflict *and a request for appointment of substitute counsel*, the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective." *Id.* at 353, 271 S.E.2d at 256 (emphasis added). We do not agree with defendant that his letter to the trial court "clearly constitutes a request for substitute counsel." Instead, defendant's letter indicates uncertainty on his part regarding why Franks was still his attorney. Had defendant wished to have Franks removed as counsel, defendant could have filed another motion to have his attorney replaced. Defendant obviously possessed the ability to do so, as evidenced by his prior *pro se* motion that was allowed by Judge Weeks. Thus, in the absence of a request for the appointment of substitute counsel, the trial court was not required to hold any hearing.

Even if we were to conclude that a hearing should have been held, we are not persuaded that any alleged conflict of interest would have been sufficient to remove Franks from the case. The issue would have been whether Franks was "able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective." *Id.* Defendant was not entitled to counsel of his choice, 301 N.C. at 351-53, 271 S.E.2d at 255, nor was he constitutionally entitled to second chair counsel, *State v. Locklear*, 322 N.C. 349, 357, 368 S.E.2d 377, 382 (1988) (explaining that the right to the "appointment of *additional* counsel in capital cases is statutory, not constitutional"). Even had defendant been constitutionally entitled to a second attorney, there is no indication that any conflict with Franks would rise to the level of rendering Franks's "assistance ineffective." Defendant never asked for Franks to be removed, but rather, Franks was initially removed on his own request. Defendant did not make any formal motion or inform the trial court in any way that he had a potential conflict of interest with

Franks. We do not agree with defendant that any potential conflict that existed between defendant and Franks would have been apparent to the trial court, such as to compel the trial court to *ex mero motu* conduct a hearing on the matter. We also disagree with defendant's alternative argument that he is entitled to present his concerns to the trial court on remand to establish his allegations if this Court finds that a new trial is not warranted. Accordingly, defendant's assignments of error are overruled.

Defendant's Pro Se *Speedy Trial Motion*

[3] Defendant next argues that the trial court erred by "summarily denying" his *pro se* motion to dismiss on speedy trial grounds. We disagree. Defendant was represented by appointed counsel and was not allowed to file *pro se* motions on his behalf. "A defendant has only two choices—'to appear *in propria persona* or, in the alternative, by counsel. There is no right to appear both *in propria persona* and by counsel.' " *State v. Thomas*, 331 N.C. 671, 677, 417 S.E.2d 473, 477 (1992) (citations omitted) (quoting *State v. Parton*, 303 N.C. 55, 61, 277 S.E.2d 410, 415 (1981), *disavowed on other grounds by State v. Freeman*, 314 N.C. 432, 437-38, 333 S.E.2d 743, 746-47 (1985)). "Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel." *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000) (citations omitted), *cert. denied*, 534 U.S. 838 (2001).

Defendant asserts that these cases do not apply to his *pro se* motion to dismiss on speedy trial grounds because defense counsel "adopted" these motions. We disagree. Before the trial court considered the motion at issue, defense counsel stated: "The defendant filed some *pro se* motions. We need rulings on those." The trial court informed defendant that he had no right to file motions on his own behalf and that he could not continue to file *pro se* motions while being represented by counsel. The trial court then declined to rule on the *pro se* motions. Defendant argues that the trial court erred in not ruling on his *pro se* motions because the trial court erroneously believed that counsel had filed motions covering the issues raised by defendant in his *pro se* motions. That the trial court might have been mistaken as to whether defense counsel had filed similar motions is inapposite. Defendant was not entitled to file *pro se* motions while represented by counsel, and the statement to the trial court by defense counsel that the *pro se* motions needed to be ruled on hardly represents counsel's adoption of defendant's motion. Accordingly, the

trial court did not err in refusing to rule on defendant's *pro se* speedy trial motion. Defendant's assignments of error are overruled.

Defendant's Pro Se *Motion to Suppress*

Likewise, defendant argues that the trial court erred in "summarily denying" his *pro se* motion to suppress. This motion was addressed by the trial court during the same discussion that related to defendant's *pro se* motion to dismiss on speedy trial grounds. For the reasons previously stated, defendant was not entitled to a ruling from the trial court on a *pro se* motion filed while he was represented by appointed counsel. Thus, the trial court did not err in refusing to rule on defendant's *pro se* motion to suppress. Accordingly, defendant's assignment of error is overruled.

The Testimony of Lieutenant Ray Wood

[4] Defendant asserts that the trial court erred in admitting some of the testimony of Lieutenant Ray Wood of the Cumberland County Sheriff's Office. Defendant argues that the testimony was "inadmissible lay opinion testimony" received in violation of his right to due process and a fair trial. Defendant's objections at trial were not based on constitutional grounds, and as a consequence, these claims are not reviewable on appeal and defendant does not contend plain error. *See* N.C. R. App. P. 10(b); *id.* 10(c)(4); *see also State v. Raines*, 362 N.C. 1, 16, 653 S.E.2d 126, 136 (2007), *cert. denied*, —— U.S. ——, 129 S. Ct. 2857 (2009). While we decline to review defendant's constitutional arguments, we will address his assertion that the testimony was inadmissible lay opinion testimony.

Rule 701 of the North Carolina Rules of Evidence states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (2007). The State never tendered Wood as an expert witness, but informed the trial court that it would offer his testimony regarding his personal observations and as a lay opinion consistent with Rule 701. We review the trial court's decision to admit evidence for abuse of discretion, looking to whether "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323

N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted). "In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007) (citing *Wainwright v. Witt*, 469 U.S. 412, 434 (1985)). We conclude that the trial court did not abuse its discretion in any of the five instances about which defendant complains, as the testimony was either not opinion testimony or was admissible as a lay opinion.

First, defendant asserts the trial court erred in overruling his objection to Wood's testimony that the "white crystal powdery-type substance" found on the vehicle in which the victims were discovered "looked like as far as the size and how it was distributed over the vehicle, is taking your car into a car wash and the car wash mechanism spraying the suds . . . and the car not being rinsed. That's what it looked like." Here, Wood was not offering his opinion that defendant attempted to wash the vehicle without rinsing it, but was explaining his observations about the size and distribution of the spots found on the vehicle. Thus, this testimony was not opinion testimony.

Second, defendant argues the trial court erred in permitting Wood to testify that it was his opinion that the victims were not shot in the vehicle in which their bodies were found. This opinion was based upon Wood's observations that there was no pooling of blood in or around the vehicle, no shell casings found in the car or around the car, very little blood spatter in the vehicle, and no holes or projectiles found in the vehicle or outside the vehicle. Thus, Wood's opinion was rationally based on his perception. Additionally, the location of the murders was a key issue linking defendant to the crime. Wood's opinion whether the victims were murdered in the location where the vehicle was found or were killed inside the vehicle was helpful to the determination of a fact of the case and was thus admissible under Rule 701. The trial court did not abuse its discretion in overruling defendant's objection.

Third, defendant objected to Wood's testimony that it was his opinion that Leavy had been "winched in" the vehicle by the use of the rope found inside the vehicle. Wood's testimony was based upon his perception of blood patterns, the location of the vehicle, and the positioning of and tension on the rope on the seat and Leavy's hands. Moreover, his opinion was helpful in determining how defendant, acting alone, would have been able to move Leavy's large body from defendant's residence to the vehicle. Accordingly, the testimony was

admissible lay opinion testimony, and the trial court did not abuse its discretion in admitting it.

Fourth, defendant argues that the trial court erred in allowing Wood to testify that a blanket seized from defendant's home was the "same type blanket" as that covering one of the decedents. Defendant did not object to this testimony at trial and has not argued in his brief that admission of this evidence amounts to plain error. Accordingly, we will not review this contention. *See* N.C. R. App. P. 10(c)(4).

Finally, defendant argues the trial court erred in allowing Wood to testify that it was his opinion that the victims were dragged through the grass at defendant's residence. This testimony was based upon Wood's observations at defendant's residence and his experience in luminol testing. Additionally, this testimony was helpful to the determination of how the victims' bodies may have been moved from defendant's residence into the vehicle and ultimately to the place where they were discovered. The testimony was admissible. Defendant's assignments of error are overruled.

Pretrial Statements of Sharon Cogdell and Jimmy Locklear

[5] Defendant argues the trial court erred in admitting the pre-trial statements of Sharon Cogdell and Jimmy Locklear for the purpose of corroborating their testimony. Although defendant raises this as a constitutional issue on appeal, he did not object on constitutional grounds at trial and does not contend plain error; accordingly, we will not review these assignments of error on constitutional grounds. *See id.* 10(b); *id.* 10(c)(4); *see also Raines*, 362 N.C. at 16, 653 S.E.2d at 136. We will review defendant's assignments of error only for alleged violations of the North Carolina Rules of Evidence, and we conclude that the trial court did not abuse its discretion in admitting the statements for corroborative purposes.

" 'Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.' " *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303 (1991) (quoting *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980)). "Deciding whether to receive or exclude corroborative testimony, so as to keep its scope and volume within reasonable bounds, is necessarily a matter which rests in large measure in the discretion of the trial court." *State v. Garcell*, 363 N.C. 10, 39-40, 678 S.E.2d 618, 637 (citations and internal quotation marks omitted), *cert. denied*, ––– U.S. –––, 78 U.S.L.W. 3252 (2009). Indeed,

> prior statements of a witness can be admitted as corroborative evidence if they tend to add weight or credibility to the witness' trial testimony. New information contained within the witness' prior statement, but not referred to in his trial testimony, may also be admitted as corroborative evidence if it tends to add weight or credibility to that testimony.

State v. Davis, 349 N.C. 1, 28, 506 S.E.2d 455, 469-70 (1998) (citations and internal quotation marks omitted), *cert. denied*, 526 U.S. 1161 (1999). "[I]f the testimony offered in corroboration is generally consistent with the witness's testimony, slight variations will not render it inadmissible. Such variations affect only the credibility of the evidence which is always for the jury." *State v. Warren*, 289 N.C. 551, 557, 223 S.E.2d 317, 321 (1976) (citations omitted). When determining whether the trial court abused its discretion, we look to whether "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. "In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *Lasiter*, 361 N.C. at 302, 643 S.E.2d at 911.

Defendant asserts that the trial court erred when Detective Robert Gilford of the Cumberland County Sheriff's Office was allowed to testify that Sharon Cogdell told him that Leavy had received a telephone call from Gillard on 9 October 2001 and that Gillard asked Leavy to go somewhere with him. While Cogdell did not testify at trial that Leavy had received a telephone call from Gillard, she did testify that Leavy received a telephone call at her residence, that about fifteen minutes later a car came to her residence and Leavy left in the car, and that she called Gillard a short while later, asking to talk to Leavy, and was told they would return her call. The trial court instructed the jury to disregard Detective Gilford's testimony insofar as it did not corroborate Cogdell's testimony. Gilford's testimony generally tracked Cogdell's testimony and was not contrary to or inconsistent with it. We cannot say that the trial court's decision to allow the testimony was manifestly unsupported by reason.

Defendant also argues the trial court erred when Detective Charles Disponzio of the Cumberland County Sheriff's Office gave corroboration testimony detailing a statement allegedly made by defendant to his cellmate Jimmy Locklear before the murders. At trial, Locklear testified that defendant was upset with an unidentified person because that person owed him money and was "ducking"

him. Defendant told Locklear that he was going to "f*** him up." Locklear also testified that the unidentified man had only paid a portion of the sales price and that he still owed defendant $1500 to $2000. Locklear testified that defendant was involved in the stealing and selling of motorcycles and that defendant had mentioned a "nine millimeter" at one time. Detective Disponzio's testimony regarding Locklear's statement was that defendant said about the man who owed him money that "[h]e was going to kill him and f*** him—or f*** him up, in other words." While Locklear testified that defendant did not use the word "kill," we note that Detective Disponzio made only a fleeting mention of the word, which could certainly be a reasonable interpretation of "f*** him up." Any prejudicial effect of the admission of this portion of the detective's testimony is mitigated by Gillis's testimony that defendant "said he was going to kill" Gillard upon defendant's release from the detention center. Additionally, the trial court properly instructed the jury on the corroborative purposes of Disponzio's testimony. Defendant also argues the trial court erred in allowing Disponzio to testify that the unnamed person with whom defendant was angry had given him the "runaround," that defendant recruited Locklear to help him "boost" motorcycles, and that defendant had "talked a lot about nine millimeters and a Glock and stuff and all that—Rugers, nine millimeters." Detective Disponzio's testimony generally tracked the testimony given by Locklear and was not in any way inconsistent with Locklear's testimony. We cannot say the trial court's decision to allow the testimony exceeded the bounds of reason. Accordingly, defendant's assignments of error are overruled.

Sufficiency of the Evidence

[6] Defendant argues that the evidence presented was insufficient to permit a reasonable juror to find defendant guilty of the murders beyond a reasonable doubt. Additionally, because the evidence of guilt was allegedly insufficient, defendant contends the evidence was insufficient for the jury to find the aggravating circumstance as to each murder, namely, that defendant engaged in a course of conduct which included the commission of another crime of violence; here, the first-degree murder of another person. We disagree.

"When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004) (citations omitted), *cert. denied*, 546 U.S. 830 (2005). "If substantial evidence exists to support each essential element of the crime charged and that defendant was the

perpetrator, it is proper for the trial court to deny the motion." *Id.* (citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citations and internal quotation marks omitted).

The State's evidence was sufficient. Witnesses testified that defendant bragged while in jail that he was going to "f*** him [Gillard] up" for not paying money owed, money that would have allowed defendant to be released from the detention center. In the days following defendant's release, he attempted to make telephone contact with Gillard at least eight times, leaving a message on Gillard's voice mail inviting him to see a motorcycle and ordering him to come alone. Shortly before his death, Gillard told others that he was going to purchase a motorcycle. On 9 October 2001, Gillard and Leavy left Leavy's residence together, and Leavy's girlfriend later called Gillard's mobile phone and was told that they were busy and would return her call later. This call was routed through the southwest panel of the cellular phone tower nearest defendant's residence. Moreover, certain evidence indicated that the murders did not occur in the vehicle containing the bodies or in the area where the vehicle was found. In defendant's yard there were two areas of roughly twenty to thirty square feet each where fresh soil was spread over the grass. Under the soil, the ground smelled of gasoline and putrid blood. During the 2007 sentencing hearing, evidence was presented that a part of the soil tested positive for blood. A piece of concrete found several inches in the ground tested positive for human blood. Two spent nine millimeter projectiles were found in the ground at defendant's residence, along with spent nine millimeter casings. The projectiles recovered from the victims' bodies and from defendant's yard were fired from a weapon with a left-hand twist and nine lands and grooves. Approximately one week after the murders, defendant asked a friend to pawn a gold ring with a black onyx stone. The ring was similar to one owned by Gillard and purchased by him several months earlier from the same pawnshop.

Defendant basically attempts to interpret the evidence in a light most favorable to him, detailing other plausible explanations for the evidence presented by the State at trial. "However, '[w]hen ruling on a motion to dismiss for insufficient evidence . . . . [a]ny contradictions or conflicts in the evidence are resolved in favor of the State and evidence unfavorable to the State is not considered.' " *State v. Wilkerson*, 363 N.C. 382, 427-28, 683 S.E.2d 174, 202 (2009) (quoting

Miller, 363 N.C. at 98, 678 S.E.2d at 594 (alterations in original) (citations omitted by court)). These assignments of error are overruled.

Jurisdictional Issues

[7] Following the guilt phase of defendant's trial in 2004, counsel for defendant, Ivarsson and Franks, met with him in a classroom at the Cumberland County Detention Center. Defendant immediately became aggressive, shouting at counsel, cursing at them, and hurling racially-charged vulgar epithets at them. Defendant then slammed his fists on a table, threw the table at Franks, and then pushed the table on Franks, knocking him to the ground. Employees of the detention center heard the commotion and entered the room. They immediately stood between defendant and his counsel and asked counsel to leave. Counsel then filed a motion to withdraw, which the trial court granted. Judge Weeks declared a mistrial as to the penalty proceeding and dismissed the jury. In 2007 Judge Lock presided over defendant's penalty proceeding, and a new jury was empaneled. Defendant argues the trial court lacked jurisdiction to enter a sentence of death against him because (1) Judge Lock did not preside over the guilt phase of defendant's trial; (2) the jury that recommended a sentence of death was not the same jury that returned the guilty verdicts in the guilt phase; and (3) the sentencing judgment was entered out-of-session and out-of-term.

We disagree with defendant that the trial court lacked jurisdiction to enter a judgment sentencing him to death. Defendant has taken issues of procedure and attempted to recast them as jurisdictional issues. While N.C.G.S. § 15A-2000(a), which governs penalty proceedings after a finding of guilt in capital cases, does envision the same trial judge presiding over a defendant's guilt phase and penalty proceeding, the statute also envisions the proceeding being held immediately or soon after the defendant has been found guilty of a capital offense. Such a scenario was impossible in this case because of defendant's unprovoked attack on one of his attorneys. No binding statute or case law prohibits a superior court judge other than the one who presided over the guilt phase from presiding over the penalty proceeding.[1] Defendant's reading of N.C.G.S. § 15A-2003 is

1. Defendant argues that *Harris v. Lee*, No. 91-CRS-16272 (Super. Ct. Onslow County Oct. 22, 2001) (unpublished order), *cert. denied*, 559 S.E.2d 802 (N.C. 2002) is persuasive in this case. We do not find defendant's analogies to this case to be compelling. We also note that we are not bound by decisions of a superior court and that this Court's denial of certiorari has no precedential value. *Jenkins v. Aetna Cas. & Sur. Co.*, 324 N.C. 394, 400, 378 S.E.2d 773, 777 (1989).

unduly narrow, and that statute is not applicable in this case. The superior court's jurisdiction over the subject matter of this case was established when defendant was indicted for a felony, and jurisdiction over the penalty phase was established when defendant was convicted of a capital offense. *See* N.C.G.S. § 7A-271 (2007). The trial court was not divested of its subject matter jurisdiction because Judge Lock, instead of Judge Weeks, presided over the penalty proceeding.

[8] Moreover, we reject defendant's argument that the sentencing jury lacked jurisdiction to recommend a sentence of death. We note again that N.C.G.S. § 15A-2000(a)(2) sets out procedure, not jurisdiction. Moreover, section 15A-2000(a)(2) addresses occasions when the guilt phase jury is unable to sit for the penalty phase. Defendant argues there was no indication that the guilt phase jury would have been unable to reconvene three years later to sit for his penalty proceeding. The likelihood of all jurors who served on the guilt phase jury to be available and qualified to serve three years later is a practical impossibility. In order for the trial jury to sit as the sentencing jury, no juror could have moved outside the district during the three-year gap between defendant's conviction and the penalty proceeding. The jurors would have been expected to not speak to others, for a period of three years about a high-profile double murder case on which they had served. Moreover, the jurors also would have been expected to shield themselves from all media reports on the case. We cannot say that it was an abuse of discretion for Judge Weeks to declare a mistrial or for Judge Lock to convene a new jury.

[9] Finally, we do not agree with defendant that the trial court lacked jurisdiction because the judgments were entered out-of-term and out-of-session. The principles articulated by this Court in *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984) and *State v. Trent*, 359 N.C. 583, 614 S.E.2d 498 (2005) are simply not relevant in this case. In *Boone* and *Trent*, both orders at issue pertained to suppression motions on which the trial court did not rule until after the session ended and the terms at which the motions were heard had expired. In this case, a mistrial was declared because of defendant's physical attack on his appointed counsel. Following this assault, both attorneys were allowed to withdraw, and new counsel needed to be appointed. The time required for defendant's new counsel to become prepared to defend him necessitated the delay in beginning the penalty proceeding. Even had some procedural error been committed, defendant would not have been prejudiced by it. "A defendant is

not prejudiced . . . . by error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (2007). Accordingly, we overrule defendant's assignments of error.

Jury Pool Selection Outside Defendant's Presence

[10] Defendant argues that the trial court violated his right under Article I, Section 23 of the North Carolina Constitution to be present at all proceedings of his capital trial when the deputy clerk selected forty-eight prospective jurors from the pool in the jury assembly room, outside defendant's presence. A defendant's right to be present at all proceedings of his capital trial under Article I, Section 23 is unwaivable. *State v. Boyd*, 332 N.C. 101, 105, 418 S.E.2d 471, 473 (1992) (citations omitted). Thus, even though defendant did not object—and actually consented to the actions of the jury clerk—we will still consider his argument.

When defendant's 2007 penalty proceeding began, the trial court informed the parties that it appeared a civil trial would be occurring concurrently in another courtroom. Approximately eighty prospective jurors had reported for duty and were being held in the jury assembly room. The trial court proposed that forty-eight jurors be selected by the jury clerk for possible service in this case. There was no objection to this plan of action. Following some discussion on administrative matters, the trial court informed the parties that the clerk had anticipated "what we were going to do, based upon my comments a moment ago" and had "already communicated that to the courtroom—excuse me, to the jury clerk who is working with the venire, and she has already drawn out 48 people and will call those names." A few days later, as the jury was still being selected, the trial court informed the parties: "Friday afternoon, I discussed with . . . the Trial Court Administrator, the process of selecting additional jurors for this week. And tentatively decided that the best thing to do would be to select a number of jurors from the venire first thing this morning and have just those jurors fill out questionnaires since they certainly need other jurors for other matters going on here in the courtroom or the courthouse this week." There was no objection by either party to the jury clerk's selecting thirty prospective jurors at random in this manner.

Defendant asserts that he had a constitutional right to be present when the prospective jurors were being chosen. Jurors are selected in the courtroom pursuant to section 15A-1214(a), which provides in pertinent part: "The clerk, under the supervision of the presiding

judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called." N.C.G.S. § 154-1214(a) (2007). The purpose of random selection in the courtroom is to ensure that neither party knows the identity of the next prospective juror to be questioned.

To the extent defendant is challenging the initial organization of the entire venire into separate panels that were later sent sequentially to the courtroom, such a process was a purely administrative matter and not a "proceeding" at which defendant is entitled to be present. We find *State v. Workman*, 344 N.C. 482, 476 S.E.2d 301 (1996), instructive even though defendant's case had been called for trial. In *Workman* this Court stated: "Defendant's right to be present at all stages of his trial does not include the right to be present during preliminary handling of the jury venires before defendant's own case has been called." *Id.* at 498, 476 S.E.2d at 309 (citations omitted). Likewise, in the instant case, the random segregation of the entire jury pool so that it could be split among defendant's proceeding and other matters being handled at the courthouse that day was a preliminary administrative matter at which defendant did not have a right to be present. *See State v. McNeill*, 349 N.C. 634, 642-43, 509 S.E.2d 415, 420 (1998) (stating that defendant did not have the right to be present when prospective jurors were sworn in by a deputy clerk in the jury assembly room and the jurors "were subject to assignment in any one of six superior courts in session as well as any number of district courts"), *cert. denied*, 528 U.S. 838 (1999). Moreover, to march a defendant who had been shackled because of a physical assault of his attorney and who had been recently convicted of two counts of first-degree murder through the courtroom halls into a jury room in order for him to be present during the random drawing of names of prospective jurors is impractical and most likely an administrative impossibility. Because defendant's right to be present at all proceedings does not extend to the jury assembly room, we disagree with defendant's contention that his right to be present was violated. Defendant's assignment of error is overruled.

Admission of Evidence from Guilt Phase at Penalty Proceeding

[11] Defendant argues the trial court erred in admitting during the penalty proceeding evidence that defendant, following the murders, possessed items that belonged to the victims. Defendant contends admission of this evidence was erroneous because he was acquitted of robbery of the victims. We disagree.

Although defendant did file a motion *in limine* to exclude evidence that defendant possessed Gillard's ring and watch and Leavy's ring, defendant did not object when the evidence was admitted. While we generally would not review defendant's claims on the merits, we elect to do so under Rule 2 of the North Carolina Rules of Appellate Procedure. Defendant's argument is that *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992), controls here rather than *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990). We disagree and find *Agee* to be on point.

While the North Carolina Rules of Evidence that controlled in *Agee* and *Scott* are not binding in a capital penalty proceeding, they do provide this Court guidance. *See State v. Duke*, 360 N.C. 110, 124, 623 S.E.2d 11, 21 (2005) (citation omitted), *cert. denied*, 549 U.S. 855 (2006). In *Scott* this Court concluded that evidence of a prior rape of which the defendant had been acquitted was inadmissible as a matter of law in a subsequent case in which the defendant was charged with the rape of another woman. 331 N.C. at 42, 413 S.E.2d at 788. In *Agee* this Court held that evidence that the defendant possessed marijuana, a charge of which the defendant had been acquitted, was admissible against the defendant in a subsequent case involving the same transaction in which the defendant was charged with possession of LSD. 326 N.C. at 546-50, 391 S.E.2d at 173-76. In distinguishing *Agee*, the Court in *Scott* wrote: "The 'chain of circumstances' link that arguably made [the marijuana] evidence probative in *Agee* by virtue of its temporal relevance to the crime for which the defendant was on trial is absent here." 331 N.C. at 46, 413 S.E.2d at 790-91.

As in *Agee*, the evidence presented during the penalty proceeding here was not offered to prove that defendant had robbed his victims. Instead, the State used the evidence to prove its single aggravating factor for each murder—that defendant had engaged in a course of conduct that involved a crime of violence against another person or persons, namely the murder of another. Defendant's possession of the victims' items in and of itself would not be sufficient to prove robbery beyond a reasonable doubt. However, evidence that defendant possessed these items was relevant to linking defendant to both victims. Moreover, as in *Agee*, defendant's possession of the items was temporally relevant to the chain of circumstances surrounding defendant's crimes. The trial court did not err in admitting the evidence. *See* N.C.G.S. § 15A-2000(a)(3) (2007) (stating, *inter alia*, that in the penalty proceeding, "[a]ny evidence which the court deems to have probative value may be received"). Defendant's assignments of error are overruled.

PRESERVATION ISSUES

Defendant raises as preservation issues (1) that the trial court erred by denying his motion for a bill of particulars detailing the State's theory of the case; (2) that the short-form indictment used was insufficient to charge first-degree murder; (3) that the trial court erred in denying defendant's motions to strike the death penalty from consideration because the death penalty is cruel and unusual punishment and is administered in an arbitrary and capricious manner; and (4) that the trial court erred in refusing to give his requested jury instruction on mitigating circumstances. We have rejected these arguments in the past, and decline to revisit them today. *See State v. Elliott*, 360 N.C. 400, 421-24, 628 S.E.2d 735, 749, *cert. denied*, 549 U.S. 1000 (2006); *State v. Garcia*, 358 N.C. 382, 387-90, 423-25, 597 S.E.2d 724, 731-33, 752-53 (2004), *cert. denied*, 543 U.S. 1156 (2005); *State v. Conaway*, 339 N.C. 487, 532-34, 536, 453 S.E.2d 824, 852-55, *cert. denied*, 516 U.S. 884 (1995).

PROPORTIONALITY

[12] Because we have concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we now consider: (1) whether the record supports the aggravating circumstances found by the jury; (2) whether the death sentences were entered under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both the facts of the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (2007).

The jury found only one aggravating circumstance in each murder, the section 15A-2000(e)(11) aggravating circumstance that the murder was part of a course of conduct in which defendant engaged and that course of conduct included the commission by defendant of other crimes of violence against another person. We have previously noted that sufficient evidence was presented that defendant murdered both Gillard and Leavy. Accordingly, we find that the evidence supports the aggravating circumstances found by the jury. Additionally, nothing in the record indicates that the sentences were imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we determine whether defendant's sentences were proportional, considering both the crime and defendant.[2] In determining proportionality, we consider "all cases which are roughly similar in facts to the instant case, although we are not constrained to cite each and every case we have used for comparison." *State v. McNeill*, 360 N.C. 231, 254, 624 S.E.2d 329, 344 (citing *State v. Al-Bayyinah*, 359 N.C. 741, 760-61, 616 S.E.2d 500, 514 (2005), *cert. denied*, 547 U.S. 1076 (2006)), *cert. denied*, 549 U.S. 960 (2006). "Although we 'compare this case with the cases in which we have found the death penalty to be proportionate . . . we will not undertake to discuss or cite all of those cases each time we carry out that duty.' " *Garcia*, 358 N.C. at 429, 597 S.E.2d at 756 (quoting *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, 512 U.S. 1254 (1994) (alteration in original)). "[O]nly in the most clear and extraordinary situations may we properly declare a sentence of death which has been recommended by the jury and ordered by the trial court to be disproportionate." *State v. Chandler*, 342 N.C. 742, 764, 467 S.E.2d 636, 648 (citation omitted), *cert. denied*, 519 U.S. 875 (1996). The determination of proportionality of an individual defendant's sentence is ultimately dependent upon the sound judgment and experience of the members of this Court. *See McNeill*, 360 N.C. at 253, 624 S.E.2d at 344 (citing *Garcia*, 358 N.C. at 426, 597 S.E.2d at 754).

There have been eight cases in which this Court has determined that a defendant's sentence was disproportionate: *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

In all these cases, there was a single victim, but here, defendant murdered two people. "[W]e have never found a death sentence disproportionate in a double-murder case." *State v. Sidden*, 347 N.C. 218, 235, 491 S.E.2d 225, 234 (1997) (citing *State v. Conner*, 345 N.C. 319, 338, 480 S.E.2d 626, 635, *cert. denied*, 522 U.S. 876 (1997)), *cert.*

2. Defendant argues that the proportionality review as set out by statute and this Court is unconstitutional. We reviewed and rejected these arguments in *Garcia*, and decline to revisit them here. 358 N.C. at 429, 597 S.E.2d at 756.

denied, 523 U.S. 1097 (1998). We decline to do so here. In terms of the aggravating circumstances found, this case is very similar to *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056 (1982), in which this Court found the defendant's sentence to be proportionate when the only aggravating circumstance found was the (e)(11) aggravator. *Id.* at 684, 690, 292 S.E.2d at 260, 263.

In this case, the facts are more similar to those cases in which a defendant has needlessly taken the lives of two human beings, as opposed to one. We found the death penalty not disproportionate in *State v. Raines*, 362 N.C. at 26, 653 S.E.2d at 142, in which the defendant killed a husband and wife, *id.* at 7, 653 S.E.2d at 130. Likewise, in *Duke*, 360 N.C. at 144, 623 S.E.2d at 33, we noted how the defendant's murder of two men was significant in a finding of proportionality. *See also Sidden*, 347 N.C. at 235, 491 S.E.2d at 234; *Conner*, 345 N.C. at 338, 480 S.E.2d at 635.

The evidence here indicated that defendant lured his victims to his residence by telling Gillard that he had another motorcycle for him. Defendant instructed Gillard to come alone. Defendant had been angry with Gillard for failing to pay him in full for his last motorcycle deal and had made threats against Gillard while in jail. Defendant's killing of Gillard appeared to be motivated by revenge for Gillard's failure to pay, which prevented defendant from being able to make bail during his incarceration. Moreover, defendant was convicted of both murders on the basis of premeditation and deliberation. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Watts*, 357 N.C. 366, 380, 584 S.E.2d 740, 750 (2003) (citations and internal quotation marks omitted), *cert. denied*, 541 U.S. 944 (2004). We can conclude that defendant's sentences are proportionate.

CONCLUSION

Defendant has made other assignments of error, but has not provided any argument or supporting authority for these assignments in his brief. Consequently, we consider those assignments of error abandoned, and they are dismissed. *See* N.C. R. App. P. 28(b)(6); *Raines*, 362 N.C. at 26, 653 S.E.2d at 142 (citation omitted).

We conclude defendant received a fair trial and sentencing proceeding, and we find no error in his convictions or sentences. Moreover, we conclude that defendant's sentences of death are not disproportionate and should remain undisturbed.

NO ERROR.

Justice TIMMONS-GOODSON took no part in the consideration or decision of this case.

BERNARD SCARBOROUGH v. DILLARD'S, INC., formerly Dillard Department Stores, Inc., a North Carolina Corporation

No. 112A08

(Filed 11 December 2009)

1. Damages— punitive—judgment notwithstanding the verdict—standard for appellate review

In reviewing a trial court's ruling on a motion for judgment notwithstanding the verdict on punitive damages, appellate courts must determine whether the nonmovant produced clear and convincing evidence from which a jury could reasonably find one or more of the statutory aggravating factors required by N.C.G.S. § 1D-15(a) and that the aggravating factor was related to the injury for which compensatory damages were awarded. Evidence that is only more than a scintilla cannot satisfy the nonmoving party's threshold statutory burden of clear and convincing evidence.

2. Appeal and Error— findings—directed verdict and judgment notwithstanding the verdict—not binding on appeal

Although findings are normally binding on the appellate court when not challenged by appellant, trial court rulings on motions for directed verdict and judgment notwithstanding the verdict should not involve findings, and any findings that are made are not binding on appeal. Findings provide a convenient, familiar format for the trial court to state its reasons for upholding or disturbing a final award, but those findings involve merely a recitation of the evidence rather than a determination of its truth or weight.

3. Malicious Prosecution— malice—investigation into alleged embezzlement—sufficiency of evidence

Plaintiff did not present sufficient evidence of willful or wanton conduct or malice sufficient for punitive damages in a

malicious prosecution action where plaintiff was a shoe salesman who was charged with embezzlement after two customers left the store without paying for shoes. Plaintiff contended that defendant's investigation in the store was superficial and cursory, but the investigation was handled by Charlotte-Mecklenburg Police Department officers, who also worked at the store, and the prosecutor did not ask for any additional investigation or information when presented with the case. Although the investigation may not have been perfect, plaintiff did not adduce any evidence that would have changed the officers' decision to present the case to an Assistant District Attorney.

4. Malicious Prosecution— employee charged with embezzlement—reckless disregard of employee's rights—sufficiency of evidence

A malicious prosecution plaintiff did not present sufficient evidence of a reckless disregard of his rights in procuring his prosecution for embezzlement despite evidence that he simply made a mistake in forgetting to charge two customers for shoes. Refusing to accept an employee's explanation and telling the employee the consequences of the situation during an interview does not equate with reckless disregard of an employee's rights.

5. Malicious Prosecution— malice—comments from store manager—evidence not sufficient

A malicious prosecution plaintiff's argument that there was evidence of malice in comments from plaintiff's store manager before his arrest for embezzlement was too speculative.

Justice TIMMONS-GOODSON dissenting.

Justice HUDSON 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, 188 N.C. App. 430, 655 S.E.2d 875 (2008), reversing entry of judgment notwithstanding the verdict in defendant's favor as to punitive damages on 8 January 2007 by Judge Hugh B. Campbell, Jr. in District Court, Mecklenburg County. Heard in the Supreme Court 15 October 2008.

David Q. Burgess for plaintiff-appellee.

Poyner & Spruill LLP, by David W. Long, Douglas Martin, and John W. O'Hale, for defendant-appellant.

PARKER, Chief Justice.

The issue before the Court on this appeal is whether the trial court erred in granting defendant judgment notwithstanding the verdict as to punitive damages. For the reasons stated herein, we conclude that the trial court did not err, and the decision of the Court of Appeals is reversed.

This case arises out of an action for malicious prosecution instituted by plaintiff Bernard Scarborough as the result of his having been indicted, tried, and acquitted of embezzlement from his employer, defendant Dillard's, Inc. At the outset, we note that the sufficiency of the evidence to support the underlying tort of malicious prosecution is not before the Court in that defendant did not cross appeal the trial court's denial of its motion for judgment notwithstanding the verdict (JNOV) as to the jury's determination of liability for malicious prosecution.

The evidence presented at trial tended to show that on 27 October 1997, plaintiff worked in the ladies' shoe department at Dillard's, where he had been employed part-time for approximately two years. Around 8:00 p.m., plaintiff waited on two women for approximately thirty-five to forty minutes, showing them about twenty pairs of shoes. When one of the women decided to purchase two pairs of shoes, plaintiff took the shoes to the register, scanned the shoes, and placed them in a bag. Before plaintiff completed this transaction, the other woman came to the register and asked him about trying on a pair of shoes. Plaintiff voided the first transaction so he could check the price of the shoes for that customer and to prevent his employee number from remaining in the register when he went into the stockroom to look for the shoes. Plaintiff was unable to find shoes in the width the woman needed but agreed to stretch the shoes for her. The two women stated that they would return for the third pair. The women then left Dillard's with two pairs of shoes for which no payment had been made.

The women later returned and asked plaintiff if he could hold the third pair of shoes until the next day. Plaintiff agreed, and the woman who wanted the shoes wrote her name, Betty Jordan, on a piece of paper which plaintiff attached to the shoe box. Plaintiff also wrote his employee number on the piece of paper so he could receive credit for the sale.

After the women left, two other shoe department employees, Lynette Withers and Selma Brown, who had watched the transaction,

commented to plaintiff that he had had a big sale and asked if they could look at the journal tape to see what the amount was. Plaintiff agreed. Upon looking at the tape Withers and Brown confirmed that the women had taken the first two pairs of shoes without paying for them. Ms. Brown told plaintiff that the sales transaction was missing. Plaintiff then called Steven Gainsboro, the manager on duty that night, to tell him what had happened. Mr. Gainsboro told plaintiff he would discuss the incident the next day with David Hicklin, the shoe department manager.

When plaintiff arrived at Dillard's the next evening, he met with Mr. Hicklin, Kevin McCluskey, the store manager, and Sergeant Cullen Wright, a Dillard's loss prevention employee, who also worked full time as an officer for the Charlotte-Mecklenburg Police Department (CMPD). During the two-hour interview, plaintiff explained that he had made a mistake, took responsibility for the incident, and offered to pay Dillard's for the shoes. Plaintiff also offered to submit to a polygraph exam. Mr. McCluskey accused plaintiff of knowing the two women and threatened to have him prosecuted for embezzlement and ruin his full-time job at First Union National Bank if he did not provide the names of the women. Plaintiff told Mr. McCluskey that he did not know the women and could not provide their names. Sergeant Wright also participated in questioning plaintiff about the incident and took a written statement from him. At the end of the interview, Mr. McCluskey terminated plaintiff for embezzlement.

After plaintiff's termination, Sergeant Ken Schul, another Dillard's security guard who was employed full time as an officer for the CMPD, took statements from four Dillard's employees, Ms. Withers, Ms. Brown, Mr. Gainsboro, and Mr. Hicklin, about plaintiff's failed transaction. On 12 November 1997, Sergeant Schul met with Assistant District Attorney (ADA) Nathaniel Proctor to present a case against plaintiff. Upon review of the information presented, Mr. Proctor authorized the prosecution of plaintiff for embezzlement. Mr. Proctor did not ask for additional information or investigation. Thereafter, Sergeant Schul obtained a warrant for plaintiff's arrest.

Approximately two weeks after his termination from Dillard's, plaintiff was arrested in the atrium of One First Union Center in Charlotte while on his way to his office. Uniformed police officers, one of whom was Sergeant Wright, handcuffed plaintiff and escorted him outside to a police car. Upon his release from jail, plaintiff returned to First Union to find that his employment was suspended

without pay because of his arrest for embezzlement and that he would be eligible to return to work only if the charges against him were cleared.

Plaintiff was subsequently indicted by the grand jury for embezzlement. Plaintiff was tried for embezzlement in Superior Court, Mecklenburg County. On 27 May 1998, a jury found plaintiff not guilty.

On 4 April 2001, plaintiff initiated this action for malicious prosecution. Following a trial in January 2005, the jury returned a verdict in plaintiff's favor, awarding him $30,000 in compensatory damages and $77,000 in punitive damages for malicious prosecution. On 24 February 2005, the trial court granted Dillard's motion for JNOV as to punitive damages and entered an order setting aside that award. Plaintiff appealed to the Court of Appeals, which remanded the case because, contrary to N.C.G.S. § 1D-50, the trial court's 24 February 2005 order contained no reasons why the trial court set aside the jury verdict as to punitive damages. *Scarborough v. Dillard's, Inc.*, 179 N.C. App. 127, 130, 632 S.E.2d 800, 803 (2006). Upon remand, the trial court filed an order on 8 January 2007 setting out the basis for its judgment notwithstanding the verdict as to punitive damages. Plaintiff appealed from that order on 9 January 2007.

The Court of Appeals reversed the trial court's entry of judgment notwithstanding the verdict as to punitive damages. The Court of Appeals' majority reviewed the issue under the "more than a scintilla of evidence" standard. *Scarborough v. Dillard's Inc.*, 188 N.C. App. 430, 431, 655 S.E.2d 875, 876 (2008). The dissenting judge would have affirmed the trial court as plaintiff failed to present "clear and convincing evidence" of any statutory aggravating factor required for punitive damages. *Id.* at 438, 655 S.E.2d at 881 (Hunter, Robert C., J., dissenting).

Defendant appealed to this Court based on the dissenting opinion in the Court of Appeals. Defendant contends that the Court of Appeals applied an incorrect standard of review and that the evidence was insufficient to support a jury's finding of an aggravating factor. We agree.

[1] This Court has stated that "[t]he test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is the same as that applied when ruling on a motion for directed verdict." *Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984) (citing

Summey v. Cauthen, 283 N.C. 640, 648, 197 S.E.2d 549, 554 (1973)). A motion for judgment notwithstanding the verdict "is essentially a renewal of an earlier motion for directed verdict." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985) (citation omitted). A motion for directed verdict "tests the legal sufficiency of the evidence to take the case to the jury and support a verdict" for the nonmovant. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977) (citing, *inter alia*, *Investment Props. of Asheville, Inc. v. Allen*, 281 N.C. 174, 188 S.E.2d 441 (1972)).

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citation omitted). A directed verdict and judgment notwithstanding the verdict are therefore "not properly allowed 'unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish.' " *Manganello*, 291 N.C. at 670, 231 S.E.2d at 680 (quoting *Graham v. North Carolina Butane Gas Co.*, 231 N.C. 680, 683, 58 S.E.2d 757, 760 (1950)).

We must first determine the application of these principles to an award of punitive damages. Our General Assembly has set parameters for the recovery of punitive damages through the enactment of Chapter 1D of the North Carolina General Statutes. To recover punitive damages a claimant must prove

> that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.

N.C.G.S. § 1D-15(a) (2007). The statute further provides that a claimant "must prove the existence of an aggravating factor by clear and convincing evidence." N.C.G.S. § 1D-15(b) (2007). When punitive damages are sought against a corporation, the claimant must further show that "the officers, directors, or managers of the corporation

participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C.G.S. § 1D-15(c) (2007).

The clear and convincing standard requires evidence that " 'should fully convince.' " *In re Will of McCauley*, 356 N.C. 91, 101, 565 S.E.2d 88, 95 (2002) (quoting *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 364, 177 S.E. 176, 177 (1934)). This burden is more exacting than the "preponderance of the evidence" standard generally applied in civil cases, but less than the "beyond a reasonable doubt" standard applied in criminal matters. *Williams*, 207 N.C. at 363-64, 177 S.E. at 177.

Plaintiff argues that whether the evidence is clear and convincing is for the jury to decide; and if there is more than a scintilla of evidence from which the jury could infer the existence of the aggravating factor, the determination should be left to the jury. The plain language of the statute, however, does not support this contention in the context of punitive damages.

The statute provides that a trial court in "upholding or disturbing" an award of punitive damages must "address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, *in light of the requirements of this Chapter*." N.C.G.S. § 1D-50 (2007) (emphasis added). This language, coupled with that in N.C.G.S. § 1D-15(b) requiring proof by "clear and convincing evidence," manifests that the General Assembly intended that the quantum of evidence be more than would be sufficient to uphold liability for the underlying tort and that the trial court have a role in ascertaining whether the evidence presented was sufficient to support a jury's finding of the factor under the standard established by the legislature. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986) (stating that for purposes of a directed verdict "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case" and that where "clear and convincing" evidence is required, the inquiry is "whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant").

In light of these principles, we hold that in reviewing a trial court's ruling on a motion for judgment notwithstanding the verdict on punitive damages, our appellate courts must determine whether the nonmovant produced clear and convincing evidence from which a jury could reasonably find one or more of the statutory aggravating

factors required by N.C.G.S. § 1D-15(a) and that that aggravating factor was related to the injury for which compensatory damages were awarded. Reviewing the trial court's ruling under the "more than a scintilla of evidence" standard does not give proper deference to the statutory mandate that the aggravating factor be proved by clear and convincing evidence. Evidence that is only more than a scintilla cannot as a matter of law satisfy the nonmoving party's threshold statutory burden of clear and convincing evidence.

[2] Having determined the applicable standard of review, we must now determine whether plaintiff presented clear and convincing evidence from which a jury applying that standard could reasonably find that the officers, directors, or managers of defendant Dillard's participated in or condoned conduct that was (i) malicious or willful or wanton and (ii) was related to the injury for which compensatory damages were awarded.

We initially note that although the dissenting opinion relies on plaintiff's failure to assign error to the trial court's findings of fact, defendant does not raise this issue in its new brief to this Court. Normally, when an appellant fails to assign error to findings of fact by the trial court, the findings are binding on the appellate court, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing, *inter alia*, *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)), and the only question is whether the trial court's findings support the conclusions of law, *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982), which are reviewable de novo. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980) (citing, *inter alia*, *Food Lion Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980)). However, this Court, in reviewing trial court rulings on motions for directed verdict and judgment notwithstanding the verdict, has held that the trial court should not make findings of fact, and if the trial court finds facts, they are not binding on the appellate court. *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 158-59, 179 S.E.2d 396, 398-99 (1971). Moreover, the language of the statute does not require findings of fact, but rather that the trial court "shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages." N.C.G.S. § 1D-50. That the trial court utilizes findings to address with specificity the evidence bearing on liability for punitive damages is not improper; the "findings," however, merely provide a convenient format with which all trial

judges are familiar to set out the evidence forming the basis of the judge's opinion. The trial judge does not determine the truth or falsity of the evidence or weigh the evidence, but simply recites the evidence, or lack thereof, forming the basis of the judge's opinion. As such, these findings are not binding on the appellate court even if unchallenged by the appellant. These findings do, however, provide valuable assistance to the appellate court in determining whether as a matter of law the evidence, when considered in the light most favorable to the nonmoving party, is sufficient to be considered by the jury as clear and convincing on the issue of punitive damages.

[3] We next consider defendant's contentions that plaintiff failed to present sufficient evidence of willful or wanton conduct or of malice on the part of defendant to support the jury's award of punitive damages. The General Assembly has defined "willful or wanton conduct" as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." N.C.G.S. § 1D-5(7) (2007).

Plaintiff relies on two cases in support of his contention that defendant's "superficial and cursory investigation" of the alleged embezzlement evidences "a 'reckless and wanton disregard of [his] rights' ": *Jones v. Gwynne*, 312 N.C. 393, 408-09, 323 S.E.2d 9, 18 (1984), *receded from by Hawkins v. Hawkins*, 331 N.C. 743, 417 S.E.2d 447 (1992), and *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 319, 317 S.E.2d 17, 20 (1984), *aff'd per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985). Plaintiff's reliance on these cases is misplaced as each of them is distinguishable on its facts from the present case.

In *Jones* this Court determined that the evidence was sufficient for submission to the jury on the issue of punitive damages based on the fact that the investigation conducted by defendant Gwynne, the regional security officer for McDonald's Corporation, "was conducted 'in a manner which showed the reckless and wanton disregard of the plaintiff's rights.' " *Jones*, 312 N.C. at 405, 323 S.E.2d at 16. One witness testified that she saw the plaintiff Ray Jones, McDonald's store manager, ring numerous consecutive "no sales" and put the money in the register, yet time cards showed that this particular witness had worked less than half the days she allegedly saw the plaintiff ring the "no sales." *Id.* at 406, 312 S.E.2d at 17. Although Gwynne had reviewed the daily store records, the register journal tapes, the managers' schedules, the crew schedules, and the employee time

cards for the period in question, he failed to make any notations as to when the witness worked and at trial did not know where the time cards could be located. *Id.* Moreover, no evidence was adduced at trial that the McDonald's restaurant showed a shortage of money for any day or that any McDonald's money was ever missing from that store. *Id.* Gwynne never performed an audit of the McDonald's nor did he order that an audit of the store's records be performed. *Id.* at 406-07, 323 S.E.2d at 17. After Gwynne discussed the case with two of his superiors, he talked with two detectives, telling them that he thought they had enough evidence to charge the plaintiff with embezzlement. *Id.* at 408, 323 S.E.2d at 18. Gwynne also suggested that one of the detectives discuss the case with an assistant district attorney. *Id.* The ADA advised the detective that although it sounded like a good case, if the detective " 'could get more information as to the actual conversion of the money . . . it certainly would be better.' " *Id.* At the time of the events in question, Gwynne was an employee of McDonald's Corporation and was not a sworn law enforcement officer, although he had previously been an SBI agent and a Chief Deputy Sheriff. *Id.* at 406, 323 S.E.2d at 16. By contrast, in the instant case the undisputed evidence is that the investigation was handled by Sergeants Wright and Schul acting in their capacity as CMPD officers. ADA Proctor did not ask for any additional investigation or information when presented with the case. Most importantly, the evidence was undisputed that plaintiff voided the sales transaction and permitted the two customers to leave the store with two pairs of shoes for which no payment had been received.

In *Williams* the plaintiff, a part-time employee during the Christmas season, was working in the jewelry department at the defendant department store. 69 N.C. App. at 316, 317 S.E.2d at 18. The sales people were permitted to model the jewelry to encourage customers to purchase it. *Id.* One evening at closing, after rushing to get the 14 karat gold jewelry into the safe and to leave before the lights were turned off, the plaintiff walked out of the store without removing a pair of earrings she had been wearing during the day. *Id.* She was seized by J.M. Lynch, an off-duty police officer hired to provide store security, and was taken back into the store. *Id.* She was ushered into a small room and questioned by three employees about an alleged theft of earrings. *Id.* at 316-17, 317 S.E.2d at 18. The plaintiff offered to return the earrings she had been wearing during the day, but Lynch continued to look for other earrings by examining the contents of the plaintiff's purse without her consent. *Id.* at 317, 317 S.E.2d at 18. Lynch later testified that he did not stop the plaintiff

because she was wearing the store earrings out of the store, but because he thought she had taken other earrings earlier when he saw her bend down and do something under the counter. *Id.* When Lynch's search of the plaintiff's purse revealed only the plaintiff's own earrings, Karen Beasley, head of the defendant's security force, subjected the plaintiff to a body search. *Id.* at 317, 317 S.E.2d at 19. The plaintiff's requests to call her father were refused until after the search failed to reveal any evidence of stolen property. *Id.*

Lynch had the plaintiff transported to the magistrate's office, where he attempted to have her charged with felonious larceny. *Id.* The magistrate would only issue a warrant for misdemeanor larceny of two pairs of earrings. *Id.* The plaintiff was found not guilty of these charges in District Court. *Id.* On this evidence the Court of Appeals concluded that the jury could find that the plaintiff "was treated rudely and oppressively." *Id.* at 320, 317 S.E.2d at 20. The Court of Appeals also concluded that the evidence of Lynch's failure to take an inventory to determine if jewelry was missing, his failure to check the plaintiff's sales book to determine if she had made any sales, and his failure to check with anyone regarding the plaintiff's personnel record or her character constituted evidence from which the jury could find reckless and wanton disregard of the plaintiff's rights. *Id.* at 320, 317 S.E.2d at 20-21.

Again, in the instant case the evidence is undisputed that plaintiff failed to ring the sale and permitted the customers to leave the store with two pairs of shoes for which payment had not been tendered. The evidence is undisputed that Sergeant Schul presented the results of the investigation to an ADA before obtaining a warrant from the magistrate.

Nevertheless, plaintiff argues that as in *Jones* and *Williams*, defendant acted willfully and wantonly in reckless disregard of his rights in its investigation of the incident by failing to inquire into his character and employment records, as well as failing to obtain statements from all possible witnesses, including Betty Jordan, one of the two women who received the shoes. Plaintiff further argues defendant did not divulge exculpatory evidence to the police.

We find these arguments unpersuasive in light of the investigation conducted by Sergeants Wright and Schul before the case was submitted to ADA Proctor. Plaintiff was interviewed by Sergeant Wright, Mr. Hicklin, and Mr. McCluskey the day after the incident and before he was fired. Sergeant Wright took a written statement from

plaintiff during this meeting. The officers took statements from plaintiff's coworkers, Ms. Brown and Ms. Withers, as well as from his supervisors Mr. Gainsboro and Mr. McCluskey. Ms. Withers's statement expressed her belief that plaintiff had given the shoes to the women on purpose, even though Gainsboro thought plaintiff had made a mistake. However, Mr. Gainsboro's statement does not reflect that he thought plaintiff had made a mistake. The relevance of this allegedly exculpatory evidence involving Mr. Gainsboro's opinion about whether plaintiff made a mistake or acted intentionally is problematic at best. In *Jones* the undiscovered or undisclosed exculpatory evidence was presented by the plaintiff at trial and demonstrated that had the investigator discovered this evidence, the defendant would have known that no money was missing from McDonald's. In this case Mr. Gainsboro's initial opinion that plaintiff made a mistake has no bearing on the existence of missing property or goods. Further, though the record does not disclose why Mr. Gainsboro's statement fails to mention his initial opinion or impression, Mr. Gainsboro would have been entitled to change his opinion. Moreover, that Mr. Gainsboro initially thought plaintiff made a mistake was disclosed through Ms. Withers's statement. Certainly this omission does not rise to the level of clear and convincing evidence of willful or wanton reckless disregard of plaintiff's rights in conducting the investigation. Although defendant's investigation may not have been perfect and could perhaps have included statements from additional witnesses, unlike in *Jones* and *Williams*, plaintiff has not adduced any evidence that this additional investigation that plaintiff thinks could have been conducted would have changed the officers' decision to present the case to the ADA. We simply do not know what any additional investigation would have revealed. Speculation is not probative evidence of willful or wanton conduct.

[4] Plaintiff next contends that defendant acted with a conscious and intentional disregard of his rights in procuring his prosecution knowing that it would cause him to lose his full-time job at First Union Bank despite evidence showing that he simply made a mistake in forgetting to charge the women for the shoes. Plaintiff testified that during the meeting the day after the incident occurred, Mr. McCluskey repeatedly accused him of knowing the two women and threatened to "mess up" his job at First Union if he did not tell Dillard's who the women were. Plaintiff testified that he told Mr. McCluskey that he did not know the women and that he would take a polygraph test to clear his name. At the time of the meeting, Dillard's was in possession of the piece of paper with the name

"Betty Jordan" on it, which had been placed by plaintiff on the box of shoes that he had put on hold for one of the women who was supposed to return the next day to purchase the shoes.

While plaintiff's characterization of Mr. McCluskey's statements reveals that Mr. McCluskey may have been somewhat intemperate in his interview with plaintiff, interviews such as this one are always stressful. The pertinent question is whether, under the circumstances, Mr. McCluskey's statements to plaintiff that he was suspected of embezzlement and that if he were charged with embezzlement, it would adversely affect plaintiff's position at First Union Bank constitutes evidence of reckless disregard for plaintiff's rights, or whether Mr. McCluskey simply confronted plaintiff with the truth. That being charged with embezzlement would affect a person's job with a bank is indisputable. The underlying premise of plaintiff's argument is that Mr. McCluskey acted inappropriately by not merely accepting plaintiff's explanation that he made a mistake by forgetting to re-ring the sale. Department store managers have an obligation to protect the safety and security of people and property within the store. Common sense dictates that a store manager cannot be precluded from taking investigative measures necessary to fulfill this obligation when confronted with the information Mr. McCluskey had in this instance. Refusing to accept an employee's explanation and telling an employee the consequences of the situation do not equate with reckless disregard of an employee's rights.

[5] Plaintiff next argues that he presented sufficient evidence of malice on the part of defendant in procuring his felony prosecution to support the jury's award of punitive damages. In the context of punitive damages, "[m]alice" is defined as "a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant." N.C.G.S. § 1D-5(5) (2007).

Plaintiff argues that malice can be evidenced by his previous reprimand by Mr. McCluskey for referring a customer to another shoe store. Plaintiff testified that at the beginning of his meeting with management the day after the incident, Mr. McCluskey repeatedly said, "I cannot believe you're [Scarborough] in my office again." Plaintiff also argues that the prosecution was due to Mr. McCluskey's belief that plaintiff was so inept that the women were able to dupe him out of the shoes rather than any honest belief that plaintiff had intentionally given away the shoes. These arguments are too speculative and fall well short of constituting clear and convincing evidence from

which a jury could conclude that Mr. McCluskey acted with malice under N.C.G.S. § 1D-15(a).

In conclusion, we hold that the proper standard of review of a trial court's ruling on a motion for judgment notwithstanding the verdict as to punitive damages is whether the nonmovant produced clear and convincing evidence of one of the statutory aggravating factors for punitive damages.

Inasmuch as we have determined that the evidence in this case is not sufficient to support a jury's finding of a statutory aggravating factor by clear and convincing evidence, we do not reach the issues of whether the factor "was related to the injury" or whether one of defendant's "officers, directors, or managers . . . participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C.G.S. § 1D-15(c).

For the forgoing reasons, the decision of the Court of Appeals is reversed.

REVERSED.

Justice TIMMONS-GOODSON dissenting.

The majority conflates the burden of persuasion—the exclusive province of the jury—with the burden of production. In so doing, the majority improperly weighs the evidence and substitutes its own judgment for the jury's. I therefore respectfully dissent. Because plaintiff presented sufficient evidence to support the jury's award of punitive damages, the trial court erred in granting defendant's motion for judgment notwithstanding the verdict.

I. N.C.G.S. § 1D-15

Subsections 1D-15(a) and (b) state that:

> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.

(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

N.C.G.S. §§ 1D-15 (a),(b) (2007).

To determine the General Assembly's intent in requiring "clear and convincing" evidence of punitive damages under N.C.G.S. § 1D-15 and whether by establishing such burden of proof, the General Assembly intended to alter the trial court's review of the evidence upon a motion for judgment notwithstanding the verdict, I believe it instructive to closely examine two basic concepts of law: the burden of proof and judgment notwithstanding the verdict.

II. Burden of Proof

The burden of proof in any case includes both the burden of production and the burden of persuasion. *Black's Law Dictionary* 209 (8th ed. 2004) [hereinafter *Black's*]; *see also* N.C.G.S. § 8C-1, Rule 301 (2007) (distinguishing between the burden of production and the burden of persuasion); *Hunt v. Eure*, 189 N.C. 482, 486, 127 S.E. 593, 594 (1925); *Speas v. Merchs. Bank & Tr. Co.*, 188 N.C. 524, 526, 125 S.E. 398, 399 (1924); 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 30 (6th ed. 2004) [hereinafter Broun]. The burden of production, also known in North Carolina as the "duty of going forward," *Speas*, 188 N.C. at 529, 125 S.E. at 401, is "[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling" such as a directed verdict or a judgment notwithstanding the verdict, *Black's* 209. *See also Speas*, 188 N.C. at 526, 125 S.E. at 399 (contrasting the "burden or duty of going forward and producing evidence" with the party's burden of persuasion); Broun § 30 (same). The burden of persuasion, meanwhile, is the "party's duty to convince the fact-finder to view the facts in a way that favors that party." *Black's* 209; *see also* Broun § 33. The burden of persuasion is commonly known in North Carolina as the "burden of the issue." *Speas*, 188 N.C. at 529, 125 S.E. at 401; *see also Bd. of Educ. v. Makely*, 139 N.C. 54, 57-58, 139 N.C. 30, 35-36, 51 S.E. 784, 786 (1905); Broun §§ 30, 33. The burden of persuasion is also often "loosely termed [the] burden of proof." *Black's* 209 (emphasis omitted); *see also* Broun § 33.

The burden of production and the burden of persuasion are distinct concepts. *See*, *e.g.*, *Speas*, 188 N.C. at 529, 125 S.E. at 401 ("The burden of the issue and the duty of going forward with evidence are two very different things."); *Makely*, 139 N.C. at 57-58, 139

N.C. at 35-36, 51 S.E. at 786 (distinguishing the burden of production from the burden of proof); *Black's* 209 (same). Significantly, the trial court may review the evidence to ensure that the burden of production is met, while the burden of persuasion rests with the trier of fact:

> "The important practical distinction between these two senses of 'burden of proof,' is this: 'The risk of non[]persuasion operates when the case[s] . . . come into the hands of the jury [] while the duty of producing evidence implies a liability to a ruling [of] the judge disposing of the issue without leaving the question open to the jury's deliberation[].' "

Hunt, 189 N.C. at 488, 127 S.E. at 596 (quoting 5 John Henry Wigmore, *Evidence* § 2487 (2d ed. 1923) (alterations in original)); *see also Campbell v. Everhart*, 139 N.C. 395, 405, 139 N.C. 503, 516, 52 S.E. 201, 206 (1905) ("The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in the conception of the law. The first lies within the province of the court, the last within that of the jury."); *Black's* 209 (defining the burden of production as the "party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder" rather than by the trial judge, while the burden of persuasion is the "party's duty to convince the fact-finder"); Broun §§ 32, 33, 39.

A. Varying Levels of the Burden of Persuasion

The burden of persuasion is "heavier or lighter depending upon the kind of case and the particular issue involved." Broun § 33; *see also Speas*, 188 N.C. at 528-29, 125 S.E. at 400-01 (describing the differing levels of the burden of persuasion); *Black's* 209 (identifying varying burdens of persuasion). In civil cases, the burden of persuasion is usually the "greater weight" or "preponderance" of the evidence, *Black's* 209, but other civil cases require a greater burden of persuasion, that of "clear and convincing evidence," *see Speas*, 188 N.C. at 528-29, 125 S.E. at 401, also called the "middle burden of proof," *Black's* 209. *See also* Broun § 42. In criminal cases, the burden of persuasion is almost always "beyond a reasonable doubt." *Speas*, 188 N.C. at 528, 125 S.E. at 400; *Black's* 209. In each case, the jury must determine whether the party with the burden of persuasion has met that burden with evidence that preponderates, clearly convinces, or establishes the matters at issue beyond a reasonable doubt. These various burdens of persuasion relate to the credibility of the evidence offered rather than the quantity of the evidence. *See In re Will of*

Lomax, 225 N.C. 592, 595, 35 S.E.2d 876, 878 (1945) (noting that the probative value of testimony offered "is a matter only for the jury").

B. The "Clear and Convincing" Burden of Persuasion

The majority asserts that, *as a matter of law*, plaintiff failed to present "clear and convincing" evidence in support of his claim for punitive damages. In so concluding, the majority conflates the burden of production with the burden of persuasion. Determining whether a plaintiff has met the burden of persuasion by producing "clear and convincing" evidence is the exclusive province of the fact finder. *See, e.g.*, *In re Will of McCauley*, 356 N.C. 91, 102, 565 S.E.2d 88, 95 (2002) ("Whether the evidence on these questions is clear, strong, and convincing is for the jury to decide."); *Speas*, 188 N.C. at 530, 125 N.C. at 401. This principle is well established. As this Court admonished in *Lehew v. Hewett*, 130 N.C. 15, 16, 130 N.C. 22, 22-23, 40 S.E. 769, 770 (1902):

> The evidence was sufficient to be submitted to the jury, with the instruction that it must be clear, strong and convincing to warrant a verdict for the plaintiff, but whether it was or was not "strong, clear and convincing" was to be determined by the jury and not by the court; otherwise, the jury would be useless.
>
> "The [j]udge has no more right, when the testimony[,] if believed[,] is sufficient to be submitted to the jury, to determine in the trial of civil actions what is strong, clear and convincing proof[,] tha[n] he has in the trial of a criminal action to express an opinion as to whether guilt has been shown beyond a reasonable doubt."

Id. (quoting *Cobb v. Edwards*, 117 N.C. 167, 173, 117 N.C. 245, 253, 23 S.E. 241, 244 (1895) (alterations in original)); *see also Lefkowitz v. Silver*, 182 N.C. 361, 372, 182 N.C. 339, 350, 109 S.E. 56, 61 (1921) (noting that it is the role of the jurors to decide if evidence is strong, cogent and convincing, "just as they decide in ordinary civil cases whether the proof of plaintiff preponderates, or in criminal cases whether the State has established the crime beyond a reasonable doubt").

Section 1D-15 of the North Carolina General Statutes, like so many statutes, sets forth both the burden of production and the burden of persuasion. To be awarded punitive damages, the plaintiff must meet his burden of production by producing evi-

dence of (1) fraud, (2) malice, or (3) willful or wanton conduct. N.C.G.S. § 1D-15(a). The plaintiff's burden of persuasion is to produce "clear and convincing" evidence of one of these aggravating factors. *Id.* § 1D-15(b). The "clear and convincing" burden of persuasion required by N.C.G.S. § 1D-15(b) is neither novel nor unique in our statutory scheme and case law. Our statutes require varying burdens of persuasion—from preponderance of the evidence, to clear and convincing, to beyond a reasonable doubt. *See*, *e.g.*, N.C.G.S. §§ 7B-805 (2007) (requiring clear and convincing evidence); 7B-2409 (2007) (requiring proof beyond a reasonable doubt); 42-30 (2007) (requiring preponderance of the evidence). The majority concludes that because the burden of persuasion set forth in N.C.G.S. § 1D-15 is "clear and convincing," the trial court must, upon a motion for directed verdict or judgment notwithstanding the verdict, review and determine whether the evidence is clear and convincing. Yet as explained above, the burden of persuasion lies within the province of the jury. *See Martin v. Underhill*, 265 N.C. 669, 675, 144 S.E.2d 872, 876 (1965) (stating that when the required burden of persuasion is clear, cogent, and convincing evidence, "whether the evidence has that convincing quality is a question for the jury upon proper instructions from the court" but "the rule as to the sufficiency of the proof to withstand a motion for judgment of nonsuit [is] the same as in other cases" (citations omitted)). I do not believe, and the majority offers no compelling argument otherwise, that the General Assembly intended to overturn this settled principle of law by merely requiring a heightened burden of persuasion in order to recover punitive damages under N.C.G.S. § 1D-15.

III. Judgment Notwithstanding the Verdict

"A motion for judgment notwithstanding the verdict . . . is essentially a renewal of an earlier motion for a directed verdict." *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987) (citation omitted). It requires the trial court to assess whether the burden of production has been met by evidence that is "legally sufficient to take the case to the jury." *Id.* (citations omitted). It is well established that "[t]he party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *Id.* "In ruling on the motion, the trial court must consider the evidence in the light most favorable to the non-moving party, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor." 320 N.C. at 733-34, 360 S.E.2d at 799 (citing, *inter alia*, *Smith v. Price*,

315 N.C. 523, 340 S.E.2d 408 (1986)). Judgment notwithstanding the verdict may not be granted "unless it appears *as a matter of law* that a recovery simply cannot be had by plaintiff upon *any view of the facts* which the evidence reasonably tends to establish." *Id.* (emphases added) (citing *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977)).

Contrary to the majority's assertions, the trial court does not alter its review of the plaintiff's *burden of production* upon a motion for judgment notwithstanding the verdict merely because the *burden of persuasion* is higher or lower in each case. As long as the plaintiff has met his burden of production and the facts in evidence establish a prima facie case, the case belongs with the jury. *See, e.g.*, *Millers Mut. Ins. Ass'n v. Atkinson Motors Inc.*, 240 N.C. 183, 187, 81 S.E.2d 416, 420 (1954); *Campbell*, 139 N.C. at 405, 139 N.C. at 516-17, 52 S.E. at 206 (noting that "the province of the jury should not be invaded in any case" and that when reasonable minds "might reach different conclusions, the evidence must be submitted to the jury" (citations omitted)). The trial court then instructs the jury on, *inter alia*, the plaintiff's burden of persuasion, and it is "for the jury to say, upon the facts and the circumstances shown by [the] plaintiff's evidence" whether the plaintiff has established his claim. *Millers Mut. Ins.*, 240 N.C. at 187, 81 S.E.2d at 419-20.

Here, the trial court instructed the jury regarding plaintiff's "clear and convincing" burden of persuasion on his claim for punitive damages. "This Court presumes that jurors follow the trial court's instructions." *State v. Cummings*, 352 N.C. 600, 623, 536 S.E.2d 36, 53 (2000), *cert. denied*, 532 U.S. 997 (2001). The jury applied the clear and convincing burden of persuasion to plaintiff's evidence and found that punitive damages were warranted. The jury in its discretion, therefore, awarded plaintiff punitive damages. *See Watson v. Dixon*, 352 N.C. 343, 348, 532 S.E.2d 175, 178 (2000). This Court will not set aside the jury's determination unless only a single inference, unfavorable to the plaintiff, is possible from the evidence:

> Taking the case away from the jury, while a duty sometimes unavoidable, is always a delicate task, involving much more than a strong feeling that the plaintiff ought not to recover. The power of the court is *limited to the ascertainment whether there is any evidence at all which has probative value in any or all of the facts and circumstances offered in the guise of proof*. It is not a matter of passing upon the weight of evidence when it has

> weight. *That power is denied us.* It is a matter of dropping the proffered proof into evenly poised balances to see whether it weighs against nothing.

Wall v. Bain, 222 N.C. 375, 378, 23 S.E.2d 330, 332-33 (1942) (emphases added) (citations omitted).

IV. Evidence Presented

In the present case, I conclude that plaintiff met his burden of production. Taken in the light most favorable to the nonmovant, the evidence shows that plaintiff, a forty-one year old African-American man, was terminated from his employment as a part-time shoe salesman at Dillard's after mistakenly allowing two African-American women to leave the store with two pairs of shoes for which they did not pay. When plaintiff realized his mistake, his "hands start[ed] shaking" and he uttered an expletive. Plaintiff immediately reported his mistake to the manager on duty, Steven Gainsboro. Gainsboro took no action to recover the shoes, but merely checked the register tape. Gainsboro believed that plaintiff's actions were inadvertent rather than intentional. Gainsboro told plaintiff he would speak to his supervisor, shoe department manager David Hicklin, the following day. Although other Dillard's shoe department employees later observed the two women carrying the bag with the shoes, no steps were taken to approach or apprehend the women.

The next day, plaintiff telephoned Hicklin three times to explain what had happened. When plaintiff finally reached him, Hicklin told plaintiff he didn't "know what [plaintiff was] talking about" but that they would talk when plaintiff came to work that evening. When plaintiff arrived at Dillard's that evening, Hicklin summoned him to the manager's office, where he waited outside for approximately fifteen minutes. Once plaintiff was allowed to enter the office, he was interviewed by Hicklin, store manager Kevin McCluskey, and Officer Cullen Wright of the Mecklenburg Police Department. McCluskey immediately told plaintiff, "I cannot believe you're in my office again." McCluskey had formally reprimanded plaintiff the previous week for referring a customer to another store when Dillard's did not carry the type of shoe the customer desired to purchase.

The "drain[ing]" interview lasted at least two hours, during which the three men repeatedly accused plaintiff of being acquainted with the women and intentionally allowing them to leave with the shoes. McCluskey threatened to charge plaintiff with embezzlement and

"mess up" his job at First Union if he did not reveal the names of the two women. Plaintiff repeatedly explained that he had made a mistake, took responsibility for the incident, and offered to pay for the shoes and to submit to a polygraph examination. At the end of the interview, McCluskey terminated plaintiff's employment at Dillard's and banned him from entering any Dillard's store. Plaintiff was "very upset" and "very surprised" by the interview. Dillard's referred the matter to Officer Wright and Officer Ken Schul, another Mecklenburg Police Department officer who also worked at Dillard's, for prosecution. Officer Wright later arrested plaintiff at his place of employment with First Union on charges of embezzlement. First Union subsequently suspended plaintiff without pay because of his arrest for embezzlement.

V. Punitive Damages Based on Malicious Prosecution

In establishing his malicious prosecution claim, plaintiff here was required to prove that defendant (1) initiated the earlier proceeding, (2) with malice and (3) without probable cause, and (4) that the earlier proceeding terminated in his favor. *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984) (quoting *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979)). The jury found defendant liable for malicious prosecution of plaintiff and—as the majority acknowledges—the validity of that verdict stands. Thus it is uncontroverted that at least the greater weight of the evidence showed that defendant acted with malice.

The majority appears to concede that plaintiff presented evidence of the aggravating factor of malice, but concludes that the evidence falls short of the "clear and convincing" standard required by N.C.G.S. § 1D-15. Again, however, whether evidence is clear and convincing is a matter for the trier of fact. The majority's efforts to rationalize and explain the actions of various persons and events illuminate the difficulty of reviewing a cold record and attempting to assess whether evidence is clear and convincing. For example, the majority characterizes McCluskey's threat to plaintiff to "mess up" his job at First Union if he did not reveal the names of the women who took the shoes—even though McCluskey possessed the name of one of the women, whom he did not bother to investigate—as "somewhat intemperate" and "simply confronting plaintiff with the truth." This is indeed one possible inference from the evidence presented. An equally plausible view of the evidence presented is that McCluskey had no intention of conducting a genuine investigation of the incident, that instead, he personally disliked plaintiff and believed him to

be an incompetent employee, and that he therefore seized upon plaintiff's mistake in order to terminate his employment with Dillard's and advance his termination at First Union. Such a view is imminently reasonable given the evidence of the pre-existing ill will McCluskey demonstrated towards plaintiff, plaintiff's lack of involvement in the theft, the interrogation-style interview McCluskey conducted, McCluskey's threat to "mess up" plaintiff's job at First Union, and the fact that no one at Dillard's appeared to be at all interested in locating the two women or recovering the merchandise. The jury may have also drawn conclusions from the fact that none of plaintiff's supervisors at Dillard's—Gainsboro, Hicklin, or McCluskey—testified at trial.

In *Jones* this Court held that the Court of Appeals erred in concluding that the plaintiff's evidence was insufficient to justify submission of the issue of punitive damages to the jury based on malicious prosecution when there was evidence from which a reasonable juror could conclude that defendant's investigation of the plaintiff was conducted with reckless and wanton disregard of the plaintiff's rights. 312 N.C. at 408-09, 323 S.E.2d at 18. In that case the evidence tended to show that the defendant conducted only "a superficial and cursory investigation" of the plaintiff employee before soliciting his prosecution for alleged embezzlement. *Id*; *see also Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 319-20, 317 S.E.2d 17, 20-21 (1984) (holding the trial court erred in failing to submit the issue of punitive damages to the jury when there was evidence from which the jury could find that the defendant maliciously prosecuted the plaintiff in a manner evincing a "reckless and wanton disregard of her rights"), *aff'd per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985). The majority contends *Jones* and *Williams* are factually distinguishable and therefore, inapplicable. Cases may always be distinguished on their facts, however. Whether cases may be *meaningfully* distinguished is the pertinent question. That the majority dedicates nearly half of its opinion to discussing the facts of the instant case and attempting to distinguish them from the facts of *Jones* and *Williams* speaks volumes.

VI. Conclusion

Taken in the light most favorable to plaintiff, I conclude that plaintiff met his burden of production by presenting evidence from which a reasonable juror could conclude that defendant acted with malice and with reckless and wanton disregard for plaintiff's rights. Given the various possible interpretations of the evidence, judgment notwithstanding the verdict was improper. *Taylor*, 320 N.C. at 733-34,

360 S.E.2d at 799. It was the jury's role to sift through the evidence, evaluate the demeanor and credibility of the witnesses, and determine whether plaintiff met his burden of persuasion by producing clear and convincing evidence in support of his claim for punitive damages. The jury did so and found in favor of plaintiff. The majority's decision usurps the jury's role and imposes its own view of the evidence, contrary to well-established case law. I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. KELCIE LEE ANDREW MORTON

No. 347A09

(Filed 11 December 2009)

Search and Seizure— frisk of defendant for weapons—reasonable suspicion

The decision of the Court of Appeals that the trial court erred by denying defendant's motion to suppress scales and cocaine seized during a search of defendant's person is reversed for the reason stated in the Court of Appeals dissenting opinion that, under the totality of the circumstances, officers had reasonable suspicion to frisk defendant for a weapon based upon a confidential informant's tip that defendant was involved in a recent drive-by shooting, the fact defendant was wearing gang colors, and information received from other informants and anonymous tipsters that defendant was selling drugs in the area.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 198 N.C. App. ——, 679 S.E.2d 437 (2009), vacating judgments entered 25 April 2008 by Judge W. Osmond Smith, III in Superior Court, Person County. Heard in the Supreme Court 18 November 2009.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

Mercedes O. Chut for defendant-appellee.

PER CURIAM.

For the reasons stated in Section I of the dissenting opinion, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for consideration of the remaining issues.

REVERSED AND REMANDED.

BRYAN TATE HELMS v. ANGELIQUE LANDRY

No. 55A09

(Filed 11 December 2009)

Paternity—motion for paternity test—prior order establishing paternity—absence of appeal or Rule 60(b) motion

A decision of the Court of Appeals that the mother of a child born out of wedlock was entitled to a paternity test after custody was changed from the mother to the purported biological father was reversed for the reasons stated in the dissenting Court of Appeals opinion that the father's paternity was established in a prior court order and the mother failed to appeal that order in a timely manner and failed to seek relief from that order pursuant to Rule of Civil Procedure 60(b).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 194 N.C. App. ——, 671 S.E.2d 347 (2009), reversing an order entered 13 September 2007 by Judge Christy T. Mann in District Court, Mecklenburg County, and remanding for further proceedings. Heard in the Supreme Court on 17 November 2009.

Thurman, Wilson & Boutwell, PA., by John D. Boutwell, for plaintiff-appellee/appellant.

Angelique Landry, pro se, defendant-appellant/appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY D/B/A DOMINION NORTH CAROLINA POWER, COMPLAINANTS, AND PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR v. TOWN OF KILL DEVIL HILLS, INTERVENOR

No. 68A09

(Filed 11 December 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 670 N.C. App. 341, 670 S.E.2d 341 (2009), affirming an order entered 18 September 2007 by the Utilities Commission, Docket No. E-22, Sub 437, in Raleigh, North Carolina. Heard in the Supreme Court 16 November 2009.

McGuireWoods LLP, by Mark E. Anderson, Edgar M. Roach, Jr., and Monica E. Webb; and by Stephen H. Watts, II, E. Duncan Getchell, Jr., and Kristian Mark Dahl, pro hac vice, for complainant-appellee Virginia Electric and Power Company d/b/a Dominion North Carolina Power.

Antoinette R. Wike, Chief Counsel, and Robert S. Gillam, Staff Attorney, for intervenor-appellee Public Staff—North Carolina Utilities Commission.

Williams Mullen, by M. Keith Kapp, Kevin Benedict, and Jennifer A. Morgan, for intervenor-appellant Town of Kill Devil Hills.

North Carolina League of Municipalities, by Andrew L. Romanet, Jr., NCLM General Counsel; Gregory F. Schwitzgebel, III, NCLM Senior Assistant General Counsel; and Daniel F. McLawhorn, Associate City Attorney, City of Raleigh; and North Carolina Association of County Commissioners, by James B. Blackburn, III, amici curiae.

Allen Law Offices, PLLC, by Dwight W. Allen and Britton H. Allen, for Duke Energy Carolinas, LLC and Carolina Power and Light d/b/a Progress Energy of the Carolinas, Inc., amici curiae.

Vandeventer Black LLP, by Norman W. Shearin, Jr. and David P. Ferrell, for North Carolina Association of Electric Cooperatives, Inc. and Cape Hatteras Electric Membership Corporation, amici curiae.

PER CURIAM.

AFFIRMED.

DONALD P. EDMUNDS v. PHYLLIS M. EDMUNDS

No. 23A09

(Filed 11 December 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 194 N.C. App. ——, 669 S.E.2d 874 (2008), affirming in part, reversing in part, and remanding an order entered 31 August 2007 as amended 29 January 2008, both by Judge Nancy C. Phillips in District Court, Columbus County. Heard in the Supreme Court 16 November 2009.

The McGougan Law Firm, by Paul J. Ekster and Dennis T. Worley, for plaintiff-appellee.

The Odom Firm, PLLC, by Thomas L. Odom, Jr. and David W. Murray; and Williamson, Walton & Scott, LLP, by Benton H. Walton, III and C. Martin Scott, II, for defendant-appellant.

PER CURIAM.

AFFIRMED.

FRANCO v. LIPOSCIENCE, INC.

[363 N.C. 741 (2009)]

RICHARD A. FRANCO, JR. v. LIPOSCIENCE, INC.

No. 255A09

(Filed 11 December 2009)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 197 N.C. App. ——, 676 S.E.2d 500 (2009), affirming an order and judgment dated 8 August 2007 and an order entered on 19 October 2007, both by Judge R. Allen Baddour, Jr. in Superior Court, Wake County. Heard in the Supreme Court 16 November 2009.

James, McElroy & Diehl, P.A., by Richard B. Fennell and Preston O. Odom, III, for plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Phillip J. Strach, for defendant-appellee.

PER CURIAM.

AFFIRMED.

MARCIA ALYCE MUCHMORE v. TALLMAN H. TRASK

No. 479PA08

(Filed 11 December 2009)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 192 N.C. App. 635, 666 S.E.2d 667 (2008), affirming in part and reversing in part an order of summary judgment entered 29 December 2006 by Judge Donna Stroud and affirming an order and judgment entered 8 March 2007 by Judge Jane P. Gray, both in District Court, Wake County. Heard in the Supreme Court 17 November 2009.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

SYKES v. MOSS TRUCKING CO.

[363 N.C. 743 (2009)]

William Sykes, Employee, Plaintiff	)	
v.	)	NC INDUSTRIAL COMMISSION
Moss Trucking Co., Inc., Employer;	)	
Protective Ins. Co., Carrier; Defendants	)	

No. 381P09

ORDER

The Court allows plaintiff's petition for discretionary review for the limited purpose of remanding to the Court of Appeals for reconsideration in light of N.C.G.S. § 97-86, *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) and *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 553 (2000).

By order of the Court in Conference, this the 10th day of December, 2009.

For the Court
Hudson, J.

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

Albert v. Cowart Case below: —— N.C. App. —— (15 September 2009)	No. 410P09	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA09-93) 2. Def's (J. Kimzie Cowart) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 12/10/09 2. Dismissed as Moot 12/10/09
Baker v. Rosner Case below: 197 N.C. App. —— (16 June 2009)	No. 304P09	Defs' PDR Under N.C.G.S. § 7A-31 (COA08-1298)	Denied 12/10/09
Benton v. Hanford Case below: 195 N.C. App. —— (20 January 2009)	No. 088P09	Def's (Progressive Southeastern Ins.) PDR Under N.C.G.S. § 7A-31 (COA08-44)	Denied 12/10/09
Boylan v. Verizon Wireless Case below: 201 N.C. App. —— (17 November 2009)	No. 498P09	Defs' Motion for Temporary Stay (COA09-350)	Allowed 12/08/09
Bryson v. Hargrove Case below: State v. Bryson 195 N.C. App. 325	No. 107P09-2	Plt's Petition for Writ of Habeas Corpus (COA08-625)	Denied 12/10/09
Helms v. Landry Case below: 198 N.C. App. —— (21 July 2009)	No. 343P09	Def-Appellant's PDR (COA08-1256)	Denied 12/10/09
Housecalls Home Health Care, Inc. v. State Case below: —— N.C. App. —— (15 September 2009)	No. 463P09	Defs' Motion for Temporary Stay (COA08-1322)	Allowed 11/24/09
In re M.L.T.H. Case below: 200 N.C. App. —— (3 November 2009)	No. 497P09	Appellant's (State of NC) Motion for Temporary Stay (COA08-1569)	Allowed 12/08/09
In re P.C.L.P. Case below: 199 N.C. App. —— (1 September 2009)	No. 385P09	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA09-379)	Denied 12/10/09

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

Jones v. Steve Jones Auto Grp. Case below: 200 N.C. App. —— (3 November 2009)	No. 502P09	Defs' Motion for Temporary Stay (COA08-1593)	Allowed 12/09/09
Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr., P.A. Case below: 199 N.C. App. —— (1 September 2009)	No. 420P09	Defs' (Southeastern Orthopedics & Speer) PDR Under N.C.G.S. § 7A-31 (COA08-1372)	Denied 12/10/09
Nale v. Ethan Allen Case below: 199 N.C. App. —— (1 September 2009)	No. 405P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-55)	Denied 12/10/09
Richardson v. N.C. Dep't of Pub. Instruction Case below: 199 N.C. App. —— (18 August 2009)	No. 393P09	Petitioner's (Richardson) PDR Under N.C.G.S. § 7A-31 (COA09-83)	Denied 12/10/09
Roberts v. Roberts Case below: 197 N.C. App. (19 May 2009)	No. 256P09	1. Def's Motion for Temporary Stay (COA08-404) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 07/09/09 363 N.C. 583 Stay dissolved 12/10/09 2. Denied 12/10/09 3. Denied 12/10/09 4. Dismissed as Moot 12/10/09
Rutherford v. General Ins. Co. of Am. Case below: 195 N.C. App. 325	No. 099P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-422)	Denied 12/10/09

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

Sam's East, Inc. v. Hinton Case below: 197 N.C. App. —— (19 May 2009)	No. 249P09	1. Plt's NOA Based Upon a Constitutional Question (COA08-453) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Plt-Appellant's Motion to Dismiss PDR and NOA (With Consent of Def)	1. —— 2. —— 3. Dismissed as Moot 12/10/09 4. Allowed 12/10/09
State v. Brewington Case below: 199 N.C. App. —— (1 September 2009)	No. 403P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-980)	Denied 12/10/09
State v. Butler Case below: 200 N.C. App. —— (20 October 2009)	No. 471P09	Def's Motion for Review (COA09-551)	Denied 12/10/09
State v. Duren Case below: 200 N.C. App. —— (6 October 2009)	No. 466P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-248)	Denied 12/10/09
State v. Gomez Case below: 193 N.C. App. 455	No. 470P09	Def's PWC to Review Order of Mecklenburg County Superior Court (COA08-13)	Denied 12/10/09
State v. Goode Case below: 197 N.C. App. —— (16 June 2009)	No. 303P09	1. Def-Appellant's NOA Based Upon a Constitutional Question (COA08-1145) 2. State's Motion to Dismiss Appeal 3. Def-Appellant's PDR	1. —— 2. Allowed 12/10/09 3. Denied 12/10/09
State v. Hairston Case below: —— N.C. App. —— (15 September 2009)	No. 439P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1579)	Denied 12/10/09
State v. Hill Case below: —— N.C. App. —— (15 September 2009)	No. 425P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1347)	Denied 12/10/09

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

State v. Hines Case below: —— N.C. App. —— (15 September 2009)	No. 432P09	1. Def's NOA Based Upon a Constitutional Question (COA09-202) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 12/10/09 2. Denied 12/10/09
State v. Hunt Case below: 198 N.C. App. —— (4 August 2009)	No. 370P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-1377) 2. State's Motion to Deny Petition	1. Denied 12/10/09 2. Dismissed as Moot 12/10/09
State v. Jones Case below: —— N.C. App. —— (15 September 2009)	No. 431P09	1. Def's Motion for NOA (COA09-252) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 12/10/09 2. Denied 12/10/09
State v. Melvin Case below: 199 N.C. App. —— (1 September 2009)	No. 382P09	State's Motion for Temporary Stay (COA09-62)	Allowed 09/18/09
State v. Morrow Case below: 200 N.C. App. —— (6 October 2009)	No. 461A09	1. Def's NOA (Dissent) (COA08-867) 2. Def's PDR as to Additional Issues 3. Def's Petition for Writ of Supersedeas	1. —— 2. Denied 12/10/09 3. Denied 12/10/09
State v. Parker Case below: 197 N.C. App. —— (16 June 2009)	No. 291P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-08-1471)	Denied 12/10/09
State v. Rouse Case below: Randolph County Superior Court	No. 120A92-5	1. Def's Motion to Hold in Abeyance the Time to File PWC 2. Def's alternative motion for extension of time to file PWC from denial of his MAR based upon mental retardation	1. Denied 11/09/09 2. Allowed 11/09/09
State v. Spann Case below: 199 N.C. App. —— (1 September 2009)	No. 422P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-32) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 12/10/09 2. Dismissed as Moot 12/10/09
State v. Strickland Case below: 199 N.C. App. —— (18 August 2009)	No. 391P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1186)	Denied 12/10/09

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

State v. Taylor Case below: 200 N.C. App. —— (3 November 2009)	No. 486P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1467)	Denied 12/10/09
State v. Walker Case below: —— N.C. App. —— (15 September 2009)	No. 442P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1565)	Denied 12/10/09
State v. Walston Case below: 196 N.C. App. —— (21 April 2009)	No. 200P09	1. Def's NOA Based Upon a Constitutional Question (COA08-889) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 12/10/09 2. Denied 12/10/09
Sykes v. Moss Trucking Co., Inc. Case below: 199 N.C. App. —— (1 September 2009)	No. 381P09	1. Plt's NOA (COA08-1039) 2. Defs' Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 12/10/09 3. See Special Order 12/10/09 Page 743 **Timmons-Goodson, J., Recused**
Wal-Mart Stores East, Inc. v. Hinton Case below: 197 N.C. App. —— (19 May 2009)	No. 250P09	1. Plt's NOA Based Upon a Constitutional Question (COA08-450) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Plt-Appellant's (With Def's Consent) Motion to Dismiss Petition and NOA	1. —— 2. —— 3. Dismissed as Moot 12/10/09 4. Allowed 12/10/09
Worthy v. Ivy Cmty. Ctr., Inc. Case below: 198 N.C. App. —— (4 August 2009)	No. 373P09	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA08-458) 2. Defs' PWC to Review Decision of COA	1. Denied 12/10/09 2. Denied 12/10/09

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

PETITION TO REHEAR

Southeastern Jurisdictional Admin. Council, Inc. v. Emerson Case below: 363 N.C. App. 590	No. 062A08-2	Defs' (Emerson and Huffman) Petition for Rehearing	Denied 12/10/09

ANDREA GREGORY, EMPLOYEE v. W.A. BROWN & SONS, EMPLOYER, PMA INSURANCE GROUP, CARRIER

No. 447A08

(Filed 29 January 2010)

Workers' Compensation— notice of injury—not timely given—remanded for findings and conclusions on prejudice

In workers' compensation cases involving delayed notice, the plain language of N.C.G.S. § 97-22 requires findings of a reasonable excuse for the delay and that the employer was not prejudiced in order for the Industrial Commission to award compensation, regardless of whether the employer has actual knowledge of the accident. The Full Commission in this case concluded that plaintiff had a reasonable excuse for failing to give timely written notice, but made no findings or conclusions about prejudice to defendants, and erred by awarding benefits. The case was remanded for findings and conclusions on the issue of prejudice.

Justice HUDSON dissenting.

Justice TIMMONS-GOODSON 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, 192 N.C. App. 94, 664 S.E.2d 589 (2008), affirming an opinion and award entered by the North Carolina Industrial Commission on 11 May 2007. Heard in the Supreme Court on 1 April 2009.

DeVore, Acton, & Stafford, P.A., by William D. Acton, Jr., for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for defendant-appellants.

NEWBY, Justice.

This case involves a claim under the Workers' Compensation Act for disability and medical payments due to a workplace accident. Plaintiff-employee failed to give the employer written notice of the accident within thirty days after the accident's occurrence as directed by N.C.G.S. § 97-22. The question presented is whether, in order for any compensation to be payable under such circumstances,

the Industrial Commission must (1) conclude as a matter of law that the employer has not been prejudiced by the employee's failure to provide timely written notice and (2) support that conclusion with appropriate findings of fact. Because the express language of section 97-22 requires us to answer this question in the affirmative, we reverse in part the decision of the Court of Appeals and remand to that court for further remand to the Industrial Commission for findings of fact and conclusions of law regarding the issue of prejudice.

I. BACKGROUND

Plaintiff began working for defendant W.A. Brown & Sons ("Brown & Sons") in June 1999. As of October 2001 plaintiff had been experiencing pain in her lower back for approximately six months and was taking over-the-counter medication for her pain. During the week of 11 October 2001, plaintiff sustained an injury to her lower back while lifting a heavy container at work. Although plaintiff testified before a representative of the Industrial Commission ("the Commission") that the incident occurred on the morning of 11 October 2001, Brown & Sons' time records showed that plaintiff was not at work that morning. Presumably because the precise timing of plaintiff's injury is therefore uncertain, the Commission simply found plaintiff suffered an injury "on an unknown date" during the week of 11 October 2001.

Plaintiff alleged that, immediately after the incident, she reported her injury to Rick Dunaway, her team leader. Dunaway in turn reported the incident to Barry Christy, plaintiff's supervisor, who gave plaintiff a back support belt. Plaintiff worked the remainder of the week. On Sunday 14 October 2001, plaintiff saw a doctor about her back pain. She told the doctor she had been having pain for about six months and described the incident at work. However, because Brown & Sons had not authorized the medical visit, the doctor's office "would not treat [plaintiff] as a possible workers' compensation patient and made no record of her report of injury."

The following Tuesday, plaintiff reported for work but was so visibly impaired by pain that Christy referred her to Pam Cordts in human resources. Plaintiff told Cordts about her pain and inability to work, but she did not then claim that her injury was work related. According to the opinion and award of the Full Commission, Cordts "gave plaintiff paperwork on Family Medical Leave and short-term disability, but did not discuss the possibility of workers' compensation" because she "believed that [plaintiff's injury] was something

that had occurred outside of work." Cordts told plaintiff to see a doctor and that "for her own safety she would not be allowed to return to work without a note from the doctor."

During the ensuing year, plaintiff saw an orthopedic surgeon, a neurosurgeon, and a chiropractor and underwent a variety of examinations to determine the nature and cause of her pain. Throughout this process, the doctors' examinations were limited because plaintiff would complain of severe pain during the tests. As a result, the Full Commission found "it was initially difficult for the treating physicians to sort out diagnoses for [plaintiff's] physical problems and to determine the relationship between her symptoms and the injury at work." Based on expert testimony that plaintiff "likely had a pre-existing [sic] back condition at the time of her work-related injury," the Full Commission found that plaintiff "sustained an injury to her back that aggravated her preexisting degenerative condition."

Plaintiff failed to give Brown & Sons written notice of her accident as directed by N.C.G.S. §§ 97-22 and 97-23 until she filed a Form 18, entitled "Notice of Accident to Employer (G.S. 97-22) and Claim of Employee or His Personal Representative or Dependents (G.S. 97-24)." Plaintiff completed her Form 18 on 1 February 2002, and it was filed with the Commission on 5 February 2002, nearly four months after the claimed accident.

The matter was initially heard before Deputy Commissioner Morgan S. Chapman ("the deputy"), who, on 28 April 2004, entered an opinion and award denying plaintiff's claim for workers' compensation benefits. The deputy made numerous findings of fact, the most pertinent of which are as follows. When Barry Christy, plaintiff's supervisor, gave plaintiff a back support belt on the day of the accident, Christy "was unaware of a specific injury." When Pam Cordts in human resources asked plaintiff about her injury, "plaintiff indicated that she did not know how she had done it and that she had been having back problems for quite a while." After Cordts told plaintiff she would not be allowed to return to work without a doctor's clearance, plaintiff saw a doctor and "stated that the onset of her symptoms was six months previously and that she was not injured on the job." During plaintiff's neurosurgical evaluation on 12 December 2001, "she gave a six-month history of symptoms and did not describe the incident at work, although she advised that her job involved heavy lifting." In addition, the deputy found:

> 13. Defendants denied this claim since there was no record of an injury at work in plaintiff's medical records and since she had denied that her back condition was related to a work-related injury to Ms. Cordts, to the adjuster, Brian Gray, who spoke with her on November 9, 2001 regarding her short term disability claim, and on the claims forms for the disability benefits.
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> . . . .
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> 15. . . . . Defendants were prejudiced by the delay in receiving written notice since they otherwise might well have accepted the claim as compensable, but rather allowed plaintiff to pursue disability benefits, for which they would not receive a credit since the benefits were not totally employer funded, since defendants were not able to designate the medical treatment plaintiff would receive and since the treatment which plaintiff obtained was unusually protracted. The fact that the claim was denied was due to plaintiff's own statements to representatives of defendants which gave defendants very good grounds to believe that the back condition was not due to a compensable injury at work.

Based upon these findings of fact, the deputy concluded as a matter of law that "plaintiff sustained an injury by accident arising out of and in the course of her employment with defendant." However, the deputy further concluded that

> plaintiff's claim is barred due to her failure to give her employer written notice of the injury within thirty days since she did not have reasonable excuse for the delay and since defendants were prejudiced by it. Defendants did not have actual knowledge of the injury despite the initial verbal report since plaintiff repeatedly thereafter denied that she was injured at work. G.S. § 97-22.

Plaintiff appealed the deputy's opinion and award to the Full Commission, and defendants cross-appealed. The Full Commission reviewed the case and reversed the deputy's opinion and award, entering its opinion and award on 18 January 2005. The Full Commission determined that Brown & Sons did have actual notice of plaintiff's work-related injury and concluded that plaintiff had a reasonable excuse for failing to give Brown & Sons timely written notice of her accident in accordance with N.C.G.S. § 97-22. The Full Commission made the following conclusions of law:

1. On an unknown date during the week of October 11, 2001, plaintiff sustained an injury by accident arising out of and in the course of her employment with defendant in that she sustained a back injury as the result of a specific traumatic incident of the work assigned.

2. The aggravation or exacerbation of plaintiff's pre-existing back condition as a result of a specific traumatic incident, which has resulted in loss of wage earning capacity, is compensable under the Workers' Compensation Act.

3. Defendants had actual notice of plaintiff's work-related injury, and resulting workers' compensation claim, (1) when plaintiff immediately reported her injury to her team leader, (2) when plaintiff's supervisor gave her a back support brace so that she could continue working; and (3) when her supervisor sent her to human resources to discuss her injury. Because defendants had actual knowledge of plaintiff's work-related injury, plaintiff's failure to give written notice of her claim did not bar her claim for compensation.

4. Even if defendants had not had actual notice, given the nature of plaintiff's injury and her pre-existing back condition, plaintiff's failure to give written notice within 30 days is reasonably excused because plaintiff did not reasonably know of the nature, seriousness, or probable compensable character of her injury until after extensive treatment with Dr. Roy, her treating physician.

(Citations omitted.)

The Full Commission also found that Cordts "failed to ask specific questions regarding the cause of plaintiff's injury," "did not take proper action to assess whether or not plaintiff's injury was, in fact, work related," and that "there is no evidence that Ms. Cordts spoke, as she should have, with either [plaintiff's team leader] or [plaintiff's supervisor] to determine if plaintiff's supervisors had actual knowledge of a work-related injury or incident involving plaintiff." Regarding plaintiff's visit to an orthopedic surgeon following her meeting with Cordts, the Full Commission found that plaintiff did, in fact, tell the surgeon that she had been injured on the job. The Full Commission made no findings that plaintiff failed to describe the workplace accident during her neurosurgical evaluation or that she repeatedly denied to defendants that her back condition was due to a work-related injury.

Most importantly, the Full Commission reversed the deputy's conclusion that "[d]efendants were prejudiced by the delay in receiving written notice" of the accident. However, the Full Commission made no findings of fact or conclusions of law with respect to the issue of prejudice to defendants. Regarding plaintiff's failure to comply with the notice requirement of N.C.G.S. § 97-22, the Full Commission simply concluded: "Because defendants had actual knowledge of plaintiff's work-related injury, plaintiff's failure to give written notice of her claim did not bar her claim for compensation."

The Full Commission remanded the matter for assignment to a deputy commissioner "for the taking of additional evidence or further hearing, if necessary, and the entry of an Opinion and Award with findings on the issues of (1) the extent of plaintiff's disability; (2) the amount of indemnity benefits due plaintiff; and (3) the extent of medical compensation due plaintiff." Defendants sought immediate review, but the Court of Appeals dismissed their interlocutory appeal. After remand, a deputy commissioner entered an opinion and award in the case on 4 May 2006. Defendants appealed, and on 11 May 2007, the Full Commission entered an opinion and award in which it stated: "The Full Commission's Opinion and Award of January 18, 2005 is incorporated by reference as if fully set forth herein." The Full Commission concluded that "[p]laintiff was totally disabled from her compensable specific traumatic incident from October 16, 2001, and continuing to May 31, 2005," and ordered defendants to pay plaintiff temporary total disability compensation for that time period. The Full Commission reserved for future determination the issue of "the extent of plaintiff's disability, if any, after May 31, 2005."

Defendants appealed the Full Commission's opinion and award. A divided panel of the Court of Appeals affirmed, holding that the Full Commission's conclusion that Brown & Sons had actual knowledge of plaintiff's injury was supported by findings of fact, which were in turn supported by competent evidence. *Gregory v. W.A. Brown & Sons*, 192 N.C. App. 94, 106, 664 S.E.2d 589, 596 (2008). Unlike the Full Commission, the Court of Appeals then addressed the issue of prejudice, with the majority stating: "In light of this actual knowledge, we also hold that Defendant-Employer was not prejudiced by Plaintiff's failure to provide written notice of her injury within thirty days." *Id.* (citation omitted). The dissenting judge questioned the majority's decision to "infer a lack of prejudice when the Commission has not addressed that issue specifically," 192 N.C. App. at 111, 664 S.E.2d at 599 (Jackson, J., dissenting in part), and would

have "remand[ed] to the Commission for findings of fact and conclusions of law addressing the issue of prejudice as required by section 97-22," *id.* at 114, 664 S.E.2d at 601. Defendants appealed to this Court on the basis of the dissenting opinion in the Court of Appeals.

II. ANALYSIS

We begin by observing a significant incongruity between the findings of fact made by the deputy and the findings of fact made by the Full Commission. We have long held that the Full Commission is the ultimate fact finder in a workers' compensation case and that its determinations of credibility are conclusive. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998). Here, however, while the deputy specifically found that plaintiff actively denied to defendant's representative that her injury was work related, the Full Commission made no related finding of its own either accepting or rejecting this finding by the deputy. Instead, the Full Commission implicitly required defendant to ascertain that plaintiff's injuries were work related. Because we need not resolve this anomaly to decide this case, we leave for another day the issue whether a finding by a deputy remains effective if that finding is not addressed either directly or indirectly by the Full Commission.

Section 97-22 of the General Statutes deals with notice by an injured employee to the employer, while section 97-23 deals with the contents of written notice. Section 97-22 provides:

> Every injured employee or his representative *shall* immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer *a written notice of the accident*, and the employee shall not be entitled to physician's fees nor to any compensation *which may have accrued under the terms of this Article prior to the giving of such notice*, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; *but no compensation shall be payable* unless such written notice is given within 30 days after the occurrence of the accident or death, *unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.*

N.C.G.S. § 97-22 (2007) (emphases added).

Section 97-23 provides:

> The notice provided in the foregoing section [G.S. 97-22] shall state in ordinary language the name and address of the employee, the time, place, nature, and cause of the accident, and of the resulting injury or death; and shall be signed by the employee or by a person on his behalf, or, in the event of his death, by any one or more of his dependents, or by a person in their behalf.
>
> No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby, and then only to such extent as the prejudice.
>
> Said notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State, or may be sent by registered letter or certified mail addressed to the employer at his last known residence or place of business.

Id. § 97-23 (2007) (brackets in original).

It is clear from these sections that, in enacting the Workers' Compensation Act, the General Assembly was concerned to avoid prejudice to employers resulting from insufficient notice of their employees' accidents. It is equally clear that the legislature wished to prevent unnecessary disputes, such as occurred in the instant case, regarding whether notice of an accident was given and what that notice might have contained. The General Assembly sought to resolve these concerns by requiring employees to put notice of their accidents in writing, to include certain vital information therein, and to submit such notice in a timely fashion to an appropriate representative of the employer. *Id.* §§ 97-22, -23.

The legislature also recognized, however, that employees would not always give written notice in perfect compliance with the statutes. The General Assembly therefore provided that an employee who fails to give the employer written notice of an accident within thirty days can still receive compensation based on that accident if "[(1)] reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and [(2)] the Commission is satisfied that the employer has not been prejudiced thereby." *Id.* § 97-22. This two-pronged test eschews a preference for form over function while simultaneously ensuring that workers' compensation benefits will only be payable when there is at least substantial compliance with the purposes of the written notice requirement.

This Court has previously read section 97-22 to mean that the plaintiff in a case under the Workers' Compensation Act

> *is not entitled to recover* unless he can show that he has complied with the provisions of the statute in respect to the giving of a notice, or has shown reasonable excuse to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

Singleton v. Durham Laundry Co., 213 N.C. 32, 36, 195 S.E. 34, 36 (1938) (emphasis added) (applying N.C. Code § 8081(dd) (1935), recodified as N.C.G.S. § 97-22 pursuant to Act of Feb. 1, 1943, ch. 15, sec. 3, 1943 N.C. Sess. Laws 13, 13-14). *Singleton* also states, "It is the duty of the Commission to make . . . specific and definite findings upon the evidence reported . . . particularly when there are material facts at issue." *Id.* at 34-35, 195 S.E. at 35. This Court in *Singleton* ultimately found error in the Commission's failure to make findings of fact on the "controverted issue" of the plaintiff's compliance with the statutory provisions regarding written notice, or alternatively, on the issues of reasonable excuse and lack of prejudice. *Id.* at 36, 195 S.E. at 36.

The principles set forth in section 97-22 and elucidated in *Singleton* were recently reiterated in *Watts v. Borg Warner Automotive, Inc.*, 171 N.C. App. 1, 613 S.E.2d 715, *aff'd per curiam*, 360 N.C. 169, 622 S.E.2d 492 (2005). In *Watts*, the Commission awarded compensation despite a lack of timely written notice after concluding that the plaintiff-employee had a reasonable excuse for not giving written notice of his accident and that the defendant-employer was not prejudiced by the delay. *Id.* at 5, 613 S.E.2d at 719. The Court of Appeals stated that due to the plaintiff-employee's failure to give timely "*written* notice," section 97-22 allowed compensation only if the failure of notice was reasonably excused and the defendant-employer was not prejudiced. *Id.* at 4, 613 S.E.2d at 718 (citation omitted). Although the Commission had made conclusions of law on these issues, the Court of Appeals held the Commission failed to support those conclusions adequately and remanded for additional findings of fact. *Id.* at 6, 613 S.E.2d at 719 (citations omitted). In so holding, the Court of Appeals rightly did not suggest that this analysis applies only when the defendant-employer lacked actual notice of the accident. This Court subsequently affirmed the Court of Appeals in a per curiam decision. 360 N.C. 169, 622 S.E.2d 492.

A careful reading of section 97-22 confirms that these prior decisions represent proper applications of that statute. Section 97-22 begins by establishing a presumptive requirement of written notice of accidents as a prerequisite to compensation. The statute goes on to provide that an employee who fails to give such written notice may still be entitled to physician's fees and compensation "*which may have accrued . . . prior to the giving of [written] notice*" if the employer had actual knowledge of the accident. N.C.G.S. § 97-22 (emphasis added). The remaining portion of the statute is then set off by a semicolon. The language following the semicolon initially provides that "*no compensation shall be payable* unless such written notice is given within 30 days after the occurrence of the accident or death." *Id.* (emphasis added). In other words, the language after the semicolon applies to all workers' compensation benefits, regardless of whether they accrue before or after the giving of written notice. Section 97-22 then provides that the requirement of written notice within thirty days after the accident will be waived only if "reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." *Id.* Thus, when the employee fails to provide written notice of the accident within thirty days, "no compensation shall be payable" unless the Commission is satisfied both that the delay in written notice was reasonably excused and that the employer was not prejudiced. *Id.* According to the statute's plain language, these two factors must be found regardless of whether the employer has actual knowledge of the accident.

Requiring findings of fact and conclusions of law on the issue of prejudice is consistent with section 97-22, with *Singleton* and *Watts*, and with this Court's recent decision in *Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 669 S.E.2d 582 (2008), *reh'g denied*, 363 N.C. 260, 676 S.E.2d 472 (2009). In *Richardson*, the plaintiff-employee failed to give written notice of her accident within thirty days. *Id.* at 658-59, 669 S.E.2d at 584. It was uncontested that the defendants in that case had actual notice of the plaintiff's accident, and in light of that actual notice, the Commission concluded that the defendants were not prejudiced by the delay in written notice. *Id.* at 661, 669 S.E.2d at 585. This Court agreed, concluding in light of *Richardson's* particular facts "that the Commission's findings and conclusions were adequate." *Id.* at 662, 669 S.E.2d at 585.

We indicated in *Richardson* that the plaintiff was not required to give her employer written notice of her accident under the circum-

stances of the actual notice in that case. *Id.* at 658, 669 S.E.2d at 583 (stating that written notice was not necessary "when the employer has actual notice of [the employee's] on-the-job injury, *as the employer had here*" (emphasis added)). The actual notice the employer had in *Richardson* is different from Brown & Sons' actual notice in several significant respects. The employer in *Richardson* made no efforts to mitigate the employee's injuries and failed to investigate the circumstances of her accident despite the employer's "aware[ness] of plaintiff's injuries and medical treatments based on her regular communications." *Id.* at 662, 669 S.E.2d at 586. By contrast, in the instant case, the Full Commission found that the doctor who initially treated plaintiff did not view her as a possible workers' compensation patient and made no record of plaintiff's report of injury. The Full Commission also found that Pam Cordts in human resources "believed that [plaintiff's injury] was something that had occurred outside of work," in part because plaintiff "did not report it as a workers' compensation claim, didn't allude to it being a workers' comp claim." Furthermore, the employee in *Richardson* was involved in an automobile accident, which was a discrete occurrence resulting in relatively certain injuries. In this case, on the other hand, plaintiff had been experiencing back pain for approximately six months when her accident occurred and sought workers' compensation after she "aggravated her preexisting degenerative condition." The timing of plaintiff's injury was uncertain both because of the discrepancy in the evidence as to the time and place of the injury and because plaintiff continued reporting for work after her accident. As a result of plaintiff's actions, initial attempts by physicians to diagnose plaintiff's problem and determine whether it was work related were inconclusive.

The foregoing distinctions accentuate the most important factual difference between *Richardson* and the instant case, which concerns whether the parties disputed the issue of actual notice. In *Richardson*, "[t]he defendants acknowledge[d] the plaintiff's same-day notification of the accident," *id.* at 660, 669 S.E.2d at 585, and there was no indication in the record of any dispute as to whether the contents of the plaintiff's notification were sufficient to prevent prejudice to the defendants, *see* N.C.G.S. § 97-23 (setting forth the necessary contents of written notice under N.C.G.S. § 97-22). By contrast, in this case, the issue of actual notice was a primary point of contention at the hearing level that engendered irreconcilable findings by the deputy and the Full Commission, respectively. The result we reached in *Richardson* was proper in light of the defendants' failure

in that case to argue that they did not receive actual notice sufficient to prevent them from being prejudiced. *Richardson* demonstrates how the facts of a particular case can justify a determination by the Full Commission that an employer had actual notice sufficient to obviate written notice, even in the absence of a specific finding of fact. Nevertheless, as a general rule, when a workers' compensation plaintiff has not given written notice of the accident within thirty days thereafter, the plaintiff cannot receive any compensation unless the Commission makes proper findings and conclusions with respect to the issues of reasonable excuse and prejudice to the employer.

In the case *sub judice*, it is undisputed that plaintiff failed to provide written notice until she filed her workers' compensation claim nearly four months after her accident. Thus, under section 97-22, plaintiff can receive no workers' compensation benefits unless the Commission concludes as a matter of law that the delay in written notice was reasonably excused and that Brown & Sons was not prejudiced. Because the Full Commission's opinion contains no conclusion that Brown & Sons was not prejudiced, that opinion is an insufficient basis upon which to award compensation to plaintiff.

A mere conclusion that Brown & Sons was not prejudiced, however, would not render the Full Commission's opinion and award adequate. To enable the appellate courts to perform their duty of determining whether the Commission's legal conclusions are justified, the Commission must support its conclusions with sufficient findings of fact. *Pardue v. Blackburn Bros. Oil & Tire Co.*, 260 N.C. 413, 415-16, 132 S.E.2d 747, 748-49 (1963).

> The Commission is not required to make a finding as to each detail of the evidence or as to every inference or shade of meaning to be drawn therefrom. But specific findings of fact by the Commission are required. *These must cover the crucial questions of fact upon which plaintiff's right of compensation depends.* If the findings of fact of the Commission are insufficient to enable the Court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the end that the Commission make proper findings.

Id. at 416, 132 S.E.2d at 749 (emphasis added) (citations omitted). While the following example is provided for guidance and is not intended to limit either deputies or the Full Commission, findings of fact to the effect that an employer had actual knowledge within thirty days after an employee's accident, and that the actual knowledge

included such information as the employee's name, the time and place of the injury or accident, the relationship of the injury to the employment, and the nature and extent of the injury, could support a legal conclusion that the employer was not prejudiced by the delay in written notice.

This Court has previously provided similar direction as to the "crucial questions of fact" that underlie legal conclusions regarding reasonable excuse and lack of prejudice. In *Booker v. Duke Medical Center*, we held that an employer had waived its right to appeal the issue of notice by failing to raise that issue before the Commission. 297 N.C. 458, 481-82, 256 S.E.2d 189, 204 (1979). In so holding, we noted that if the employer had raised the notice issue before the Industrial Commission, it would have been appropriate for the Commission to "conduct[] an inquiry in accordance with G.S. 97-22," *id.*, and make findings of fact with respect to whether the lack of notice "was excusable and nonprejudicial," 297 N.C. at 481, 256 S.E.2d at 203. We also stated: "The purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury." *Id.* at 481, 256 S.E.2d at 204 (citing 3 A. Larson, Workmen's Compensation Law § 78.20 (1976)). Findings of fact to the effect that these purposes of the notice requirement were vindicated despite the lack of timely written notice of an employee's accident could likewise support a legal conclusion that the employer was not prejudiced by the delay in written notice.

Not every instance of actual notice will satisfy the statutory requirements of reasonable excuse and lack of prejudice. The Industrial Commission is therefore obligated to apply the test in each case in which timely written notice of the accident is lacking, and the Commission cannot award compensation in such a case unless it concludes as a matter of law that the absence of such notice is reasonably excused and that the employer has not been prejudiced. Further, because the right to compensation of an employee who did not give timely written notice depends on the Commission's conclusions on these legal issues, the Commission must support those conclusions with appropriate findings of fact as detailed above. *Pardue*, 260 N.C. at 416, 132 S.E.2d at 749.

As observed previously, it is undisputed in this case that plaintiff failed to provide written notice until she filed her workers' compen-

sation claim nearly four months after her accident. Therefore, the Full Commission erred in awarding benefits to plaintiff without concluding that defendants were not prejudiced by the delay and supporting such a conclusion with appropriate findings of fact.

In addition, we note that N.C.G.S. §§ 97-22 and 97-23 place the burden of notice on the employee, not the employer. In its opinion and award, the Full Commission found that Pam Cordts in human resources "failed to ask specific questions regarding the cause of plaintiff's injury" and "did not take proper action to assess whether or not plaintiff's injury was, in fact, work related," and that "there is no evidence that Ms. Cordts spoke, *as she should have*, with either [plaintiff's team leader] or [plaintiff's supervisor] to determine if plaintiff's supervisors had actual knowledge of a work-related injury or incident involving plaintiff." (Emphasis added.) Thus, assuming without deciding that plaintiff stated to Cordts that the injury was not work related, the Full Commission's analysis incorrectly placed upon defendant the burden to disprove plaintiff's denial that her injury was work related. The Commission may not shift the burden of notice from the employee to the employer and then use the resulting findings as the factual basis for a conclusion that defendants were not prejudiced by plaintiff's failure to give timely written notice of her accident.[1] *Cf. Jacobs v. Safie Mfg. Co.*, 229 N.C. 660, 661-62, 50 S.E.2d 738, 739 (1948) (holding that the burden of notice did not shift to employer after employee requested a meeting with employer's superintendent and employee's sister told the superintendent that employee had been injured on the job).

In enacting N.C.G.S. § 97-22, the General Assembly expressed its intention that an employee who has an accident and does not timely notify the employer in writing should not receive compensation based on that accident unless the Industrial Commission is satisfied that the lack of timely written notice was reasonably excused and that the employer was not prejudiced. Thus, we hold that, when the employee does not give timely written notice as required by section 97-22, regardless of whether the employer had actual notice of the

1. We are cognizant that certain sections of the Workers' Compensation Act place burdens on employers rather than employees. Sections 97-18 and 97-92, however, apply to employers that have knowledge of employees' "injuries," not employers with knowledge of employees' "accidents." N.C.G.S. §§ 97-18, -92 (2007). Unlike "accident," "injury" is a defined term under the Workers' Compensation Act, meaning "only injury by accident arising out of and in the course of the employment." *Id.* § 97-2(6) (2007). An employer's notice of an employee's "accident," standing alone, does not necessarily trigger any statutory duties for the employer.

accident, the Industrial Commission cannot award compensation unless it (1) concludes as a matter of law that the lack of timely written notice was reasonably excused and that the employer was not prejudiced and (2) supports those conclusions with appropriate findings of fact.

III. DISPOSITION

The Full Commission in this case erred in awarding benefits to plaintiff without concluding that defendants were not prejudiced by plaintiff's failure to give written notice within thirty days after her accident and without supporting such a conclusion with appropriate findings of fact. Therefore, we reverse the decision of the Court of Appeals as to the issue raised by the dissenting opinion in that court. The remaining issues addressed by the Court of Appeals are not before this Court, and its decision as to those issues remains undisturbed. This case is remanded to the Court of Appeals for further remand to the Industrial Commission with instructions to enter findings of fact and conclusions of law regarding the issue of prejudice in a manner not inconsistent with this opinion.

REVERSED IN PART AND REMANDED.

Justice HUDSON dissenting.

We squarely decided the question presented here in our recent, unanimous decision in *Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 669 S.E.2d 582 (2008). Despite no change to the governing statutory framework, the majority would essentially overrule *Richardson* just one year later, while claiming not to do so, in order to reach a particular outcome here. By this decision the majority adds nothing but confusion and inconsistency to our own jurisprudence[2] and strays from the proper role and approach of this Court. As such, I respectfully dissent.

The sole issue presented to this Court on appeal is whether a defendant-employer's actual knowledge of a plaintiff-employee's work-related injury satisfies the notice-of-injury requirement under N.C.G.S. § 97-22, obviating the need for findings of fact as to any alleged prejudice. In our decision in *Richardson* we unanimously held that, under N.C.G.S. § 97-22, "[w]hen an employer has actual

2. The General Assembly could, if it so desired, quickly eliminate any confusion by clarifying the language of N.C.G.S. § 97-22, which has not been amended since it originally passed in 1929.

notice of the accident, the employee need not give written notice, and therefore, the Commission need not make any findings about prejudice." *Id.* at 663, 669 S.E.2d at 586.

The majority here maintains that we somehow limited the holding of *Richardson* to "the unique circumstances of the actual notice in that case." Even a cursory reading of that opinion clearly illustrates that we attached no such conditions to our statement of the law. If the majority has decided to overrule *Richardson*, by now "[r]equiring findings of fact and conclusions of law on the issue of prejudice," regardless of whether the employer has actual knowledge or notice of the injury, the Court should do so directly and avoid creating unnecessary confusion in the law for employers, employees, and the Industrial Commission regarding which types of actual knowledge are sufficient and which are not. Providing such certainty is fundamental to our judicial role:

> It is, then, an established rule to abide by former precedents, *stare decisis*, where the same points come up again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land—not delegated to pronounce a new law, but to maintain and expound the old one—*jus dicere et non jus dare*.

McGill v. Town of Lumberton, 218 N.C. 586, 591, 11 S.E.2d 873, 876 (1940) (citations and quotation marks omitted); *see also Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 851-52 ("A primary goal of adjudicatory proceedings is the uniform application of law. In furtherance of this objective, courts generally consider themselves bound by prior precedent, *i.e.*, the doctrine of *stare decisis*." (citing *Payne v. Tennessee*, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 736-37 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."), and *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 472, 206 S.E.2d 141, 145 (1974) (observing that stare decisis "promotes stability in the

law and uniformity in its application"))), *cert. denied*, 533 U.S. 975, 150 L. Ed. 2d 804 (2001).

Indeed, the distinction the majority attempts to draw between the facts of *Richardson* and those presented here demonstrates the need for a straightforward, easily applied rule such as the one enunciated just one year ago in *Richardson*. The majority goes to great lengths in its attempts to find a material difference between the actual knowledge of the employer in *Richardson* and that of the employer here. These efforts ignore the fundamental reality that, for purposes of our appellate review of an Industrial Commission opinion and award, there is no meaningful difference between the "uncontested" actual knowledge in *Richardson* and the Commission's finding of fact and conclusion of law that defendant-employer here had actual notice of plaintiff's injury. Because that finding and conclusion were not the basis of the dissent in the Court of Appeals, they are binding on us on appeal, and the degree to which they were contested is irrelevant to our review. *See State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 436, 666 S.E.2d 107, 111 (2008) (" 'Where 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 questions which are . . . specifically set out in the dissenting opinion as the basis for that dissent . . . . ' " (quoting N.C. R. App. P. 16(b); *accord State v. Hooper*, 318 N.C. 680, 681-82, 351 S.E.2d 286, 287 (1987))).

Notwithstanding decades of case law on both stare decisis and our proper standard of review concerning findings of fact and conclusions of law that are binding on appeal, the majority here indulges defendant-employer's improper efforts to relitigate once again the question of actual notice.[3] While offering the disclaimer that such detail is offered only to demonstrate that "the issue of actual notice was a primary point of contention at the hearing level," the majority's subsequent analysis reveals that they simply disagree with the Full Commission's finding. To bolster their position, the majority even recites the findings and conclusions of the *deputy* commissioner, purportedly to show that the issue "engendered irreconcilable findings by the deputy and Full Commission, respectively." Of course, these findings are not "irreconcilable"; they have indeed been reconciled and determined—by the Full Commission, in its proper statutory role as the ultimate fact finder in worker's compensation cases.

3. In fact, we specifically denied defendant-employer's petition for discretionary review on that issue.

The majority's analysis can only be characterized as precisely the type of reweighing of evidence that our statutes and case law explicitly disallow:

> On appeals from the Industrial Commission, the Commission's findings of fact must be sustained if there is competent evidence in the record to support them. *Lawrence v. Hatch Mill*, 265 N.C. 329, 144 S.E.2d 3 (1965). This is so even if there is evidence which would support a contrary finding, because "courts are not at liberty to reweigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached." *Rewis v. Insurance Co.*, 226 N.C. 325, 330, 38 S.E.2d 97, 100 (1946).

Hill v. Hanes Corp., 319 N.C. 167, 172, 353 S.E.2d 392, 395 (1987); *see also* N.C.G.S. § 97-86 (2007) ("The award of the Industrial Commission . . . shall be conclusive and binding as to all questions of fact . . . ."); *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965) ("The Workmen's Compensation Act, G.S. 97-86, vests the Industrial Commission with full authority to find essential facts. The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The courts may set aside findings of fact only upon the ground they lack evidentiary support. The court does not have the right to weigh the evidence and decide the issue on the basis of its weight." (citations omitted)); *Johnson v. Erwin Cotton Mills Co.*, 232 N.C. 321, 322, 59 S.E.2d 828, 829 (1950) (holding that, because "[t]he evidence permits the inferences therefrom which were drawn by the Commission, though other inferences appear equally plausible," "[t]he courts are not at liberty to reweigh the evidence because different conclusions might have been reached." (citations omitted)); *Riddick v. Richmond Cedar Works*, 227 N.C. 647, 648, 43 S.E.2d 850, 851 (1947) ("Where the record is such as to permit either finding [a compensable or noncompensable injury], the determination of the Industrial Commission is conclusive on appeal." (citations omitted)); *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 41-42, 153 S.E. 591, 593 (1930) (holding that, when there is evidence to support a finding by the Commission, "whether the Appellate Court agrees with the conclusion of the Commission or not, the finding of such fact is conclusive, by express declaration of the statute").

Indeed, the bulk of the majority opinion concentrates on whether plaintiff's actual notice of her injury to defendant-employer was

somehow sufficient to trigger defendant-employer's duties under N.C.G.S. § 97-92 to keep a record of the injury and file a report with the Industrial Commission. This distraction from the actual question at hand is a classic straw man, as that issue has already been definitively decided and is not before us for review. Moreover, the majority's emphasis and reliance for its holding on the extent to which the issue of actual notice was disputed at trial impermissibly allow defendants yet another bite at the apple—their third, at least—regarding this issue, which has been conclusively decided in plaintiff's favor.

This case presents us with the Commission's finding and conclusion that defendant-employer had actual notice of plaintiff's work-related injury when she immediately reported it to her team leader, received a back brace from her supervisor, and was sent by her supervisor to human resources. The Commission further concluded that "plaintiff's failure to give written notice within 30 days is reasonably excused because plaintiff did not reasonably know of the nature, seriousness, or probable compensable character of her injury until after extensive treatment." Given these binding findings and conclusions, the sole question before us is whether, as a matter of law, the Full Commission is required under N.C.G.S. § 97-22 to make findings regarding prejudice when a defendant-employer has actual knowledge of a plaintiff-employee's injury. In pertinent part, the statute provides:

> Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, . . . *unless it can be shown that the employer*, *his agent or representative*, *had knowledge of the accident*, . . . but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

N.C.G.S. § 97-22 (2007) (emphasis added). Notably, in *Richardson* we analyzed N.C.G.S. § 97-22 and observed that "in enacting N.C.G.S. § 97-22, the General Assembly did not intend to require an injured worker to give written notice when the employer has actual notice of her on-the-job injury, as the employer had here." 362 N.C. at 658, 669 S.E.2d at 583. Here, even though the employer had immediate knowl-

edge, and failed to carry out its own statutory duty to investigate, plaintiff also gave detailed written notice less than four months later, when she filed her Form 18 Notice of Accident to Employer and Claim of Employee for Workers' Compensation Benefits.

In *Richardson* we explicitly discussed both the requirements under N.C.G.S. § 97-22 and the potentially prejudicial effect of a lack of notice:

> The plain language of section 97-22 requires an injured employee to give written notice of an accident "unless it can be shown that the employer, his agent or representative, had knowledge of the accident." *When an employer has actual notice of the accident, the employee need not give written notice, and therefore, the Commission need not make any findings about prejudice.* The second clause of N.C.G.S. § 97-22, following the semicolon, applies to those cases in which written notice is required because the employer has no actual notice of the accident. It explains that an employee may be excused from even that requirement by providing a reasonable excuse for failing to give notice and by showing that the employer has not been prejudiced. Here, the employer's immediate actual notice of plaintiff's injury by accident satisfied the purposes of section 97-22 . . . . Moreover, *although we now hold it was not required to do so*, the Commission specifically concluded that the employer here suffered no prejudice . . . .

Id. at 663-64, 669 S.E.2d at 586-87 (emphases added) (emphasis omitted).

Thus, as established in *Richardson*, if a defendant-employer has actual knowledge of a plaintiff-employee's work-related injury, N.C.G.S. § 97-22 does not require the employee to provide written notice or the Full Commission to make explicit findings about prejudice, or the lack thereof, to the defendant-employer. Certainly, it is logical that, if a defendant-employer has *actual knowledge* of an injury, the Full Commission has no need to be "satisfied that the employer has not been prejudiced" by the employee's "not giving such notice," N.C.G.S. § 97-22, as there can be no prejudice due to lack of knowledge when there is, in fact, no lack of knowledge.[4] This

4. Following this logic, I note the absurdity of the majority's disposition here, to once again remand this case to the Full Commission "with instructions to enter findings of fact and conclusions of law regarding the issue of prejudice," concerning an injury that occurred more than eight years ago.

result is also entirely consistent with the purpose of the notice statute. *See* 7 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* ch. 126, at 126-1 (Dec. 2007) [hereinafter *Larson's Workers' Compensation Law*] ("Since the purpose of the notice requirement is to enable the employer to protect itself by prompt investigation and treatment of the injury, failure to give formal notice is usually no bar if the employer had actual knowledge or informal notice sufficient to indicate the possibility of a compensable injury . . . ."); *id.* § 126.03[1][a] ("The present tendency is to excuse lack of notice whenever the employer acquired actual knowledge of the accident, no matter how that knowledge was acquired."); *see also* J. Maynard Keech, *Workmen's Compensation in North Carolina 1929-1940*, at 49 (1942) ("When delay of notice beyond thirty days is excused by the Commission because the employer was not prejudiced, . . . *or when the employer had knowledge of the accident or death*, the employee . . . is not barred from compensation." (emphasis added)); *id.* app. A at 174 ("Employee or representative must report immediately by written notice to employer or agent (*unless these had knowledge of fact*) the facts of injury or death." (emphasis added) (summary of accident reporting provisions of N.C. Workmen's Compensation Law)).

This analysis likewise conforms with the standard practice in the majority of jurisdictions throughout the country concerning the possible prejudicial effects of failure to comply with the notice-of-injury requirement. *See Larson's Workers' Compensation Law* § 126.04[4], at 126-16 ("The requirement [of notice] is no mere technicality. It serves a specific function in protecting the legitimate rights of the employer . . . . Accordingly, there is no lack of cases in which compensation claims have foundered on the rock of prejudice to the employer due to *noncompliance with the notice provision*." (emphasis added)); *see also Booker v. Duke Med. Ctr.*, 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979) (observing that the notice-of-injury requirement "allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury." (citation omitted)).

The Commission has already found and concluded that defendant-employer had actual notice of the injury. Now, the majority would require the Commission to enter yet another opinion and award—its third in this case, not including that of the deputy commissioner—to enter a finding that would essentially amount to "defendant-employer was not prejudiced by a lack of notice because defendant-employer did have notice." A remand is an unnecessary waste of time and resources.

North Carolina courts have also followed this practice: as the dissenting opinion in the Court of Appeals noted, that court has held in numerous prior opinions that actual knowledge of an injury negates any requirement to make a finding regarding prejudice. *Gregory v. W.A. Brown & Sons*, 192 N.C. App. 94, 111-12, 664 S.E.2d 589, 599 (2008) (Jackson, J., dissenting in part) (referring to such a holding in *Legette v. Scotland Mem'l Hosp.*, 181 N.C. App. 437, 448, 640 S.E.2d 744, 752 (2007), *appeal dismissed and disc. rev. denied*, 362 N.C. 177, 658 S.E.2d 273 (2008), and citing *Davis v. Taylor-Wilkes Helicopter Serv., Inc.*, 145 N.C. App. 1, 11, 549 S.E.2d 580, 586 (2001), and *Sanderson v. Ne. Constr. Co.*, 77 N.C. App. 117, 123, 334 S.E.2d 392, 395 (1985)); *see also Richardson v. Maxim Healthcare/Allegis Grp.*, 188 N.C. App. 337, 358-60, 657 S.E.2d 34, 47-48 (Wynn, J., dissenting in part) (discussing *Jones v. Lowe's Cos.*, 103 N.C. App. 73, 76-77, 404 S.E.2d 165, 167 (1991), and *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 378, 616 S.E.2d 403, 413 (2005), *appeal dismissed*, 360 N.C. 288, 627 S.E.2d 464 (2006)), *aff'd in part*, *rev'd in part*, 362 N.C. 657, 669 S.E.2d 582 (2008). Likewise, the Court of Appeals majority in this case quoted *Lakey v. U.S. Airways, Inc.*, in which an earlier panel more recently held that, "[f]ailure of an employee to provide written notice of her injury will not bar her claim where the employer has actual knowledge of her injury," 155 N.C. App. 169, 172, 573 S.E.2d 703, 706 (2002) (citations omitted), *disc. rev. denied*, 357 N.C. 251, 582 S.E.2d 271 (2003), as well as the older case of *Chilton v. Bowman Gray School of Medicine*, 45 N.C. App. 13, 18, 262 S.E.2d 347, 350 (1980).

Moreover, the case relied on by the majority, *Singleton v. Durham Laundry Co.*, 213 N.C. 32, 195 S.E. 34 (1938), did not involve the factual situation presented here, namely, an employer who had actual knowledge of the employee's injury. Rather, in *Singleton*, "[t]he record further shows that at the same time the defendants denied liability, for that the matter was never reported, *the employer had no knowledge that the accident existed until the notice was received from the Industrial Commission*." *Id.* at 33-34, 195 S.E. at 35 (emphasis added). Significantly, the language from *Singleton* quoted by the majority, that an employee "is not entitled to recover unless he can show that he has complied with the provisions of the statute in respect to the giving of a notice," uses an indefinite article, referring to "*a* notice," suggesting that either actual knowledge or written notice would be sufficient to satisfy the statutory requirement.

Similarly, contrary to the majority's assertion that "[t]he principles set forth in section 97-22 and elucidated in *Singleton* were recently reiterated in *Watts v. Borg Warner Automotive, Inc.*, 171 N.C. App. 1, 613 S.E.2d 715 (2005)," we issued no written opinion in that case, instead simply affirming per curiam a decision by the Court of Appeals in a case that did not implicate the question of actual knowledge but only involved the employee's delay in providing written notice. *See* 360 N.C. 169, 622 S.E.2d 492 (2005) (per curiam). This Court has, in fact, concluded explicitly that an employer's actual knowledge obviates the need for written notice: we did so one year ago in *Richardson*. As we noted there, our decision was in keeping with the numerous Court of Appeals opinions outlined above, the prevailing practice in jurisdictions around the country, and the purpose of the notice requirement. *See Richardson*, 362 N.C. at 663, 669 S.E.2d at 586 ("When an employer has actual notice of the accident, the employee need not give written notice, and therefore, the Commission need not make any findings about prejudice.").

If a defendant-employer has actual knowledge of an injury, as it did here, yet itself fails to take action either to "minimiz[e] the seriousness of the injury" or to "investigat[e] . . . the circumstances surrounding the injury," *Booker*, 297 N.C. at 482, 256 S.E.2d at 204, then any prejudice it suffers due to that failure cannot be attributed to the plaintiff-employee. Any prejudicial effect is therefore irrelevant to the Full Commission's evaluation of the employee's claim for workers' compensation. *Cf. Larson's Workers' Compensation Law* § 126.04[5] ("Once the record shows that the required notice *has not been given*, the fatal effect of this showing must be offset by definite findings showing the kind of excuse or lack of prejudice that will satisfy the statute." (emphasis added)).

Finally, this interpretation of N.C.G.S. § 97-22 is also in keeping with our long-standing directive that the Worker's Compensation Act must be liberally construed to effectuate its purpose of providing compensation to employees injured during the course and within the scope of their employment. *Essick v. City of Lexington*, 232 N.C. 200, 208, 60 S.E.2d 106, 112 (1950); *see also Keller v. Elec. Wiring Co.*, 259 N.C. 222, 225, 130 S.E.2d 342, 344 (1963) ("The Compensation Act requires that it be liberally construed to effectuate the objects for which it was passed—to provide compensation for workers injured in industrial accidents."); *Thomas v. Raleigh Gas Co.*, 218 N.C. 429, 433, 11 S.E.2d 297, 300 (1940) ("It is a familiar rule that the terms of the

Workmen's Compensation Act must be liberally construed and liberally applied." (citations omitted)).

This liberal construction prevents the sort of denial of benefits engaged in by the majority here, namely, "upon technical, narrow and strict interpretation" of the Act, in contravention of its purpose. *Graham v. Wall*, 220 N.C. 84, 90, 16 S.E.2d 691, 694 (1941); *see also Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 577, 139 S.E.2d 857, 862 (1965) ("In the absence of other than technical prejudice to the opposing party, the liberal spirit and policy, of the Compensation Act should not be defeated or impaired by a too strict adherence to procedural niceties." (citations and quotation marks omitted)); *Johnson*, 199 N.C. at 40, 153 S.E. at 593 ("It is generally held by the courts that the various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation."). Thus, our history of liberal construction has been in favor of the claimant. *See, e.g.*, *Derebery v. Pitt Cty. Fire Marshall*, 318 N.C. 192, 199, 347 S.E.2d 814, 819 (1986) ("This liberal construction in favor of claimants comports with the statutory purpose of allocating the cost of work-related injuries first to industry and ultimately to the consuming public." (citing *Petty v. Associated Transp., Inc.*, 276 N.C. 417, 173 S.E.2d 321 (1970) and *Vause v. Vause Farm Equip. Co.*, 233 N.C. 88, 63 S.E.2d 173 (1951))).

Here, the Full Commission both found as fact and concluded as a matter of law that defendant-employer had immediate actual knowledge of plaintiff's work-related injury, on the day that it occurred. Even though plaintiff's supervisor provided plaintiff a back brace, referred her to human resources, and knew that plaintiff was unable to return to her job for a substantial period thereafter, defendants failed to investigate the claim, as required by statute, or to take any action to mitigate the effects of the injury. As such, the notice-of-injury requirement under N.C.G.S. § 97-22 was satisfied, and under our holding in *Richardson*, the Full Commission was not required to make any additional findings about prejudice, or the lack thereof, to defendants.

The majority opinion attempts to have it both ways: claim that it is consistent with *Richardson* by improperly limiting that holding to its facts, while simultaneously turning that holding on its head by requiring the Commission to make findings and conclusions on prejudice "regardless of whether the employer had actual notice of the

accident." Even worse, the majority's discussion of what kind of actual notice is "sufficient" and their so-called "test" for the same create uncertainty and confusion in the law regarding the degree to which actual knowledge must be disputed, or when such knowledge might obviate the need for written notice.

I would abide by stare decisis and apply our recent, unanimous decision in *Richardson* and the proper standard of review to the Full Commission's findings of fact. Thus, I would affirm the Court of Appeals decision upholding the Full Commission's opinion and award.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

DEBORAH HAMPTON BIRD v. JAMES CALVIN BIRD, II

No. 545A08

(Filed 29 January 2010)

1. Rules of Civil Procedure— summary judgment—private investigator's affidavit—passive voice—personal knowledge requirement

An affidavit from a private detective in an alimony case that was phrased in the passive voice ("Michael Scott Cooper was observed . . .") satisfied the personal knowledge requirement of Rule 56(e) where the affidavit began with the statement that the investigator had been retained for the investigation, raising the reasonable inference that everything in her affidavit was based on her personal knowledge. There was no record or mention of any other individual performing the investigation, and the trial court's duty to treat indulgently the Rule 56 materials of the party opposing the motion reasonably encompassed the passive voice averments in this affidavit.

2. Divorce— alimony—cohabitation—genuine issue of fact

The forecasted evidence in an alimony case was sufficient to raise a genuine issue of material fact as to cohabitation by plaintiff former wife where the evidence, viewed collectively, tended to show that plaintiff (who was awarded alimony in the original

action) and Cooper voluntarily assumed some degree of marital rights, duties, and obligations, but there was a genuine dispute regarding the subjective intent of plaintiff and Cooper regarding their relationship.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 193 N.C. App. 123, 668 S.E.2d 39 (2008), reversing an order granting summary judgment for plaintiff entered on 29 October 2007 by Judge Joseph E. Turner in District Court, Guilford County. On 5 February 2009, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court 8 September 2009.

Nix and Cecil, by Lee M. Cecil, for plaintiff-appellant.

Wyatt Early Harris Wheeler, LLP, by Arlene M. Reardon and Stanley F. Hammer, for defendant-appellee.

MARTIN, Justice.

This appeal from a divided decision of the Court of Appeals presents the question of whether defendant's forecast of evidence was sufficient to overcome plaintiff's motion for summary judgment. The Court of Appeals held that the trial court erred in granting summary judgment to plaintiff. We affirm.

Plaintiff Deborah Hampton Bird and defendant James Calvin Bird, II were married on 18 August 1985 and legally separated on or about 1 January 2004. On 25 June 2004, plaintiff filed a complaint in District Court, Guilford County, seeking child custody, child support, postseparation support, alimony, and equitable distribution of marital property.

In an order entered on 3 February 2006, the trial court directed defendant to pay alimony to plaintiff in the amount of $5,592.27 per month from November 2005 through October 2008. Thereafter, defendant was ordered to pay $5,497.27 per month from November 2008 through October 2020. The trial court also ordered that defendant make a lump-sum payment of $10,000.00 every April beginning in 2007 and ending with the last such payment in 2020.

On 30 May 2007, defendant filed a motion to terminate the alimony order pursuant to N.C.G.S. § 50-16.9. In the motion defendant alleged that plaintiff was cohabiting with another man and that,

as a result, defendant was permitted to terminate alimony payments. On 6 September 2007, plaintiff responded by filing a motion alleging that she was "entitled to a summary judgment in her favor, denying the defendant's motion to terminate alimony." In support of her motion, plaintiff submitted the affidavit of Michael Scott Cooper (the Cooper Affidavit). On 26 October 2007, defendant submitted an affidavit signed by Ann W. Cunningham (the Cunningham Affidavit) in opposition to plaintiff's motion for summary judgment. On 29 October 2007, the trial court granted plaintiff's motion for summary judgment.

On appeal, the Court of Appeals reversed the trial court's grant of summary judgment in favor of plaintiff. *Bird v. Bird*, 193 N.C. App. 123, 668 S.E.2d 39 (2008). The Court of Appeals concluded that the affidavits submitted by both parties created a genuine issue of material fact on cohabitation. *Id.* at 127, 668 S.E.2d at 42. Although Cunningham used the passive voice in her affidavit to describe events observed, the Court of Appeals concluded the Cunningham Affidavit complied with Rule of Civil Procedure 56(e) because it was "reasonable to assume that [she] was the observer referenced in her averments." *Id.* at 130, 668 S.E.2d at 43. Noting that the Cooper Affidavit, "standing alone, might give rise to an issue of fact on cohabitation," the court reviewed both affidavits and concluded they "clearly raised" an issue of fact. *Id.* at 129, 668 S.E.2d at 43. The dissenting judge believed that the Cunningham Affidavit did not comply with Rule 56(e) and that summary judgment in plaintiff's favor should be affirmed. *Id.* at 131, 668 S.E.2d at 44 (Jackson, J., dissenting).

Plaintiff appealed as of right to this Court based on the dissenting opinion. On 5 February 2009, this Court allowed plaintiff's petition for discretionary review as to additional issues.

[1] At the outset, we consider whether the affidavit signed by Ann W. Cunningham complies with Rule 56(e) of the North Carolina Rules of Civil Procedure.

"When a motion for summary judgment is made and supported . . . an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided . . . must set forth specific facts showing that there is a genuine issue for trial." N.C.G.S. § 1A-1, Rule 56(e) (2009); *see In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) ("[Summary] judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and

that any party is entitled to a judgment as a matter of law.' ") (citations omitted). "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C.G.S. § 1A-1, Rule 56(e) (2009).

It is well settled that Rule 56(e) affidavits must be based on the affiant's personal knowledge. *See Singleton v. Stewart*, 280 N.C. 460, 467, 186 S.E.2d 400, 405 (1972) (holding that a portion of an affidavit stating, "[T]he plaintiff is advised and informed that . . ." could not be considered). Nonetheless, "the evidence forecast by the party against whom summary judgment is contemplated is to be indulgently regarded, while that of the party to benefit from summary judgment must be carefully scrutinized." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (citing *Page v. Sloan*, 281 N.C. 697, 704, 190 S.E.2d 189, 193 (1972)). Moreover, the trial court should consider the Rule 56 forecasts of evidence in the light most favorable to the nonmoving party. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citing *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975)). Ultimately, "[i]f there is any question as to the *weight* of evidence, summary judgment should be denied." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999) (emphasis added) (citing *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 535, 180 S.E.2d 823, 830 (1971)).

Defendant, the nonmoving party in the trial court here, asserted that plaintiff cohabited with another man, Michael Scott Cooper, and sought to terminate his alimony payments to plaintiff on that basis. Defendant tendered the Cunningham Affidavit in opposition to plaintiff's motion for summary judgment. In her affidavit, Cunningham averred that she was a private investigator with Cunningham & Associates and a member of the National Association of Investigative Services. She further stated:

> 3.
>
> I was retained to investigate Michael Scott Cooper and Deborah Hampton Bird to determine whether they cohabited.
>
> 4.
>
> Michael Scott Cooper was observed during the months of February and March 2007.

5.

During the investigation, Michael Scott Cooper was observed at Deborah Hampton Bird's residence for a minimum of eleven (11) consecutive nights.

6.

During the investigation, Michael Scott Cooper was observed on numerous occasions driving the vehicle of Ms. Hampton Bird, and she was observed driving his vehicle on numerous occasions.

7.

During the investigation, Michael Scott Cooper was observed moving furniture and boxes into the residence of Ms. Hampton Bird.

8.

During the investigation, Michael Scott Cooper's residence in Hillsborough, NC appeared as though no one lived in the house. A rug had been rolled up in the middle of the living room floor, and furniture seemed to be absent from the house. There were two ceiling fans in boxes on the floor. A fine layer of dust could be seen on the furniture and floor. The office in the house was observed to be dusty. Plants in said residence appeared to be in need of water.

. . . .

13.

Michael Scott Cooper was observed to park, regularly, in Deborah Hampton Bird's garage.

14.

Michael Scott Cooper was regularly observed assisting Ms. Bird with chores such as walking the dog, taking care of the dog, unloading the vehicle when she returned from trips, and assisting her when she returned from the grocery store.

15.

On at least one occasion, Michael Scott Cooper was observed allowing workmen into the home of Ms. Bird when she was not present. He remained in the home during the entire time the workmen serviced the home and then he showed them out of the house.

Plaintiff argues that the repeated use of the passive voice in the Cunningham Affidavit fails to satisfy the personal knowledge requirement of Rule 56(e).

We disagree and hold that the trial court was permitted to consider the Cunningham Affidavit under the specific facts of this case. As an initial matter, Cunningham's statement that she "was retained to investigate Michael Scott Cooper and Deborah Hampton Bird to determine whether they cohabited" raises a reasonable inference that everything in her affidavit is based on her personal knowledge as an investigator. Although her investigative agency is titled "Cunningham & Associates," there is no record or mention of any other individual performing the instant investigation. To be sure, the trial court's duty to treat indulgently the Rule 56 materials of the party opposing the motion reasonably encompasses the passive voice averments set forth in the Cunningham Affidavit.[1] Accordingly, we affirm the Court of Appeals on this question.

[2] We next consider whether the forecasted evidence of cohabitation was sufficient to overcome plaintiff's motion for summary judgment.

The General Assembly enacted the current version of the alimony statute in 1995. Act of June 21, 1995, ch. 319, sec. 2, 1995 N.C. Sess. Laws 641 (codified at N.C.G.S. §§ 50-16.1A to -16.9 (2009)). The present statute "reflects the modern notions of need as the basis for alimony [and] grant[s] the court authority also to consider fault." 2 Suzanne Reynolds & Jacqueline Kane Connors, *Lee's North Carolina Family Law* § 9.3, at 283 (5th ed. 1999) [hereinafter *Lee's Family Law*]. Under the current statute, "[i]f a dependent spouse . . . engages in cohabitation . . . alimony shall terminate." N.C.G.S. § 50-16.9(b) (2009).

Cohabitation is defined by statute as "the act of two adults dwelling together continuously and habitually in a private heterosexual relationship." *Id.* "Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations." *Id.* Therefore, to find cohabitation, there must be evidence of: (1) a "dwelling together continuously and habitually" of two adults and (2) a "voluntary mutual assumption of those marital rights, duties, and

1. As has been aptly observed, "[i]n spite of generations of textbooks, use of the passive [voice] has increased." *Webster's Dictionary of English Usage* 720 (1989).

obligations which are usually manifested by married people." *Id.*; *see Lee's Family Law* § 9.85, at 494-95; *cf. Craddock v. Craddock*, 188 N.C. App. 806, 812, 656 S.E.2d 716, 720 (2008) (holding that conflicting evidence related to various factors including frequency of overnight visits by alleged cohabiting man presented genuine issues of material fact); *Oakley v. Oakley*, 165 N.C. App. 859, 863, 599 S.E.2d 925, 928 (2004) (holding sexual relationship and occasional trips and dates insufficient standing alone to show cohabitation).

The parties' forecast of evidence in the present case consisted primarily of the Cooper and the Cunningham affidavits. Cooper conceded that he "was involved intermittently in a romantic relationship with the plaintiff." Cooper also averred that during his relationship with plaintiff, they dated each other exclusively at times and casually at other times. Cooper stated that he rented the house he owned in Summerfield, North Carolina, in order to move his residence to Hillsborough, North Carolina, and while doing so, he "stayed occasionally" with plaintiff. Though acknowledging that he swapped vehicles with plaintiff, Cooper claimed he used plaintiff's vehicle solely because "her . . . vehicle was more suited for moving furniture." Cooper also stated that he gave plaintiff furniture he no longer needed and helped her move it into her home. However, he claimed that he "never moved [his] property into [her] residence" and that he "did not share finances" with plaintiff. Finally, he acknowledged that plaintiff and he took "trips together" and "dined together with her children." On the ultimate question, Cooper stated that he never cohabited with plaintiff.

Cunningham alleged in her affidavit that Cooper had been observed at plaintiff's home "for a minimum of eleven (11) consecutive nights"; that plaintiff and Cooper were observed driving each other's vehicles; that Cooper was observed moving furniture and boxes into plaintiff's home, walking plaintiff's dog, parking in plaintiff's garage, and carrying groceries into plaintiff's home; that Cooper let workers into and out of plaintiff's home; and that Cooper's residence in Hillsborough appeared neglected "as though no one lived in the house."

The parties have not cited and we have not located a case addressing the quantum of forecasted evidence necessary to present an issue of material fact on the question of cohabitation. The Court of Appeals, however, has addressed this issue on numerous occasions. Prior to the 1995 version of the alimony statute, the Court of Appeals

decided *Rehm v. Rehm*, 104 N.C. App. 490, 409 S.E.2d 723 (1991). In that case, the parties entered into a separation agreement whereby the husband would pay alimony to the wife until a series of events occurred, including "if the wife cohabits with someone of the opposite sex." *Id.* at 491, 409 S.E.2d at 723 (emphasis omitted). After the husband stopped paying alimony based on the wife's alleged cohabitation, the wife sought to recover the unpaid alimony. *Id.* The wife appealed from the trial court's order terminating the husband's obligation to pay alimony. 104 N.C. App. at 492, 409 S.E.2d at 723.

Lacking a statutory definition of cohabitation at that time, the Court of Appeals considered the dictionary definition of that term: "To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations." *Id.* at 493, 409 S.E.2d at 724 (quoting *Black's Law Dictionary* 236 (5th ed. 1979)). The court found "sufficient evidence . . . to support the findings of fact and adequate findings of fact to support the trial court's conclusions of law" that the former wife had engaged in cohabitation. *Id.* at 494, 409 S.E.2d at 725. The findings of fact included the following: the wife had monogamous sexual relations with a man who was an overnight guest in her home as many as five times per week; when leaving the home he kissed the wife goodbye; and he went on trips lasting more than one day with the wife and sometimes with a minor child. *Id.* at 492-93, 409 S.E.2d at 724.

After the 1995 revisions to the alimony statute, the Court of Appeals again considered when alimony should terminate based on cohabitation. In *Oakley v. Oakley*, the wife filed a motion for contempt against her former husband for failure to pay alimony. 165 N.C. App. at 860, 599 S.E.2d at 926-27. The husband claimed his former wife's alleged cohabitation extinguished his alimony obligation. The Court of Appeals affirmed the trial court's findings and conclusion that the wife did not engage in cohabitation. *Id.* at 863, 599 S.E.2d at 928.

In its analysis the Court of Appeals addressed the voluntary assumption of marital rights and duties under section 50-16.9 by considering the law that defines resumption of the marital relationship. *Id.* at 862, 599 S.E.2d at 928 (citing N.C.G.S. § 52-10.2 (2009) (defining "[r]esumption of marital relations" as "voluntary renewal of the husband and wife relationship, as shown by the totality of the circum-

stances. Isolated instances of sexual intercourse . . . shall not constitute resumption of marital relations.")). Under this approach, two methods are utilized to determine whether the parties have resumed their marital relationship: (1) "where there is objective evidence, that is not conflicting, that the parties have held themselves out as man and wife, the court does not consider the subjective intent of the parties"; (2) "where the objective evidence of cohabitation is conflicting," the parties' "subjective intent" can be considered. *Id.* at 863, 599 S.E.2d at 928 (citations omitted). Applying this methodology to the question of cohabitation, the court determined that the defendant had failed to present any evidence of activities beyond a sexual relationship and occasional trips and dates. *Id.* Accordingly, because there was "no assumption of any 'marital rights, duties, and obligations which are usually manifested by married people,' " *id.*, the court affirmed the trial court's findings and conclusion that the plaintiff had not engaged in cohabitation.

Another cohabitation case, *Craddock v. Craddock*, concerned an action to recover alimony based on the provisions of the parties' separation agreement. 188 N.C. App. at 808, 656 S.E.2d at 718. The separation agreement included a termination clause for cohabitation. *Id.* The Court of Appeals applied the *Oakley* analysis and considered the parties' subjective intent along with objective evidence of cohabitation. 188 N.C. App. at 811-12, 656 S.E.2d at 719-20. The court found that the former wife had a mutually exclusive relationship with another man. *Id.* at 811, 656 S.E.2d at 720. They "went out to eat dinner or cooked meals together on the weekends, went to movies, traveled together on overnight vacations, spent holidays together, exchanged gifts, and engaged in monogamous sexual activity." *Id.* at 811-12, 656 S.E.2d at 720.

The evidence in *Craddock* conflicted, however, over how often the man stayed overnight, whether he permanently kept clothes at the former wife's home, and "to what extent [he] used plaintiff's residence as his 'base of operations' for his real estate appraisal business." *Id.* at 812, 656 S.E.2d at 720. Reversing the trial court's grant of summary judgment in the wife's favor, the Court of Appeals observed that " '[s]ummary judgment is rarely proper when a state of mind . . . is at issue.' " *Id.* (quoting *Valdese Gen. Hosp., Inc. v. Burns*, 79 N.C. App. 163, 165, 339 S.E.2d 23, 25 (1986)). The court ultimately concluded that "genuine issues of material fact exist[ed] on whether plaintiff and [another man] engaged in cohabitation." 188 N.C. App. at 812, 656 S.E.2d at 720.

Turning to the present case, the forecast of evidence is sufficient to overcome summary judgment. Cunningham's investigation determined that Cooper stayed in the plaintiff's home for eleven consecutive nights. Both affidavits acknowledged that Cooper and plaintiff exchanged vehicles, and Cooper's vehicle was regularly observed at plaintiff's home. Cunningham also observed Cooper moving furniture and boxes into plaintiff's home. Cunningham noted that Cooper allowed workers into plaintiff's residence and apparently supervised their work before escorting them out of the home. Significantly, Cooper's residence in Hillsborough "appeared as though no one lived [there]."

Evidence was also forecasted as to the voluntary assumption of marital rights, duties, and obligations by Cooper and plaintiff. The relationship included activities such as sharing in chores and participating in typical family activities like going out to dinner. Cunningham observed Cooper walking plaintiff's dog and unloading the vehicle when plaintiff returned from trips. All of these incidents, when viewed collectively, tended to show that plaintiff and Cooper voluntarily assumed some degree of marital rights, duties, and obligations.

As evidenced by plaintiff and Cooper's denial of cohabitation, there is also a genuine dispute regarding the subjective intent of plaintiff and Cooper with respect to their relationship. Because summary judgment is "particularly inappropriate where issues such as motive, intent, and other subjective feelings and reactions are material," *Creech*, 347 N.C. at 530, 495 S.E.2d at 913 (citation omitted), the trial court erred by granting plaintiff's motion for summary judgment.

Like the Court of Appeals, we express no opinion on the merits. *Bird*, 193 N.C. App. at 130-31, 668 S.E.2d at 44 (majority) (" '[I]t is not the function of this Court, or the trial court for that matter, to weigh conflicting evidence of record.' " (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004) (alteration in original))). Nonetheless, because "[s]ummary judgment is inappropriate where reasonable minds might easily differ as to the import of the evidence," *Marcus Bros.*, 350 N.C. at 221-22, 513 S.E.2d at 326 (citing *Dettor v. BHI Prop. Co. No. 101*, 324 N.C. 518, 522, 379 S.E.2d 851, 853 (1989)), we hold that the Cunningham Affidavit, when considered alongside the Cooper Affidavit, raises a genuine issue of material fact on the question of cohabitation. The Court of Appeals

properly reversed the trial court's order granting plaintiff's motion for summary judgment. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

ANGELL COPPER, BY HIS MOTHER AND GUARDIAN AD LITEM, SHERRY COPPER; DESMOND JOHNSON, BY HIS FATHER AND GUARDIAN AD LITEM, WILMER JOHNSON; ERIC WARREN AND DION WARREN, BY THEIR MOTHER AND GUARDIAN AD LITEM, DEANN WARREN; JOSHUA THORPE, BY HIS MOTHER AND GUARDIAN AD LITEM, TRECO THORPE; TODD DOUGLAS, DECEASED, BY HIS MOTHER AND ADMINISTRATRIX OF HIS ESTATE, SHERYL SMITH; DEANTONIO RHODES, BY HIS MOTHER AND GUARDIAN AD LITEM, LINDA RHODES; JAZMYN JENKINS; AND GINA SOLARI; AS INDIVIDUALS AND AS REPRESENTATIVES OF THE CLASS OF SIMILARLY SITUATED DURHAM PUBLIC SCHOOL STUDENTS v. ANN T. DENLINGER, INDIVIDUALLY AND AS SUPERINTENDENT OF DURHAM PUBLIC SCHOOLS; THE DURHAM PUBLIC SCHOOL BOARD OF EDUCATION; GAIL HEATH, INDIVIDUALLY AND AS CHAIR OF THE DURHAM PUBLIC SCHOOL BOARD OF EDUCATION; HEIDI CARTER, STEVE MARTIN, AND STEVE SCHEWEL, INDIVIDUALLY AND AS MEMBERS OF THE DURHAM PUBLIC SCHOOL BOARD OF EDUCATION; LARRY MCDONALD, INDIVIDUALLY AND AS FORMER PRINCIPAL OF SOUTHERN HIGH SCHOOL; RICHARD WEBBER, INDIVIDUALLY AND AS PRINCIPAL OF C.E. JORDAN HIGH SCHOOL; RODRIQUEZ TEAL, INDIVIDUALLY AND AS PRINCIPAL OF SOUTHERN HIGH SCHOOL; WORTH HILL, DURHAM COUNTY SHERIFF; AND R.A. SIPPLE AND JOSEPH COSTA, INDIVIDUALLY, AS AGENTS AND EMPLOYEES OF THE DURHAM COUNTY SHERIFF, AS AGENTS OF THE SUPERINTENDENT OF DURHAM PUBLIC SCHOOLS, AND AS AGENTS OF THE DURHAM PUBLIC SCHOOL BOARD OF EDUCATION

No. 526A08

(Filed 29 January 2010)

1. Civil Rights— schools—gang policy—suspension

Plaintiff student did not sufficiently state a direct constitutional claim for relief from a suspension under a public school's gang policy where an adequate state remedy existed through appeals provided by statute. The complaint did not allege facts or events indicating that anyone took action to prevent pursuit of an appeal, that the student or his mother sought further appeal after a meeting with school officials, or that it would have been futile to attempt to appeal his suspension to the board.

2. Civil Rights— gang policy—school suspension—claim not stated

A complaint arising from a suspension under a public school's gang policy was not sufficient as a matter of law to state a claim for relief for violation of federal due process rights where the student's own allegations revealed that he and his mother failed to avail themselves of the due process offered under state law.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 193 N.C. App. 249, 667 S.E.2d 470 (2008), affirming in part and reversing in part an order entered 5 October 2006 by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County, and remanding for further proceedings. On 5 February 2009, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court 5 May 2009.

Frances P. Solari for plaintiff-appellees.

Tharrington Smith, LLP, by Ann L. Majestic and Christine Scheef, for Durham Public Schools Board of Education; and Cranfill, Sumner & Hartzog, L.L.P. for Ann T. Denlinger, defendant-appellants.

Allison B. Schafer, General Counsel, for North Carolina School Boards Association, amicus curiae.

North Carolina Justice Center, by Jack Holtzman, for North Carolina Justice Center, ACLU of North Carolina Legal Foundation, Advocates For Children's Services Of Legal Aid Of North Carolina, North Carolina State Conference of NAACP Branches, Triangle Lost Generation Task Force, and North Carolina Black Leadership Caucus, amici curiae.

HUDSON, Justice.

On 24 March 2006, plaintiffs, Durham public high school students or their parents,[1] filed a purported class action complaint[2] in Su-

1. As for student Todd Douglas, who was deceased at the time the lawsuit was filed, his mother, Sheryl Smith, was named plaintiff as administratrix of his estate. For ease of reference, we refer to his claims as "the Douglas claims" in this opinion.

2. The class has not been certified.

perior Court, Durham County, seeking compensatory and punitive damages, a declaratory judgment, and injunctive relief against the Durham Public Schools Board of Education (the "Board"), Board secretary and Durham Public Schools Superintendent Ann Denlinger in her official and individual capacities, and various other individuals later dismissed from the suit. According to the allegations in the complaint, the Board, Ms. Denlinger, school principals, and other individuals affiliated with public high schools in Durham had subjected minority students "to more severe disciplinary measures for less serious offenses than white students," including imposing school suspensions "without due process of law," and had "[f]alsely and indiscriminately label[ed]" minority students as " 'gang affiliated.' "

In connection with these factual allegations, plaintiffs contended that defendants had conspired "to deny minority students an equal educational opportunity in the Durham Public Schools." Plaintiffs asserted that, specifically with respect to school suspensions, defendants had violated several of plaintiffs' federal and state constitutional rights, including their rights to due process, equal protection, and a sound basic education. In seeking a declaratory judgment, plaintiffs argued that the Board's policy related to gangs "does not provide adequate notice to students of the precise conduct prohibited," "gives excessive subjective discretion to school officials and school resource officers to pick and choose what conduct by what students to punish," and "is unconstitutionally vague and therefore void and unenforceable."

On 5 October 2006, the trial judge dismissed all claims against the Board, Ms. Denlinger and the school board members, and the named school principals.[3] As to the particular claims before this Court, the trial court based the dismissals on the following grounds: (1) regarding the Douglas state constitutional claims against the Board for violating his right to procedural due process, an adequate state statutory remedy was available to challenge suspension decisions, and the student had failed to allege either that he had exhausted his administrative remedies or that these remedies were inadequate; (2) regarding the Douglas federal procedural due process claims under 42 U.S.C. § 1983, brought against Ms. Denlinger in her individual capacity, the student had failed to demonstrate that he had exhausted his administrative remedies or that Ms. Denlinger had violated rights "clearly

3. All other defendants, law enforcement officials including the Durham County Sheriff, were previously dismissed in an order entered 12 July 2006.

established" under federal law, thereby entitling Ms. Denlinger to qualified immunity in her individual capacity; and (3) regarding the Board's gang policy, it "defines a violation . . . with sufficient definiteness that a student could understand what conduct was prohibited and it established standards to permit enforcement in a non-arbitrary, non-discriminatory manner."

The Court of Appeals unanimously affirmed the trial court's dismissal of the majority of plaintiffs' claims against the majority of the named defendants. *Copper ex rel. Copper v. Denlinger*, 193 N.C. App. 249, 286, 667 S.E.2d 470, 495 (2008). The panel was divided in reversing the dismissal of the Douglas state constitutional claim against the Board, and his § 1983 claim against Ms. Denlinger in her individual capacity, for alleged violations of his procedural due process rights. *Id.* at 286-87, 667 S.E.2d at 495. Defendants appealed based on the dissent. Although the Court of Appeals unanimously reversed the dismissal of plaintiffs' claim concerning the Board's gang policy, *id.*, we allowed defendants' petition for discretionary review of that issue. We also allowed review of the question of whether a school board may be held liable for monetary damages under the state constitution for the actions of its employees. Because we find that plaintiffs have not stated a claim for relief under the state constitution, we do not reach this issue.

The central question we address is whether the allegations in the complaint are sufficient to state a claim for relief against the Board under the state constitution and against Ms. Denlinger in her individual capacity under § 1983 for violations of Douglas's constitutional right to procedural due process. After careful consideration of each of the complaint's allegations concerning these Douglas claims and his treatment by the school, we hold that he did not.

The complaint here contains allegations of disciplinary actions taken against nine Durham public high school students and includes nearly six hundred paragraphs. Of these, roughly seventy-five pertain to the Douglas claims. We have summarized the pertinent facts below using plaintiffs' own statements from the complaint, which we treat as true when reviewing an order dismissing a complaint under Rule 12(b)(6). *See*, *e.g.*, *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 442, 666 S.E.2d 107, 114 (2008) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true.") (quoting *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) (citation omitted))).

State Constitutional Claim Against the Board

[1] To assert a direct constitutional claim against the Board for violation of his procedural due process rights, a plaintiff must allege that no adequate state remedy exists to provide relief for the injury. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 ("Therefore, in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution."), *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992); *see also Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009) (noting that "an adequate remedy must provide *the possibility* of relief under the circumstances." (emphasis added)).

The complaint contends that the Board violated Douglas's state constitutional right to procedural due process by denying him a hearing before his long-term suspension from school. Because we find that an adequate state remedy exists to redress this alleged constitutional injury, we need not address whether the allegations in the complaint, when taken as true, would establish a violation of procedural due process under our state constitution. Indeed, our General Assembly has enacted two separate statutes that provide a means of redressing such an injury. Sections 115C-45(c) and 115C-391(e) allow an appeal to the Board, and then to superior court, "from any final administrative decision" related to student discipline and from a suspension lasting "in excess of 10 school days," respectively. N.C.G.S. §§ 115C-45(c), 391(e) (2007).

The complaint appears to suggest that Ms. Denlinger and Larry McDonald, the principal of Southern High School, purposely backdated correspondence to Douglas and his mother, Sheryl Smith, to convert what had effectively become a long-term suspension into a short-term suspension and thereby thwart his right to appeal to the Board. However, the complaint fails to allege any facts or events to the effect that the Board—or anyone else—actually took action to prevent the student or his mother from pursuing an appeal. Although the complaint maintains that Ms. Smith was told that she had no right to appeal a short-term suspension, it also reflects that she retained a new attorney upon learning this information, yet took no additional action at that time, despite her knowledge that her son had been out of school for twelve days, constituting a long-term suspension.

Similarly, the complaint does not assert that the student or his mother sought any further appeal, to the Board or elsewhere, following a meeting with Mr. McDonald and other school officials on 6 October 2003, when the student had been out of school for seven days. Rather, the complaint reflects that Ms. Smith had representation from not one, but two, attorneys during this time period. From the complaint, it appears that even with legal counsel, neither she nor her son took any affirmative steps to appeal the suspension. None of the allegations in the complaint indicates that the student or his mother objected to the outcome of the 6 October meeting, which reduced the disciplinary action from an initial proposed expulsion to a suspension. While Ms. Smith did decide to transfer her son to a different school immediately following the meeting, the complaint does not assert that her decision was based on any alleged violation of procedural due process rights.

Under N.C.G.S. §§ 115C-45(c) and 391(e), the student here always had the statutory right to appeal; thus, the complaint's allegation that he "was never given" that opportunity fails. As we recently observed in *Craig*, "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." 363 N.C. at 339-40, 678 S.E.2d at 355. Here, the complaint contains no allegations suggesting that the student was somehow barred from the doors of either the courthouse or the Board. Nor does the complaint allege that he exhausted his administrative remedies, or even that it would have been futile to attempt to appeal his suspension to the Board. Thus, under our holdings in both *Corum* and *Craig*, an adequate remedy exists at state law to redress the alleged injury, and this direct constitutional claim is barred.

Section 1983 Claim Against
Denlinger in her Individual Capacity

[2] To state a claim under 42 U.S.C. § 1983, a plaintiff must show that an individual, acting under color of law, has "subjected [him] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2006). The United States Supreme Court has clarified, however, that procedural due process claims under § 1983 are evaluated differently with respect to the existence of state remedies:

> The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete *un-*

> *less and until the State fails to provide due process*. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinermon v. Burch, 494 U.S. 113, 126, 108 L. Ed. 2d 100, 114 (1990) (emphasis added); *id.* at 125, 108 L. Ed. 2d at 114 ("In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the *deprivation of such an interest without due process of law*." (emphasis added) (citations omitted)); *see also Parratt v. Taylor*, 451 U.S. 527, 543, 68 L. Ed. 2d 420, 433-34 (1981) (finding no allegation of a violation of procedural due process when the deprivation of property "did not occur as a result of some established state procedure" but was instead due to "the unauthorized failure of agents of the State to follow established state procedure"; moreover, the respondent did not contend that the procedures themselves were inadequate, and the State "provided respondent with the means by which he can receive redress for the deprivation," but respondent did not use those procedures), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31, 88 L. Ed. 2d 662, 667-68 (1986). *But see Patsy v. Bd. of Regents*, 457 U.S. 496, 516, 73 L. Ed. 2d 172, 188 (1982) (holding that, generally, "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983"); *Edward Valves, Inc. v. Wake Cty.*, 343 N.C. 426, 434-35, 471 S.E.2d 342, 347 (1996) (quoting *Zinermon* with approval and holding that a plaintiff need not exhaust administrative remedies when seeking redress for a substantive constitutional violation), *cert. denied*, 519 U.S. 1112, 136 L. Ed. 2d 839 (1997).

Here, as noted above, the Douglas claims do not contend that the state remedies provided in N.C.G.S. §§ 115C-45(c) and -391(e) are inadequate or would fail to redress the alleged constitutional injury. Likewise, the complaint does not allege that the student or his mother sought any further appeal to the Board or elsewhere, pursuant to N.C.G.S. §§ 115C-45(c) or -391(e), regarding the meeting at the school on 6 October and the decision to reduce the pending expulsion to a suspension, or the alleged failure to hold a hearing

prior to the suspension. Nor does the complaint contain any allegation that such a request was ignored or denied.

As such, even assuming *arguendo* that the 6 October meeting was constitutionally deficient and deprived the student of his right to procedural due process, the complaint fails to make the additional requisite allegation that the injury was completed when Ms. Denlinger, acting under color of law, refused to provide or somehow denied the student due process following the initial alleged deprivation. *Zinermon*, 494 U.S. at 126, 108 L. Ed. 2d at 114. The sole relevant allegation as to Ms. Denlinger, that she "purposefully postdated her letter . . . to cut off Todd's right to appeal," even when taken as true, is insufficient to establish that he was denied his right to appeal. Simply put, the student can show no claim under § 1983 for violation of procedural due process when his own allegations reveal that he and his mother failed to avail themselves of the due process offered under state law.

Moreover, the complaint reflects that on day seven of the suspension, the student, his mother, and their attorney met with Mr. McDonald, an assistant principal, a school resource officer, and an attorney for the Board. Even assuming that it would have been futile for the student and his mother to seek redress under the state remedies provided by N.C.G.S. §§ 115C-45(c) and -391(e), the allegations in the complaint do not demonstrate how this meeting violated the student's right to procedural due process. Under federal case law, the minimum due process required before a student is suspended for ten days or less is "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss v. Lopez*, 419 U.S. 565, 581, 42 L. Ed. 2d 725, 739 (1975); *see also id.* at 579, 42 L. Ed. 2d at 737 (stating that, at a minimum, a student's constitutionally protected property interest in a public education may not be taken away without "*some* kind of notice" and "*some* kind of hearing").

However, the Supreme Court also stated, "Longer suspensions or expulsions for the remainder of the school term, or permanently, *may* require more formal procedures." *Id.* at 584, 42 L. Ed. 2d at 740 (emphasis added). Our own Court of Appeals has extended those requirements in the context of long-term suspensions:

> Under the facts of this case, where respondent sought to impose a long-term suspension and the Board Policy specifically

> provided for a factual hearing before the Hearing Board, we construe the Due Process Clause of the United States Constitution, applicable to the States through the Fourteenth Amendment, to require that petitioner have the opportunity to have counsel present, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.

In re Roberts, 150 N.C. App. 86, 93, 563 S.E.2d 37, 42 (2002) (citation omitted), *disc. rev. improvidently allowed and appeal dismissed ex mero motu*, 356 N.C. 660, 660, 576 S.E.2d 327, 328 (2003), *cert. denied*, 540 U.S. 820, 157 L. Ed. 2d 38 (2003), *overruled on other grounds by N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 661-64, 599 S.E.2d 888, 895-97 (2004).

According to the complaint, at the end of the 6 October meeting at the school, Mr. McDonald "said Todd had not been suspended for the remainder of the school year, but for only ten days, and that he could return to school on October 14, 2003," which would have meant he was out of school for a total of twelve days. Aside from the presence of Ms. Smith and her attorney, the complaint alleges no additional facts about what took place during the meeting, such as whether the student was allowed to present his version of events or to question or call his own witnesses, or how the discussion developed. The complaint does not allege that Ms. Denlinger, Mr. McDonald, or any other Board or school official prevented or denied the student the right to engage in those actions at the hearing. Likewise, there are no allegations of any objections to the meeting's outcome, that is, the reduction of the suspension, beyond Ms. Smith's decision to transfer her son to another school. Even when taken as true, the allegations of the complaint pertaining to this Douglas claim are insufficient as a matter of law to state a claim for relief for a violation of the student's federal due process rights.

Conclusion

For the foregoing reasons, we conclude that plaintiff Todd Douglas, deceased, by and through his mother, Sheryl Smith, the administratrix of his estate, failed to state a claim for the violation of his procedural due process rights under either our State constitution or 42 U.S.C. § 1983. Accordingly, we reverse the Court of Appeals and affirm the trial court's dismissal of the Douglas claims under Rules 12(b)(1) and 12(b)(6). As to plaintiffs' claim for declaratory relief regarding the Board's gang policy, we conclude that discretionary

review was improvidently allowed and leave undisturbed the Court of Appeals' unanimous decision to reverse and remand for additional proceedings as to that issue.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA v. JOSHUA CARLEN MOORE

No. 60A09

(Filed 29 January 2010)

Criminal Law— self-defense—defense of family—instruction denied—error

The trial court erred by not instructing on self-defense and defense of a family member in a voluntary manslaughter prosecution where the evidence, viewed in the light most favorable to defendant, showed that the 64-year-old defendant was operating a produce stand with his wife and his grandson; the victim approached the stand and attempted to wrestle the cash box from defendant's wife, who feared for her safety; defendant ordered the victim to "back off" and he did so; the victim then put his hand in his pocket and approached the family, pulling his hand from his pocket; and defendant shot the victim one time.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 194 N.C. App. ——, 671 S.E.2d 545 (2009), finding no error in a judgment entered 17 October 2007 by Judge Frank R. Brown in Superior Court, Edgecombe County, following a jury verdict finding defendant guilty of voluntary manslaughter. Heard in the Supreme Court 17 November 2009.

Roy Cooper, Attorney General, by Jane Ammons Gilchrist, Assistant Attorney General, for the State.

Thomas & Farris, PA, by Albert S. Thomas, Jr.; and Newton, & Lee, by Eldon S. Newton, III, for defendant-appellant.

BRADY, Justice.

The sole issue before this Court is whether the trial court erred in denying defendant's requested instructions on self-defense and defense of a family member, instead instructing jurors that they were not to consider these defenses in their deliberations. We hold that the evidence, when viewed in the light most favorable to defendant, was sufficient to require the trial court to instruct the jury on the law of self-defense and defense of a family member. Accordingly, we reverse the decision of the Court of Appeals and remand to that court for further remand to the trial court for a new trial.

BACKGROUND

The State's evidence and defendant's evidence in this case varied in important respects. However, it was undisputed that on 8 July 2006, defendant Joshua Carlen Moore was sixty-four years old and working with his wife, Carol Moore, and his grandson at their produce stand in Rocky Mount. The couple's cash box was bolted to a folding table that was located behind the truck that contained much of the produce for sale. Sometime that morning, Emanuel Harris approached the couple's produce stand, walked over to the meat container, and began comparing different pieces of meat, stating he was attempting to find a piece suitable for his mother. Soon after that, a struggle erupted between Mrs. Moore and Harris when Harris attempted to steal the cash box and its contents. Charise Wilkins testified on behalf of the State that she was at the table at the time of the "tussle" and observed Harris attempt to take the cash box. She testified that she "want[ed] to say" that Harris still had his hands on the cash box when defendant jumped from the back of the truck and shot Harris once in the chest, killing him. State's witness Jasper Lindsey testified that he was present during the altercation, that Harris made "a gesture to swing to make [Mrs. Moore's] arms get out of the way," and that Harris's hands were on the cash box when he was shot. Harris was unarmed at the time of the altercation.

Defendant presented evidence, through testimony of his wife and himself, that he had been a farmer for years, that he and his wife had been married for fifty years, and that they had operated the produce stand in the same location for twenty-five years. Defendant presented numerous character witnesses, all testifying to defendant's excellent reputation for truthfulness and peacefulness. Defendant's character witnesses basically described him as a good, salt-of-the-earth type individual.

Defendant's and Mrs. Moore's testimony about the altercation differed from the testimony of the State's witnesses. Mrs. Moore testified that Harris made her nervous from the time he started asking questions at the stand, that he tried to look in the cash box every time she opened it, and that Harris was wearing a long black t-shirt and baggy pants. Moreover, she testified that during the altercation she was "frightened" and "praying" that she would not "get hurt"; that Harris became more aggressive as the attempted robbery progressed, even to the point that he picked the table up off the ground; and that she was worried she might have a heart attack because she has heart palpitations. According to Mrs. Moore, when Harris reached for the cash box and began the struggle, she shouted for her husband, who rushed to her aid and shouted for Harris to "back off." Harris did back away, but then came back toward Mrs. Moore with his left hand in his pocket. Defendant then shot him. Immediately following the shooting, defendant placed his Taurus .38 special caliber revolver in the back of the truck and went to a nearby business to call for medical assistance for Harris.

Defendant's testimony related the same facts as Mrs. Moore's testimony. Defendant stated that after "backing off," Harris put his left hand in his pocket and began to come slowly toward Mrs. Moore once again, while pulling his hand back out of his pocket. Before Harris's hand reached the top of his pocket, defendant shot him. Defendant stated that he "wasn't going to wait to see no gun." He also testified that he feared for his safety, his grandson's safety, and his wife's safety.

Defendant properly requested in writing that the trial court instruct the jury on self-defense and defense of a family member. The trial court denied those requested instructions and instead instructed the jury that the law of self-defense did not apply to the case. During closing arguments, the trial court admonished defense counsel in front of the jury for mentioning self-defense in his argument and immediately instructed jurors that they were not to consider any argument or evidence of self-defense or defense of a family member in their deliberations. The trial court then instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter. Following deliberations, the jury returned a verdict of guilty of voluntary manslaughter. The Court of Appeals, in a divided opinion, found no error, with the dissenting judge voting for a new trial. *State v. Moore*, —— N.C. App. ——, ——, 671 S.E.2d 545, 550 (2009). Defendant appealed as of right to this Court.

ANALYSIS

This Court long ago explained that "[t]he first law of nature is that of self-defense." *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927). The concept of self-defense emerged in the law as a recognition of a "primary impulse" that is an "inherent right" of all human beings. *Id.* Thus, an accused is not guilty of a crime when he shows the existence of perfect self-defense. *State v. Bush*, 307 N.C. 152, 158, 297 S.E.2d 563, 568 (1982).

> [B]efore the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

Id. at 160-61, 297 S.E.2d at 569. In determining whether an instruction on perfect self-defense must be given, the evidence is to be viewed in the light most favorable to the defendant. *State v. Watkins*, 283 N.C. 504, 509, 196 S.E.2d 750, 754 (1973) (citing *State v. Finch*, 177 N.C. 599, 99 S.E. 409 (1919)). Thus, if the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State's evidence is contradictory. *Id.* (citing, *inter alia*, *State v. Hipp*, 245 N.C. 205, 95 S.E.2d 452 (1956)).

If defendant's evidence is sufficient as to the questions set out in *Bush*, the jury should be instructed to determine the existence of perfect self-defense.

> The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:
>
> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Blue, 356 N.C. 79, 88 n.1, 565 S.E.2d 133, 139 n.1 (2002) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)). The jury may return a verdict of guilty only if it finds that the State proved beyond a reasonable doubt that defendant did not act in self-defense. *See State v. Laws*, 345 N.C. 585, 595, 481 S.E.2d 641, 646 (1997).

The law related to defense of another or a family member is substantially similar. *See State v. Perry*, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994).

> In general one may kill in defense of another if one believes it to be necessary to prevent death or great bodily harm to the other "and has a reasonable ground for such belief, the reasonableness of this belief or apprehension to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the killing."

Id. (quoting *State v. Terry*, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994)).

Viewed in the light most favorable to defendant, without considering any of the State's evidence to the contrary, the evidence shows that defendant was present at his produce stand, a place where he had a lawful right to be; that Harris was a sixteen-year-old male who was approximately six feet tall and weighed one-hundred-eighty pounds; that Harris engaged in a physical altercation with Mrs. Moore as he attempted to rob her of her cash box; that Harris grew more aggressive as the "tussle" continued and struck at Mrs. Moore; that Harris so violently pulled at the cash box that, as Mrs. Moore was pushing down, he was still able to lift the table off the ground; that Mrs. Moore fearfully cried out for her husband; that she was "scared to death"; that defendant ordered Harris to "back off"; that Harris did so, but placed his hand in his left pocket, and as he again approached the Moores, began to pull his hand from his pocket; and that defend-

ant shot Harris one time because he feared for the safety of his wife, his grandson, and himself.

It is significant that this evidence is not derived solely from defendant's own testimony, but is corroborated by other testimony and evidence received at trial. Thus, defendant's evidence is sufficient to show that he believed that it was necessary to use force to prevent death or great bodily injury to himself or a family member. Additionally, we cannot say that the facts, when taken in the light most favorable to defendant, evince an unreasonable belief to that effect. Following a protracted and violent struggle for the cash box that attracted the attention of multiple witnesses, defendant could have reasonably believed that Harris was armed and was indeed going to pull a weapon out of his left pocket. Simply put, the evidence was sufficient to require the trial court to instruct the jury on self-defense and defense of a family member.

CONCLUSION

Because defendant was entitled to jury instructions on self-defense and defense of a family member, we reverse the decision of the Court of Appeals and remand this case to that court with instructions to vacate defendant's conviction for voluntary manslaughter and to further remand this case to the trial court for a new trial.

REVERSED AND REMANDED; NEW TRIAL.

PARDUE v. BRINEGAR

[363 N.C. 799 (2010)]

ELIZABETH ELAINE PARDUE v. MICHAEL BRINEGAR AND WIFE, APRIL B. BRINEGAR; FRANCES BRINEGAR

No. 387A09

(Filed 29 January 2010)

Boundaries— line running "up the branch"—intent of grantors

A decision of the Court of Appeals that the ground location of points on a boundary in addition to three undisputed points was a factual question for the jury is reversed for the reason stated in the Court of Appeals dissenting opinion that language in the deeds to the parties stating that the boundary line runs "up the branch" unequivocally established the branch or stream as the natural boundary between the two properties, and the boundary was not two straight lines running between the undisputed markers.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 199 N.C. App. ——, 681 S.E.2d 435 (2009), affirming both an order denying plaintiff's motion for judgment notwithstanding the verdict and a judgment entered on 16 May 2008 by Judge Michael D. Duncan in District Court, Wilkes County. Heard in the Supreme Court 6 January 2010.

McElwee Firm, PLLC, by John M. Logsdon, for plaintiff-appellant.

Stone & Christy, P.A., by Bryant D. Webster, for defendant-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the trial court for entry of judgment for plaintiff.

REVERSED AND REMANDED.

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

Baker Constr. Co. v. City of Burlington Case below: 200 N.C. App. —— (20 October 2009)	No. 477P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-13)	Denied 01/28/10
Barrett v. All Payment Servs., Inc. Case below: 201 N.C. App. —— (22 December 2009)	No. 035P10	Def-Appellants' Motion for Temporary Stay (COA09-541)	Allowed 01/22/10
Blitz v. Agean, Inc. Case below: 197 N.C. App. —— (2 June 2009)	No. 278P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-686) 2. Def's PWC to Review the Decision of the COA	1. Denied 01/28/10 2. Denied 01/28/10
Boseman v. Jarrell Case below: 199 N.C. App. —— (18 August 2009)	No. 416P08-2	Def and 3rd Party Plt's (Jarrell) PDR Under N.C.G.S. § 7A-31 (COA08-957)	Allowed 01/28/10
Brock and Scott Holdings, Inc. v. West Case below: 198 N.C. App. —— (21 July 2009)	No. 352P09	1. Plt's NOA Based Upon a Constitutional Question (COA08-1051) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 01/28/10 2. Allowed 01/28/10
Brown v. N.C. Dep't of Corr. Case below: Wake County Superior Court	No. 517PA09	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's PWC	1. Allowed 12/18/09 2. Allowed 12/22/09 3. Allowed 12/22/09
Bryson v. Hargrove Case below: State v. Bryson 195 N.C. App. 325	No. 107P09-3	1. Plt's Petition for Writ of Mandamus (COA08-625) 2. Plt's Petition for Writ of Prohibition	1. Denied 01/20/10 2. Denied 01/20/10
City of Charlotte v. BMJ of Charlotte, LLC Case below: 196 N.C. App. —— (7 April 2009)	No. 196P09	Defs' PDR Under N.C.G.S. § 7A-31 (COA08-147)	Denied

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

Cochran v. Cochran Case below: 198 N.C. App. —— (21 July 2009)	No. 346P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-697)	Denied 01/28/10
County of Durham v. Daye Case below: 195 N.C. App. 527	No. 125P09	1. Defs' NOA Based Upon a Constitutional Question (COA07-1532) 2. Plt's (City of Durham) Motion to Dismiss Appeal 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Defs' PWC to Review Decision of the COA 5. Plt's (City of Durham) Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/28/10 3. Denied 01/28/10 4. Denied 01/28/10 5. Dismissed as Moot 01/28/10
Dalenko v. Peden Gen. Contr'rs, Inc. Case below: 197 N.C. App. —— (19 May 2009)	No. 259A09	Plt's NOA Based Upon a Constitutional Question (COA08-170)	Dismissed *Ex Mero Motu* 01/28/10
Faulkenbury v. Faulkenbury Case below: 195 N.C. App. 459	No. 128P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-682)	Denied 01/28/10
Gesel v. Miller Orthopaedic Clinic, Inc. Case below: —— N.C. App. —— (7 July 2009)	No. 327P09	Defs' PDR Under N.C.G.S. § 7A-31 (COA08-1077)	Denied 01/28/10

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

Goldston v. State Case below: —— N.C. App. —— (15 September 2009)	No. 443A09	1. Plts' NOA Based Upon a Constitutional Question (COA08-754) 2 Defs' NOA (Dissent) 3. Defs' Motion to Dismiss Appeal 4. Plts' PDR Under N.C.G.S. § 7A-31 5. Defs' Motion to Stay Defendant Appellants' Brief	1. —— 2 —— 3. Allowed as to the NOA Based on the Constitutional Question 01/28/10 4. Denied 01/28/10 5. Allowed 11/24/09 **Timmons-Goodson, J., Recused**
Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, LLC Case below: 199 N.C. App. —— (18 August 2009)	No. 272P08-2	Def's (International Garment Technologies, LLC) PDR Under N.C.G.S. § 7A-31 (COA08-1393)	Denied 01/28/10
Hodges v. Hodges Case below: 200 N.C. App. —— (3 November 2009)	No. 501A09	1. Def's NOA Based Upon a Constitutional Question (COA09-128, COA09-129, COA09-130) 2. Plt's Motion to Dismiss Appeal	1. —— 2. Allowed 01/28/10
Housecalls Home Health Care, Inc. v. State Case below: —— N.C. App. —— (15 September 2009)	No. 463P09	1. Plts' NOA Based Upon a Constitutional Question (COA08-1322) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. Defs' Motion for Temporary Stay 5. Defs' Petition for Writ of Supersedas 6. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied 01/28/10 3. Allowed 01/28/10 4. Allowed 11/24/09 363 N.C. 744 Stay Dissolved 01/28/10 5. Denied 01/28/10 6. Dismissed as Moot 01/28/10

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

In re Foreclosure of Bradburn Case below: 199 N.C. App. —— (1 September 2009)	No. 413P09	Respondents' (Loren & Lorie Bradburn) PDR Under N.C.G.S. § 7A-31 (COA08-1263)	Denied 01/28/10
In re Hayes Case below: 199 N.C. App. —— (18 August 2009)	No. 367P09	1. State's Motion for Temporary Stay (COA08-894) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 09/04/09 363 N.C. 653 Stay Dissolved 01/28/10 2. Denied 01/28/10 3. Denied 01/28/10 **Hudson, J., Recused**
In re M.L.T.H. Case below: 200 N.C. App. —— (3 November 2009)	No. 497P09	Appellant's (State of NC) Motion for Temporary Stay (COA08-1569)	Allowed 12/08/09

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

In re M.X. Case below: 200 N.C. App. —— (3 November 2009)	No. 527P09	1. Respondent's (Mother) Petition for Writ of Mandamus (COA09-514)	1. Dismissed 01/28/10
		2. Respondent's (Mother) NOA Based Upon a Constitutional Question	2. Dismissed *Ex Mero Motu* 01/28/10
		3. Respondent's (Mother) PDR Under N.C.G.S. § 7A-31	3. Denied 01/28/10
		4. Respondent's (Father) NOA Based Upon a Constitutional Question	4. Dismissed *Ex Mero Motu* 01/28/10
		5. Respondent's (Father) PDR Under N.C.G.S. § 7A-31	5. Denied 01/28/10
		6. Petitioner's (Mecklenburg County DSS) Motion to Dismiss Respondent Mother's NOA	6. Dismissed as Moot 01/28/10
		7. Petitioner's (Mecklenburg County DSS) Motion to Dismiss Respondent Father's NOA	7. Dismissed as Moot 01/28/10
		8. Appellee's (GAL) Motion to Dismiss Appeals	8. Dismissed as Moot 01/28/10
		9. Respondent's (Mother) Motion to Deny Guardian ad Litem's Response to Notices of Appeal and Petitions for Discretionary Review	9. Dismissed as Moot 01/28/10
		10. Respondent's (Father) Motion to Deny Guardian ad Litem's Response to Notices of Appeal and Petitions for Discretionary Review	10. Dismissed as Moot 01/28/10
In re S.R.G. Case below: 200 N.C. App. —— (3 November 2009)	No. 489P09	1. Petitioner's (Gaston Co. DSS) PDR Under N.C.G.S. § 7A-31 (COA09-789)	1. Denied 01/28/10
		2. Petitioner's (Gaston Co. DSS) PWC to Review the Decision of the COA (COA09-789) (COA08-954)	2. Denied 01/28/10
Jones v. N.C. Dep't of Corr. Case below: Wayne County Superior Court	No. 518AP09	1. State's Motion for Temporary Stay	1. Allowed 12/18/09
		2. State's Petition for Writ of Supersedeas	2. Allowed 12/22/09
		3. State's PWC	3. Allowed 12/22/09

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

Jones v. Steve Jones Auto Grp. Case below: 200 N.C. App. —— (3 November 2009)	No. 502P09	Defs' Motion for Temporary Stay (COA08-1593)	Allowed 12/09/09
Kaplan v. O.K. Technologies, LLC Case below: 196 N.C. App. —— (21 April 2009)	No. 215P09	Def's (Olivier & Bowman) PDR Under N.C.G.S. § 7A-31 (COA08-1297)	Denied 01/28/10 **Edmunds, J., Recused**
Kinlaw v. Harris Case below: 201 N.C. App. —— (8 December 2009)	No. 020A10	Plt's PDR as to Additional Issues	Allowed 01/28/10
Lassiter v. Town of Selma Case below: —— N.C. App. —— (7 July 2009)	No. 321P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-1148) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 01/28/10 2. Dismissed as Moot 01/28/10
Libertarian Party of N.C. v. State Case below: 200 N.C. App. —— (20 October 2009)	No. 479A09	1. Plts' and Intervenors' (Libertarian Party & NC Green Party) NOA (Dissent) (COA08-1413) 2. Plts' and Intervenors' (Libertarian Party & NC Green Party) NOA Based Upon a Constitutional Question	1. —— 2. Retained 01/28/10
Liptrap v. Coyne Case below: 196 N.C. App. —— (5 May 2009)	No. 238P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-991)	Denied 01/28/10
Livesay v. Carolina First Bank Case below: 200 N.C. App. —— (6 October 2009)	No. 458P09	1. Plt's NOA Based Upon a Constitutional Question (COA09-111) 2. Def's (Morley) Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/28/10 3. Denied 01/28/10
Martini v. Companion Prop. & Cas. Ins. Co. Case below: —— N.C. App. —— (7 July 2009)	No. 323A09	Def's PDR as to Additional Issues	Denied 01/28/10

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

Meherrin Indian Tribe v. Lewis Case below: 197 N.C. App. —— (2 June 2009)	No. 293P09	Defs' PDR Under N.C.G.S. § 7A-31 (COA08-928)	Denied 01/28/10
Murdock v. Chatham Cty. Case below: 198 N.C. App. —— (21 July 2009)	No. 351P09	Intervenor-Respondent's (Lee Moore Oil Co.) PDR Under N.C.G.S. § 7A-31 (COA08-809)	Denied 01/28/10
N.C. Farm Bureau Mut. Ins. Co. v. Simpson Case below: —— N.C. App. —— (7 July 2009)	No. 309P09	Def's (Harrington) PDR Under N.C.G.S. § 7A-31 (COA08-898)	Denied 01/28/10
Noble v. Hooters of Greenville (NC), LLC Case below: 199 N.C. App. —— (18 August 2009)	No. 397P09	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA08-1144) 2. Def's (Hooters of Am., Inc.) Conditional PDR Under N.C.G.S. § 7A-31 3. Def's (Hooters of Greenville) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 01/28/10 2. Dismissed as Moot 01/28/10 3. Dismissed as Moot 01/28/10
Peach v. City of High Point Case below: 199 N.C. App. —— (1 September 2009)	No. 415P09	Def's (City of High Point) PDR Under N.C.G.S. § 7A-31 (COA08-1174)	Denied 01/28/10
Petty v. Petty Case below: 199 N.C. App. —— (18 August 2009)	No. 359P09	1. Def's (Steven Petty) NOA Based Upon a Constitutional Question (COA08-1447) 2. Def's (Steven Petty) PDR Under N.C.G.S. § 7A-31 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Def's (Steven Petty) Motion to Deny Plt's Petition	1. Dismissed *Ex Mero Motu* 01/28/10 2. Denied 01/28/10 3. Denied 01/28/10 4. Dismissed as Moot 01/28/10
Sanders v. State Personnel Comm'n Case below: 197 N.C. App. —— (2 June 2009)	No. 275P09	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA08-1179) 2. Plt-Appellees' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 01/28/10 2. Dismissed as Moot 01/28/10

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Seagle v. Cross Case below: —— N.C. App. —— (7 July 2009)	No. 379P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-911)	Denied 01/28/10
Shorts v. Mega Force Staffing Grp. Case below: 200 N.C. App. —— (3 November 2009)	No. 504P09	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA08-1506) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 01/28/10 2. Dismissed as Moot 01/28/10
State v. Bandon Case below: 199 N.C. App. —— (1 September 2009)	No. 419P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1428)	Denied 01/28/10
State v. Basnight Case below: —— N.C. App. —— (7 July 2009)	No. 318P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1457)	Denied 01/28/10
State v. Belk Case below: 201 N.C. App. —— (8 December 2009)	No. 530P09	State's Motion for Temporary Stay (COA09-187)	Allowed 12/28/09
State v. Carter Case below: 198 N.C. App. —— (4 August 2009)	No. 021P09-2	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1545)	Denied 01/28/10
State v. Downey Case below: 200 N.C. App. —— (20 October 2009)	No. 469P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-61)	Denied 01/28/10
State v. Gonzalez Case below: 200 N.C. App. —— (3 November 2009)	No. 496P09	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA08-1591)	Denied 01/28/10
State v. Harris Case below: 194 N.C. App. 821	No. 008P10	Def's PDR Under N.C.G.S. § 7A-31 (COA08-641)	Denied 01/28/10

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

State v. Johnson Case below: 201 N.C. App. —— (17 November 2009)	No. 523A09	1. Def's NOA Based Upon a Constitutional Question (COA08-1499) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 01/28/10 **Martin, J., Recused**
State v. Jones Case below: —— N.C. App. —— (7 July 2009)	No. 324P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-45)	Denied 01/28/10
State v. Jones Case below: —— N.C. App. —— (15 September 2009)	No. 438P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1582)	Denied 01/28/10
State v. King Case below: Guilford County Superior Court	No. 204A99-3	Def's PWC to Review Order of the Guilford County Superior Court	Denied 01/28/10
State v. Laliberte Case below: 199 N.C. App. —— (1 September 2009)	No. 423P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1354)	Denied 01/28/10
State v. Lark Case below: —— N.C. App. —— (7 July 2009)	No. 325P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1239)	Denied 01/28/10
State v. Long Case below: 199 N.C. App. —— (1 September 2009)	No. 408P09	1. Def's NOA Based Upon a Constitutional Question (COA08-1267) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/28/10 3. Denied 01/28/10
State v. Massey Case below: 201 N.C. App. —— (17 November 2009)	No. 524P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-294)	Denied 01/28/10
State v. McNeill Case below: —— N.C. App. —— (7 July 2009)	No. 314P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1284)	Denied 01/28/10

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

State v. Meadows Case below: 201 N.C. App. —— (5 January 2010	No. 029P10	State's Motion for Temporary Stay (COA08-1576)	Allowed 01/19/10
State v. Melvin Case below: 199 N.C. App. —— (1 September 2009)	No. 382P09	1. State's Motion for Temporary Stay (COA09-62) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 09/18/09 2. Allowed 01/28/10 3. Allowed 01/28/10
State v. Mitchell Case below: 201 N.C. App. 705	No. 158P09-2	1. Def's Motion for NOA Under N.C.G.S. § 15A-1444 (COA08-666) 2. Def's Motion for Petition for Certiorari Review Under N.C.G.S. § 15A-1444 3. Def's Motion for NOA Under N.C.G.S. § 15A-1444 4. Def's Motion for Petition for Writ of Certiorari Review 5. Def's Petition of Certiorari Under N.C.G.S. § 15A-1444	1. Dismissed *Ex Mero Motu* 01/28/10 2. Denied 01/28/10 3. Dismissed *Ex Mero Motu* 01/28/10 4. Denied 01/28/10 5. Denied 01/28/10
State v. Mobley Case below: 200 N.C. App. —— (3 November 2009)	No. 494P09	Def-Appellant's PDR (COA09-139)	Denied 01/28/10
State v. Morrow Case below: 200 N.C. App. —— (6 October 2009)	No. 461A09	Def's Motion for Temporary Stay (COA08-867)	Denied 01/28/10
State v. Mumford Case below: 201 N.C. App. —— (5 January 2010)	No. 032P10	State's Motion for Temporary Stay (COA09-300)	Allowed 01/22/10
State v. Oliver Case below: 200 N.C. App. —— (20 October 2009)	No. 483P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-106)	Denied 01/28/10

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

State v. Palmer Case below: 197 N.C. App. —— (19 May 2009)	No. 257P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA08-633) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 01/28/10 2. Dismissed as Moot 01/28/10
State v. Parrish Case below: 198 N.C. App. —— (4 August 2009)	No. 342P09	Def-Appellant's PDR (COA09-50)	Denied 01/28/10
State v. Pauley Case below: 200 N.C. App. —— (20 October 2009)	No. 023P10	Def's PWC to Review the Decision of the COA (COA09-364)	Denied 01/28/10
State v. Price Case below: 201 N.C. App. —— (17 November 2009)	No. 515P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-336)	Denied 01/28/10
State v. Ray Case below: —— N.C. App. —— (7 July 2009)	No. 307P09	1. State's Motion for Temporary Stay (COA08-1329) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Lift Temporary Stay	1. Allowed 07/27/09 2. Allowed 01/28/10 3. Allowed 01/28/10 4. Denied 01/28/10
State v. Roughton Case below: 201 N.C. App. —— (22 December 2009)	No. 009P10	State's Motion for Temporary Stay (COA09-536)	Allowed 01/12/10
State v. Skipper Case below: 200 N.C. App. —— (3 November 2009)	No. 506P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-161)	Denied 01/28/10
State v. Smart Case below: 195 N.C. App. 752	No. 167P09	Def-Appellant's PDR under N.C.G.S. § 7A-31 (COA08-714)	Denied 01/28/10
State v. Thorne Case below: 201 N.C. App. —— (8 December 2009)	No. 016P10	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1598)	Denied 01/28/10

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

State v. Trombley Case below: 198 N.C. App. —— (4 August 2009)	No. 345P09	1. State's Motion for Temporary Stay (COA08-947) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 08/24/09 623 N.C. 588 Stay Dissolved 01/28/10 2. Denied 01/28/10 3. Denied 01/28/10 4. Dismissed as Moot 01/28/10
State v. Tucker Case below: 199 N.C. App. —— (18 August 2009)	No. 376P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1189)	Denied 01/28/10
State v. Umanzor Case below: 199 N.C. App. —— (18 August 2009)	No. 389P09	Def's (Umanzor) PDR Under N.C.G.S. § 7A-31 (COA08-1476)	Denied 01/28/10
State v. Veazey Case below: 201 N.C. App. —— (8 December 2009)	No. 528P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-566)	Denied 01/28/10
State v. Washburn Case below: 201 N.C. App. —— (17 November 2009)	No. 492P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-72)	Denied 01/28/10
State v. Whitaker Case below: 201 N.C. App. —— (8 December 2009)	No. 021A10	1. Def's NOA (Dissent) (COA08-1406) 2. Def's NOA Based Upon a Constitutional Question 3. Def's PDR as to Additional Issues 4. State's Motion to Dismiss Appeal (Constitutional Question)	1. —— 2. —— 3. Denied 01/28/10 4. Allowed 01/28/10
State v. Williams Case below: 201 N.C. App. —— (5 January 2010	No. 033P10	State's Motion for Temporary Stay (COA08-1334)	Allowed 01/22/10

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

State v. Williams Case below: —— N.C. App. —— (7 July 2009)	No. 467P09	Def's Motion for Appeal (COA08-1570)	Denied 01/28/10
State v. Witherspoon Case below: 199 N.C. App. —— (18 August 2009)	No. 390P09	Def's PDR Under N.C.G.S. § 7A-31 (COA08-1003)	Denied 01/28/10
State v. Wright Case below: 200 N.C. App. —— (3 November 2009)	No. 499A09	1. Def's NOA Based Upon a Constitutional Question (COA08-1392) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed 01/28/10
State v. Yarborough Case below: —— N.C. App. —— (7 July 2009)	No. 416P09	Def's PWC to Review Decision of COA (COA08-1185)	Denied 01/28/10
Steinkrause v. Tatum Case below: 201 N.C. App. —— (8 December 2009)	No. 018A10	Petitioner's (Steinkrause) Motion for Temporary Stay	Allowed 01/21/10
Stutts v. Travelers Indem. Co. Case below: —— N.C. App. —— (15 September 2009)	No. 441P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-52)	Denied 01/28/10
Swink v. Weintraub Case below: 195 N.C. App. 133	No. 101P09	Def's PDR Under N.C.G.S. § 7A-31 (COA07-960 and COA07-1088)	Denied 01/28/10

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

Teague v. N.C. Dep't of Transp. Case below: 177 N.C. App. 215	No. 281P06-7	1. Plt's Motion to Correct Sua Sponte Its Previous Denial of the PDR (COA05-522) 2. Plt's Motion to Remand the Case to NC Office of Administrative Hearings for Properly Incorporating the Exculpatory Evidence 3. Plt's Motion for NC Supreme Court to Issue a Stay of the Underlying Firing Action 4. Plt's Motion for NC Supreme Court to Issue Writ of Mandamus to NC Employment Security Commission	1. Dismissed 01/28/10 2. Dismissed 01/28/10 3. Dismissed 12/28/09 4. Dismissed 12/28/09 **Edmunds, J., Recused** **Brady, J., Recused**
Town of Oriental v. Henry Case below: 198 N.C. App. ––– (7 July 2009)	No. 357P09	Defs' PDR Under N.C.G.S. § 7A-31 (COA08-896)	Denied 01/28/10
Whiteheart v. Waller Case below: 199 N.C. App. ––– (18 August 2009)	No. 395P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-1261)	Denied 01/28/10
Williams v. Craft Dev., LLC Case below: 199 N.C. App. ––– (1 September 2009)	No. 446P09	Def's & Third-Party Plts' Motion for Temporary Stay	Allowed 11/05/09
Woods v. Moses Cone Health Sys. Case below: ––– N.C. App. ––– (7 July 2009)	No. 316P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-1556)	Denied
Yarborough v. Pierce Trailer Serv. Case below: 200 N.C. App. ––– (15 September 2009)	No. 411P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-4)	Denied 01/28/10

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

PETITION TO REHEAR

Helms v. Landry Case below: 363 N.C. App. 738	No. 055A09-2	Def's Petition for Rehearing of the judgment of the Supreme Court (COA08-33)	Dismissed

STATE OF NORTH CAROLINA v. KHALIL JACOBS

No. 169A09

(Filed 12 March 2010)

1. Appeal and Error— preservation of issues—exclusion of evidence—no offer of proof

In a first-degree murder prosecution, the exclusion of testimony from defendant's companion at the scene about the victim's prior convictions, his reputation in the community, and how often he carried firearms was not preserved for appellate review where there was no offer of proof and the significance of the evidence was not obvious from the record.

2. Appeal and Error— exclusion of evidence—subsequent remedy—no offer of proof

Any error by the trial court in a first-degree murder prosecution in its initial exclusion of evidence about the victim's character was cured by the court's subsequent ruling that the evidence, supported by a proper foundation, would be admitted. There was no offer of proof for other precluded testimony about whether defendant had any problem with the victim prior to the shooting, and the Supreme Court declined to speculate as to what the additional testimony would have been and, without a proffer, could not determine whether prejudicial error occurred.

3. Evidence— victim's reputation—evidence excluded—no abuse of discretion

The trial court did not abuse its discretion in a first-degree felony murder prosecution arising from an alleged robbery by precluding defendant from testifying about his knowledge of specific instances of violent behavior by the victim. The exclusion of evidence under the N.C.G.S. § 8C-1, Rule 403 balancing test lies within the trial court's sound discretion and will only be disturbed where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

4. Evidence— victim's convictions excluded—no prejudicial error

The trial court did not err in a first-degree murder prosecution by excluding certified copies of the victim's prior convictions where those convictions would corroborate defendant's

testimony that the victim was a violent person who had been incarcerated. There is no reasonable possibility of a different result in light of other evidence.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 195 N.C. App. ——, 673 S.E.2d 724 (2009), finding no prejudicial error in a trial resulting in a judgment entered on 15 October 2007 by Judge Stuart Albright in Superior Court, Guilford County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 10 September 2009.

Roy Cooper, Attorney General, by Melissa L. Trippe and Mark A. Davis, Special Deputy Attorneys General, for the State.

Russell J. Hollers III for defendant-appellant.

EDMUNDS, Justice.

On 15 October 2007, a jury found defendant Khalil Jacobs guilty of the murder of George Nichols. In this appeal, we consider whether the trial court erred in excluding evidence proffered by defendant in the form of certified copies of the victim's prior armed robbery convictions and certain testimony about the victim. We conclude that defendant failed to preserve for appellate review several of his objections and that the trial court did not commit prejudicial error in its evidentiary rulings. Accordingly, we affirm the decision of the Court of Appeals.

Evidence at trial showed that on 20 March 2007, defendant, who was the passenger in a car being driven by Keschia Blackwell, asked her to stop at the Great Stops gas station and convenience store at 2410 East Market Street in Greensboro so he could purchase a beer. Dana Hampton, accompanied by his friend, victim George Nichols, was also at Great Stops fueling his car. Upon seeing Hampton and the victim, defendant asked Blackwell to stop her car near them so he could talk to them. Defendant approached the victim because the victim had purchased pit bull puppies from defendant several weeks before and still owed defendant about three hundred fifty dollars of the purchase price. Despite numerous attempts, defendant had been unable to collect the remaining money.

Following defendant's instructions, Blackwell stopped close to Hampton's car, and defendant exchanged a few words with the victim

through the open window of Blackwell's car. The victim told defendant that the only money he had was approximately three dollars in his pocket. Defendant exited Blackwell's vehicle and an argument ensued between defendant and the victim. Blackwell testified that defendant said "give me everything in your pocket." The argument quickly escalated into a gunfight.

Multiple eyewitnesses indicated defendant fired first. Hampton then grabbed a nine-millimeter handgun from his car and fired eight shots at the retreating defendant, missing every time. As defendant fled on foot, Hampton helped the victim, who had been hit twice, into his car, then drove away. The victim died of wounds to his back and thigh.

Defendant took the stand on his own behalf and testified that the victim grew "loud" and "belligerent" during their encounter at Great Stops, then grabbed defendant and told Hampton, "get him, D." Defendant stated that, after hearing a gunshot, he fired twice to escape the victim's clutches and to avoid being shot by Hampton, who was shooting at him. Defendant then ran.

As detailed below, the trial court sustained the State's objection when defendant attempted to introduce into evidence certified copies of the victim's prior convictions for armed robbery. The trial court also sustained the State's objections both to a series of questions about the victim that defense counsel sought to ask during his cross-examination of Hampton, who testified for the State, and to another set of questions about the victim that defense counsel posed later when defendant testified. At the conclusion of all the evidence, the trial court instructed the jury as to both premeditated and deliberate first-degree murder and felony murder based upon the underlying felony of attempted armed robbery. The jury convicted defendant of first-degree murder under the felony murder rule only, and the trial court imposed a life sentence.

On appeal, the Court of Appeals majority found no prejudicial error, determining that, as to defendant's questions of Hampton regarding the victim's criminal history, defendant had not established that Hampton had the requisite knowledge, nor had he made an offer of proof that Hampton knew of any of the victim's convictions. ––– N.C. App. –––, –––, 673 S.E.2d 724, 728 (2009). In addition, by failing to make offers of proof, defendant had waived his right to challenge the admissibility of evidence pertaining to the victim's character and, in any event, had not demonstrated prejudice. *Id.* at –––, 673 S.E.2d

at 730. The Court of Appeals also held that the trial court's exclusion of the certified copies of the victim's convictions was appropriate because such certified copies are not admissible under Rule 404(b) and defendant had not shown that the victim's dangerousness was an essential element of a defense under Rule 405(b). *Id.* at ——, 673 S.E.2d at 728-30. The Court of Appeals dissent would have found that both the evidence of the victim's character and the certified copies of the victim's armed robbery convictions were admissible and that defendant was prejudiced by their exclusion. *Id.* at ——, 673 S.E.2d at 732, 735, 737 (McGee, J., dissenting in part).

[1] We first address the trial court's exclusion of certain evidence of the victim's character during Hampton's testimony. Hampton testified that the victim originally placed in Hampton's car the nine-millimeter handgun that Hampton used to return fire at defendant. However, when defense counsel sought to elicit from Hampton additional testimony about how often the victim carried such weapons, the nature of the victim's reputation in the community, and the felony or felonies of which the victim had previously been convicted, the trial court sustained the State's objections.

This Court has held that:

> "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. We also held that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred."

State v. Raines, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) (alteration in original)), *cert. denied*, —— U.S. ——, 174 L. Ed. 2d 601 (2009); N.C.G.S. § 8C-1, Rule 103(a)(2) (2009). Absent an adequate offer of proof, we can only speculate as to what a witness's testimony might have been. *State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310-11 (1994) (quoting *State v. King*, 326 N.C. 662, 674, 392 S.E.2d 609, 617 (1990)).

Here, Hampton was permitted to testify that he knew the victim was a convicted felon. When asked how he knew that, Hampton responded, "Hearsay," adding that the victim had not told him about any prior convictions. Defense counsel then asked which of the vic-

tim's convictions were known to Hampton, and although the trial court sustained the State's objection, Hampton nonetheless responded, "I don't know exactly." No offer of proof was made regarding any details Hampton knew about the victim's criminal history, nor is the significance of any purported knowledge or lack of knowledge of these convictions on the part of Hampton, defendant's companion at the time of the shooting, obvious from the record. Accordingly, the exclusion of this evidence has not been preserved for appellate review.

As to the victim's reputation in the community and how often the victim carried firearms, the record does not reflect what Hampton knew, and defense counsel did not seek to make an offer of proof or request that the witness be allowed to answer outside the presence of the jury. As above, the significance of this evidence is not apparent from the record and we will not speculate as to what it might have been. *See Raines*, 362 N.C. at 19-20, 653 S.E.2d at 138.

[2] Defense counsel also attempted to elicit evidence of the victim's character while examining defendant. The trial court initially sustained the State's objection when defense counsel asked defendant whether the victim had a reputation in the community. However, after a colloquy, the trial court reconsidered and ruled that the evidence "for the most part would all be admissible" if the proper foundation were laid.

Any error by a trial court in sustaining an objection may be cured by a later ruling reversing the court's initial determination, even if neither party then chooses to make further inquiry as permitted by the later ruling. *State v. Hardy*, 339 N.C. 207, 236, 451 S.E.2d 600, 616 (1994). In *Hardy*, the defendant argued that the trial court erred in preventing him from impeaching a witness on the grounds of the witness's marijuana use and poor memory. *Id.* at 235, 451 S.E.2d at 616. The trial court sustained the State's objection when defense counsel asked the witness whether he was a drug user. *Id.* The State objected again when defense counsel asked whether the witness smoked marijuana on the day in question. *Id.* The trial court did not rule on this second objection but conducted a proceeding off the record, then stated on the record outside the presence of the jury that defense counsel could pursue the line of questioning regarding the witness's marijuana usage. 339 N.C. at 235-36, 451 S.E.2d at 616. Nevertheless, defense counsel asked no further questions of that witness regarding the witness's drug use. *Id.* at 236, 451 S.E.2d at 616. This Court concluded that the defendant had not been precluded from asking the

witness about his marijuana use and could not complain on appeal about his own choice not to pursue that line of inquiry. *Id.*

Here, the State objected when defense counsel asked defendant whether the victim had a reputation in the community. The trial court initially sustained this objection but defense counsel immediately asked to approach the bench and appropriately made the proffer necessary to preserve for appellate review the trial court's ruling excluding this evidence. *See Raines*, 362 N.C. at 19-20, 653 S.E.2d at 138. A lengthy colloquy followed outside the presence of the jury. Defendant proffered that the victim had a reputation in the community, had told defendant he was a member of the Crips gang, and had robbed and shot people and been in jail. Defendant added that he was in fear when the victim raised his voice as the encounter that led to the murder escalated, and that he "wouldn't start no trouble with two men that I know carry guns."

At the conclusion of the colloquy, the trial court ruled "that if the defendant lays a proper foundation at this point . . . and the proper questions are asked, I believe that the proffered testimony for the most part would all be admissible." Further, the court found that

> If a proper foundation is laid that such fact that the defendant or the victim was allegedly a member of a street gang, specifically the [Crips], [this evidence] would bear on the reasonableness of the defendant's apprehension of [imminent] death or serious bodily injury and would not be outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury nor would it be—nor would it cause undue delay, waste of time or needless accumulation of evidence.

Defendant then resumed his testimony in the presence of the jury. Defense counsel questioned defendant extensively about the shooting and asked defendant several questions about the victim, including the victim's membership in the Crips, but did not again inquire whether the victim had a reputation in the community. Thus, defendant waived his opportunity to pursue this line of questioning. Any error by the trial court in its initial exclusion of that evidence was cured by the court's subsequent ruling that an inquiry, supported by a proper foundation, would be permitted.

Later in defendant's testimony, the trial court precluded defendant from answering defense counsel's question as to whether he had any problem with the victim prior to the shooting. However, defend-

ant made no offer of proof and we are unable to ascertain the significance of the excluded evidence. The record indicates that, prior to the objection, defendant testified that he had seen the victim more than ten times, that defendant was having difficulty collecting money the victim owed him for the puppies, that the victim would raise his voice when confronted by defendant about the money owed, and that Hampton would create a menacing presence by standing behind the victim while carrying a gun. We decline to speculate as to what defendant's additional testimony would have been and, in the absence of a proffer, cannot ascertain whether prejudicial error occurred without knowing whether the evidence excluded by the trial court would have indicated problems between defendant and the victim beyond those described to the jury, or the import of any such problems. *See Raines*, 362 N.C. at 19-20, 653 S.E.2d at 138.

[3] The trial court also precluded defendant from testifying about his knowledge of specific instances of violent behavior by the victim. The trial court initially overruled the State's objection when defense counsel asked defendant what he knew about the victim that led defendant to believe he was about to be shot. However, when defendant responded that the victim had told defendant he had shot people, been to prison, committed armed robbery, and kicked in people's doors and tied them up, the State again objected. The State did not advise the court of the basis for its objection and the court sustained the objection without comment. Defendant contends that the trial court erred in sustaining the objections to this response and to the question regarding defendant's knowledge of the victim's violent acts.

A sustained general objection is sufficient if there is any valid ground of objection. 1 John Henry Wigmore, *Evidence* § 18, at 818-28 (Peter Tillers ed., 1983), *see also* 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 19, at 84 (6th ed. 2004) ("[W]here a general objection is sustained, it seems to be sufficient, if there is any purpose for which the evidence would be inadmissible."(citing, *inter alia*, N.C.G.S. § 8C-1, Rule 103(a)(2))). Accordingly, we consider the various bases for admission or exclusion of this evidence.

Evidence of a person's character ordinarily is not admissible for the purpose of proving that he or she acted in conformity with that character trait on a particular occasion. N.C.G.S. § 8C-1, Rule 404 (2009). However, this rule does not prohibit one accused of a criminal offense from offering evidence of a pertinent character trait of

the victim. *Id.* Rule 404(a)(2). Generally, when character evidence of a victim is admissible on behalf of the defendant, proof may be made on direct examination either by testimony as to reputation or in the form of an opinion. *Id.* Rule 405(a) (2009). Moreover, when character or a trait of character of the victim is an essential element of the defense, a defendant may also offer proof of specific instances of the victim's conduct. *Id.* Rule 405(b) (2009). In addition, Rule 404(b) permits admission of evidence of "other crimes, wrongs, or acts," as specified.

Defendant's proposed testimony that he knew of certain violent acts by the victim and that the victim's time in prison led defendant to believe he was about to be shot, is principally pertinent to defendant's claim at trial that he shot the victim in self-defense and consequently was not guilty of first-degree murder on the basis of malice, premeditation, and deliberation. This excluded evidence supports defendant's self-defense claim in two ways: (1) defendant's knowledge of the victim's past at the time of the shooting is relevant to defendant's mental state; and (2) the light this knowledge cast on the victim's character could make it more likely that the victim acted in a way that warranted self-defense by defendant. However, because the jury acquitted defendant of premeditated and deliberate first-degree murder without having heard this evidence, any error in the trial court's ruling as it relates to defendant's charge of premeditated and deliberate murder is self-evidently harmless. *See State v. Shouse*, 166 N.C. 276, 278, 166 N.C. 306, 308, 81 S.E. 333, 334 (1914) (When the defendant was charged with first-degree murder, any error in the admission of evidence of threats made by the defendant that might relate to the victim, offered to establish premeditation and deliberation, was "irrelevant, unnecessary, and harmless" as a practical matter when the defendant was convicted of second-degree murder only.). As to felony murder, self-defense is available only to the extent that it relates to applicable underlying felonies. *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995). We fail to see how defendant could plead self-defense to a robbery the jury found he had attempted to commit himself.

However, defendant also contends that this evidence is relevant to the charge of attempted armed robbery. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2009). Accordingly, defendant's knowledge of the

victim's violent acts and prison time is arguably relevant to defendant's contention that he did not form the intent to commit the underlying felony of attempted armed robbery because there is greater disincentive to rob someone who has been to prison or committed violent acts. On that basis, this evidence meets the low threshold of relevancy because it could have some tendency to make it less likely that defendant attempted to rob the victim.

Next we consider whether this evidence is impermissible character evidence. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes . . . ." *Id.* Rule 404(b). The evidence of the victim's prior bad acts would be impermissible character evidence if its only relevance was to the victim's behavior at the time of the shooting. However, because the evidence is relevant to defendant's state of mind, it is not prohibited by Rule 404(b). *See State v. Gibson*, 333 N.C. 29, 42, 424 S.E.2d 95, 102-03 (1992) (The defendant's statements showed a propensity to commit murder, but also related to the defendant's state of mind, and so were not prohibited by Rule 404(b).), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 409-10, 432 S.E.2d 349, 352-53 (1993).

Nevertheless, under Rule 403, relevant evidence may be excluded if its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2009). The exclusion of evidence under the Rule 403 balancing test lies within the trial court's sound discretion and will only be disturbed "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Defendant argues that he feared being shot and would not attempt to rob someone with the victim's criminal past and history of bad acts. However, defendant testified on cross-examination that he was not afraid of the victim. Although he was not permitted to testify about specific instances of the victim's conduct, defendant was permitted to testify that the victim was a member of the Crips gang and that Hampton, when with the victim, would behave in a menacing manner. Under the deferential standard of review applicable here, we conclude that the trial court did not abuse its discretion when it excluded this evidence as to defendant's charge of attempted armed robbery.

[4] Finally, we turn to the exclusion of the certified copies of the victim's convictions. When defendant sought to introduce into evidence these copies of the victim's convictions for armed robbery, the trial court sustained the State's objection, saying:

> I don't think they're relevant. I don't think they're admissible. To the extent they are relevant under Rule 403, the Court would find that any alleged probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or very minimum needless presentation of cumulative evidence based on the testimony.

In the case *sub judice*, both the majority and the dissenting judge in the Court of Appeals cited the dissenting opinion in *State v. Wilkerson*, 148 N.C. App. 310, 559 S.E.2d 5, *rev'd per curiam*, 356 N.C. 418, 571 S.E.2d 583 (2002). In *Wilkerson*, the State entered into evidence during its case in chief testimony from a court official listing defendant's prior criminal convictions. *Id.* at 311, 559 S.E.2d at 6. This Court reversed the Court of Appeals decision in *Wilkerson* for the reasons stated in the dissenting opinion.

> [A]dmitting the bare fact of a defendant's prior *conviction*, except in cases where our courts have recognized a categorical exception to the general rule (e.g. admitting prior sexual offenses in select sexual offense cases, and admitting prior traffic-related convictions to prove malice in second-degree murder cases), violates Rule 404(b) (as the conviction itself is not probative for any Rule 404(b) purpose) as well as Rule 403, as the bare fact of a prior conviction is inherently prejudicial such that any probative value of the conviction is substantially outweighed by the danger of unfair prejudice.

Id. at 327-28, 559 S.E.2d at 16 (Wynn, J., dissenting). While *Wilkerson* involved the prior convictions of a defendant, we now consider certified copies of prior convictions of a *victim*.

The copies of the victim's convictions are relevant in that they are consistent with and corroborate to a degree defendant's testimony about the victim's violent past and prison time. Although they would be inadmissible under Rule 404(b) merely "to prove the character of [the victim] in order to show that he acted in conformity therewith," these convictions serve the separate purpose of corroborating defendant's testimony that the victim was a violent person who had been incarcerated. Accordingly, their admission is not precluded by

Rule 404(b). Unlike prior convictions of a defendant, evidence of a victim's prior convictions does not encourage the jury to acquit or convict on an improper basis. *Cf. id.* at 328, 559 S.E.2d at 16 ("By permitting the State to introduce the bare fact of a defendant's prior conviction, we permit the jury to surmise that the defendant, having once formed the necessary intent or developed the requisite *mens rea*, undoubtedly did so again; after all, another jury has already conclusively branded the defendant a criminal."). We cannot discern a basis for excluding the victim's convictions under Rule 403 because the victim was not on trial and, without this evidence, defendant's self-serving testimony lacked objective corroboration on this point. Accordingly, the trial court erred in excluding this evidence.

Nevertheless, "evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial." *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009) (citations omitted). The same rule applies to exclusion of evidence. *See State v. Brewer*, 325 N.C. 550, 565, 386 S.E.2d 569, 577 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990). Evidentiary error is prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2009); *accord Wilkerson*, 363 N.C. at 415, 683 S.E.2d at 194. Defendant bears the burden of showing prejudice. N.C.G.S. § 15A-1443(a).

Here, defendant has not shown a reasonable possibility of a different result had the evidence been admitted. As noted above, the evidence pertained to defendant's state of mind at the time of the confrontation. However, there is no reasonable possibility that the jury would have reached a different verdict in light of other evidence that supports defendant's conviction. According to evidence presented to the jury, the victim owed defendant money and would not repay the debt despite defendant's several demands. On the night in question, the armed defendant intentionally entered into a confrontation with two men he knew to be violent and told the victim to "give me everything in your pocket."

Accordingly, we find no reasonable possibility that the jury would have reached a different result if the victim's conviction records had been admitted. As explained above, the testimony that they support has low probative value, and abundant admitted evidence indicated defendant was well aware he was confronting two violent men. Defendant has not demonstrated a reasonable possibil-

ity that a different result would have been reached had the convictions been admitted. *Id.*

We affirm the Court of Appeals decision finding no prejudicial error by the trial court.

AFFIRMED.

STATE OF NORTH CAROLINA v. CHRISTOPHER LEE GIDDENS

No. 363A09

(Filed 12 March 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 199 N.C. App. ___, 681 S.E.2d 504 (2009), finding error in an amended judgment entered 9 September 2008 by Judge C. Philip Ginn in Superior Court, Macon County, and ordering a new trial. Heard in the Supreme Court 15 February 2010.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State-appellant.

James R. Parish for defendant-appellee.

PER CURIAM.

AFFIRMED.

WOODS v. MANGUM

[363 N.C. 827 (2010)]

EDWARD L. WOODS AND WIFE, BETTY R. WOODS, PLAINTIFFS v. ODELL MCFADDEN MANGUM, EXECUTRIX OF THE ESTATE OF JOHN ED MANGUM, DEFENDANT v. GEORGE W. MILLER, JR., PUBLIC ADMINISTRATOR OF THE ESTATE OF JOHN ED MANGUM, INTERVENOR DEFENDANT

No. 429A09

(Filed 12 March 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 682 S.E.2d 435 (2009), affirming a judgment entered on 10 June 2008 by Judge Howard E. Manning, Jr. in Superior Court, Durham County. Heard in the Supreme Court 16 February 2010.

Glenn, Mills, Fisher & Mahoney, P.A., by Carlos E. Mahoney, for plaintiff-appellees.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for intervenor defendant-appellant.

PER CURIAM.

AFFIRMED.

IN RE S.C.H.

[363 N.C. 828 (2010)]

IN THE MATTER OF S.C.H., A MINOR CHILD

No. 433A09

(Filed 12 March 2010)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 682 S.E.2d 469 (2009), affirming orders dated 31 December 2008 entered by Judge Thomas V. Aldridge, Jr. in District Court, Brunswick County. Heard in the Supreme Court 16 February 2010.

Jess, Isenberg & Thompson, by Elva L. Jess, for petitioner-appellee Brunswick County Department of Social Services.

Pamela Newell Williams, GAL Appellate Counsel, for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant mother.

Geoffrey W. Hosford and Sofie W. Hosford for respondent-appellant father.

PER CURIAM.

AFFIRMED.

ROBERT BAXTER, EMPLOYEE v. DANNY NICHOLSON, INC., EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, SERVICING AGENT)

No. 351PA08

(Filed 12 March 2010)

Public Officers and Employees— Industrial Commissioner— new appointment—oath not yet taken—authority of prior Commissioner

The authority of an Industrial Commissioner holding over after his term expired because no replacement had been appointed continued through the period between a successor's appointment and the successor taking the oath of office, and the Industrial Commission correctly denied defendant's motion to vacate a workers' compensation opinion and award made during the holdover period by a panel on which the holdover Commissioner was a member of the two-to-one majority. There is nothing in the North Carolina Constitution to suggest that its drafters sought to limit the power of the legislature to require an oath and to guard against vacancies in appointed offices. The statutory framework provided by the General Assembly wisely and plainly avoids the problem of vacancies and is consistent with the Constitution. N.C.G.S. § 128-7.

Justice BRADY concurring in the result only.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 191 N.C. App. 168, 661 S.E.2d 892 (2008), vacating an opinion and award filed 5 February 2007 by the North Carolina Industrial Commission and remanding the case to the Commission. Heard in the Supreme Court 18 November 2009.

DeVore, Acton & Stafford, P.A., by William D. Acton, Jr., for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Shelley W. Coleman, for defendant-appellee.

Roy Cooper, Attorney General, by Christopher G. Browning, Jr., Solicitor General, and John F. Maddrey, Assistant Solicitor General, for the State of North Carolina, amicus curiae.

Robert F. Orr and Jeanette K. Doran for North Carolina Institute for Constitutional Law, amicus curiae.

HUDSON, Justice.

This case presents the question whether the term of an appointed public officer ends immediately upon the appointment of his successor by the governor or when the successor takes the oath of office. We find that the General Assembly answered this question when it enacted N.C.G.S. § 128-7, which provides: "All officers shall continue in their respective offices until their successors are elected or appointed, and duly qualified." Under the plain meaning of the statute, we conclude that the authority of an appointed officer continues until the date on which his successor takes the oath of the office in question and thereby becomes duly qualified to begin performing the duties of that office.

On 5 February 2007, by a two-to-one majority, a panel of the Full Commission filed an opinion and award ordering defendant Danny Nicholson, Inc. to pay plaintiff Robert Baxter workers' compensation benefits, including: (1) total disability benefits and medical expenses from 13 July 1998 until the Commission orders otherwise; (2) a ten percent penalty on all unpaid installments of compensation from 13 July 1998 on; and (3) the standard attorney's fee award in such cases, plus an additional attorney's fee for the time spent by plaintiff's counsel on this matter. The award stemmed from injuries that plaintiff sustained during a workplace accident on 23 December 1996, while employed by defendant. Much of the dispute before the Industrial Commission centered on the nature of plaintiff's trial return to work and defendant's alleged unilateral termination of plaintiff's benefits.

Although the Full Commission's opinion and award was filed on 5 February 2007, the document was signed and dated by the panel on 2 February 2007. On that same date, then-Governor Michael Easley sent a letter to Commissioner Thomas Bolch, a member of the two-person majority of the panel, informing him that his service as a Commissioner was at an end and that his successor had been appointed. Commissioner Bolch's term had actually expired in 2004, and he had been holding over in his position since that time. The Governor sent another letter, also dated 2 February 2007, to the replacement Commissioner, Danny Lee McDonald, notifying him that his appointment was "effective immediately." Commissioner McDonald did not take the oath of office until 9 February 2007.

According to an affidavit from a member of the Governor's staff, "Commissioner Bolch was authorized to hold over in his position . . . until the date of the swearing in of Commissioner McDonald that

took place on or about February 9, 2007. One of the important reasons for Commissioner Bolch being specifically authorized to hold over until the date of the McDonald swearing in was to give the Industrial Commission time to issue and file any decisions, such as the current Baxter case, which had already been heard on oral argument by panels involving Commissioner Bolch but which were pending the filing of a resulting formal written opinion and award."

Based on the filing of the opinion and award after the date that Commissioner Bolch's successor had been appointed, defendant filed a motion to vacate the decision and for reconsideration and rehearing. Defendant argued, and continues to maintain, that the opinion and award was void as a matter of law because Commissioner Bolch no longer held his office, and the panel thus comprised only two members, who split their votes. On 13 March 2007, the Full Commission filed an order denying defendant's motions, and defendant appealed that order, as well as the underlying 5 February 2007 opinion and award, to the Court of Appeals. In a unanimous opinion, the Court of Appeals agreed with defendant that Commissioner Bolch "was not a qualified commissioner at the time the Opinion and Award was filed because his term as commissioner had ended and his successor had been appointed." *Baxter v. Danny Nicholson, Inc.*, 191 N.C. App. 168, 170, 661 S.E.2d 892, 893 (2008). The Court of Appeals vacated the opinion and award as void and remanded the case to the Full Commission for rehearing. *Id.* at 173, 661 S.E.2d at 895. On 27 August 2009, we allowed plaintiff's petition for discretionary review of the Court of Appeals holding, as well as the underlying substantive issues on appeal, which were not addressed by the Court of Appeals.

Article VI, Section 10 of the North Carolina Constitution, entitled "Continuation in office," provides: "In the absence of any contrary provision, all officers in this State, whether appointed or elected, shall hold their positions until other appointments are made or, if the offices are elective, until their successors are chosen and qualified." N.C. Const. art. VI, § 10. Moreover, under N.C.G.S. § 128-7, entitled "Officer to hold until successor qualified," "[a]ll officers shall continue in their respective offices until their successors are elected or appointed, and duly qualified." N.C.G.S. § 128-7 (2007). Defendant argues that, had the drafters of our Constitution intended for appointed officers to hold over until their successors are appointed *and* qualified, as provided by the statute, then Article VI, Section 10 would have specifically included language to the effect that

appointed officers "shall hold their positions until other appointments are made and qualified." Thus, according to defendant, the General Assembly essentially exceeded its legislative authority by enacting a statute that, in defendant's view, conflicts with this constitutional provision.

When considering the constitutionality of a statute, this Court long ago articulated the following principles:

> The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.

State ex rel. Att'y-Gen. v. Knight, 169 N.C. 396, 416, 169 N.C. 333, 352, 85 S.E. 418, 427 (1915). Thus, "[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt. This is a rule of law which binds us in deciding this case." *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991) (brackets in original) (citations and internal quotation marks omitted); *see also Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 49, 332 S.E.2d 67, 70 (1985) ("A statute will not be declared unconstitutional unless it is clearly so, and all reasonable doubt will be resolved in favor of its validity." (citation omitted)); *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978) ("A well recognized rule in this State is that, where a statute is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality." (citations omitted)); *Painter v. Wake Cty. Bd. of Educ.*, 288 N.C. 165, 177, 217 S.E.2d 650, 658 (1975) ("In considering the constitutionality of a statute, it is well established that the courts will indulge every presumption in favor of its constitutionality." (citations omitted)).

In *State ex rel. Martin v. Preston*, we further explained the reasoning behind this deference:

> Since our earliest cases applying the power of judicial review under the Constitution of North Carolina, . . . we have indicated that great deference will be paid to acts of the legislature—the

> agent of the people for enacting laws. This Court has always indicated that it will not lightly assume that an act of the legislature violates the will of the people of North Carolina as expressed by them in their Constitution and that we will find acts of the legislature repugnant to the Constitution *only* "*if the repugnance do really exist and is plain.*"
>
> Our acceptance of our duty to exercise the power of judicial review under the Constitution of North Carolina, tempered by our recognition of every reasonable presumption that the legislature as the lawmaking agent of the people has not violated the people's Constitution, has led this Court in more recent generations to accept certain principles of state constitutional construction which are now well established. For example, it is firmly established that our State Constitution is not a grant of power. *All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.*

325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (emphases added) (citations omitted). Likewise, "all constitutional provisions must be read *in pari materia*." *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002).

The statute here provides that "[a]ll officers *shall continue* in their respective offices until their successors are elected or appointed, *and duly qualified*." N.C.G.S. § 128-7 (emphases added). Giving the words and construction of the statute their plain meaning, the phrase "and duly qualified," immediately following the adjectives "elected or appointed," serves to modify and describe both types of officer. Thus, under the statute, an appointed public officer holds over in his or her position until a successor is both appointed and duly qualified. By contrast, the constitutional provision explicitly only allows an elected officer to hold over until a successor is "chosen and qualified," whereas appointed officers "shall hold their positions until other appointments are made." N.C. Const. art. VI, § 10.

Such a variance renders the statute unconstitutional if and only if our Constitution evinces the drafters' intent to limit the power of the legislature to address the policies advanced here—namely, to require an oath of office and to guard against vacancies in appointed offices—or to otherwise prohibit the legislature's exercise of that power. *See Preston*, 325 N.C. at 449, 385 S.E.2d at 478; *see also Baker*,

330 N.C. at 338-39, 410 S.E.2d at 891-92 ("Unless the Constitution *expressly* or by *necessary implication* restricts the actions of the legislative branch, the General Assembly is free to implement legislation as long as that legislation does not offend some specific constitutional provision."). As for the oath, the drafters made their intentions clear by including a specific provision requiring an oath of office: Article VI, Section 7 states that, "[b]efore entering upon the duties of an office, a person elected *or appointed* to the office shall take and subscribe the following oath . . . ." Both N.C.G.S. § 128-7 and N.C.G.S. § 128-5, which imposes a fine on any officer required to take an oath who fails to do so "before entering on the duties of the office," are consistent with and indeed promote this goal.

In addition, we find no language in our state Constitution suggesting any limitation on the legislature's authority to advance the policy of guarding against vacancies in appointed offices. *Cf. Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 12, 413 S.E.2d 541, 547 (1992) ("The legislative attempt to require the resignation of those having plaintiffs' status as holders of 'another elective office' imposes an additional qualification for elective office, not provided by our Constitution; thus, it fails to pass constitutional muster."). *But see Baker*, 330 N.C. at 333-34, 339, 410 S.E.2d at 888-89, 892 (upholding as constitutional a statute requiring that candidates for appointment to fill unexpired terms of district court judges be members of the same political party as the vacating judge, because the Constitution does not limit disqualifications for appointed offices and "[t]he wording . . . also does not *necessarily* imply that additional disqualifications cannot be added by the General Assembly for those persons not elected by the people").

Our reading likewise conforms with the long-standing public policy of this State against vacancies in both elected and appointed offices:

> The provision that the incumbents of offices, both elective and appointive, shall hold until their successors are selected and qualified, is in accord with a sound public policy which is against vacancies in public offices and requiring that there should always be some one in position to rightfully perform these important official duties for the benefit of the public and of persons having especial interest therein.
>
> [The provisions] in reference to these appointive offices . . . . are recognized both in our Constitution and general statutes, and

> whether regarded as part of an original term or a new and conditional term by virtue of the statute, the holders are considered by the authorities as officers *de jure* until their successors have been lawfully elected or appointed by the body having the right of selection, *and have been properly qualified* . . . .

Markham v. Simpson, 175 N.C. 135, 137, 175 N.C. 146, 148, 95 S.E. 106, 107 (1918) (emphasis added) (citations omitted). As noted by the State in its amicus brief here to this Court, "our state government would be less able to serve its citizens effectively if significant gaps in time existed between when one official leaves office and his or her successor begins serving." As such, the State maintains that "it is imperative that there is no uncertainty as to when the authority of an incoming official commences and when the authority of the outgoing ceases," and the General Assembly has provided that certainty by enacting N.C.G.S. § 11-7, requiring the oath of office before taking office, and § 128-7, directing that an appointed official hold over until his successor is duly qualified.

Here, when we place the constitutional and statutory provisions side by side, we see that the General Assembly has merely expanded on Article VI, Sections 7 and 10, to require that a public servant swear an oath before taking office, and to ensure that the office will not be made vacant by a delay between the appointment of a successor and his lawful entry into office upon becoming qualified, in this case, by taking the oath. *See*, *e.g.*, N.C. Const. art. VI, § 7 ("Before entering upon the duties of an office, a person elected or appointed to the office shall take and subscribe the following oath . . . ."); N.C.G.S. § 11-7 (2007) (providing that "every person elected or appointed to hold any office of trust or profit in the State shall, before taking office or entering upon the execution of the office, take and subscribe to the following oath . . ."); *Town of Hudson v. Fox*, 257 N.C. 789, 790, 127 S.E.2d 556, 556 (1962) (noting that commissioners "were qualified by taking the required oath"); *Sudderth v. Smyth*, 35 N.C. (13 Ired.) 307, 308, 35 N.C. 452, 453 (1852) (observing that a deputy clerk is not qualified until he "tak[es] the oaths to support the constitutions of the United States and of this State, and an oath of office").

By enacting N.C.G.S. § 128-7, the General Assembly has essentially provided the type of "assurance for the faithful discharge of the duties of the office," *State ex rel. Spruill v. Bateman*, 162 N.C. 486, 489-90, 162 N.C. 588, 593, 77 S.E. 768, 769 (1913) (emphasis omitted), that this Court has previously recognized as well within the legislature's role and the dictates of the Constitution. *See also State ex rel.*

Lee v. Dunn, 73 N.C. 595, 604-08 (1875) (holding that the General Assembly could not impose any additional qualification on eligibility for *elective* office, other than what is provided in the Constitution, and concluding that requiring a sheriff to tender a bond and receipts for taxes collected is not an added qualification).[1] Indeed, we conclude that the holdover language at issue here is consistent with the constitutional and statutory requirements that an elected or appointed officer must take the oath of office "[b]efore entering upon the duties" of that office, N.C. Const. art. VI, § 7; N.C.G.S. § 11-7, and also ensures that a vacancy will not be created by a gap between appointment to office and assumption of the duties of that office upon taking the oath.

We decline to approve an interpretation that would result in a vacancy and cessation of the work of an appointed officer immediately upon the announcement of a successor. Voiding actions taken by a holdover official during the time between the announcement of a successor and that successor's swearing-in could promote disruption and delay completion of important work already performed on the State's behalf. We see no reason to act contrary to the reasoning outlined in *Markham*, or to conclude that immediately terminating an officeholder's authority would represent a more sound public policy. We conclude instead that the statutory framework specifically provided by the General Assembly wisely and plainly avoids this problem of vacancies, and is consistent with the Constitution.

In sum, we find unpersuasive defendant's arguments that we should ignore the plain language of N.C.G.S. § 128-7 and focus exclusively on the distinction drawn in Article VI, Section 10 between elected and appointed officers. We discern no conflict—and certainly no "plain repugnance"—between Article VI, Section 10 and N.C.G.S. § 128-7 that would defeat the presumption of constitutionality and

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1. The concurring opinion is inconsistent with our past jurisprudence on the unconstitutionality of legislatively required additional qualifications for *elective* offices, as compared with the constitutionality of such qualifications for *appointed* offices. *See*, *e.g.*, *Baker*, 330 N.C. at 341, 410 S.E.2d at 893 ("The plaintiff relies on *Starbuck v. Havelock*, 252 N.C. 176, 113 S.E.2d 278 (1960); *Cole v. Sanders*, 174 N.C. 112, 93 S.E. 476 (1917); *Spruill v. Bateman*, 162 N.C. 588, 77 S.E. 768; and *State of N.C. by the At. Gen'l*, *Hargrove*, *ex rel. Lee v. Dunn*, 73 N.C. 595 (1875), for the proposition that qualifications for holding office may not be added to those found in the Constitution. These cases deal with elections to offices and are not applicable to this case. This case deals with an appointment to office."). As this Court noted in *Baker*, the General Assembly has enacted any number of statutes imposing additional qualifications for appointed offices, including for vacant seats to the General Assembly, notaries public, and the various state licensing boards. *Id.* at 339-40, 410 S.E.2d at 892.

require us to ignore the meaning of the statute, particularly in light of Article VI, Section 7. The constitutional and statutory provisions may reasonably be read and considered together, and nothing in our Constitution suggests that the drafters sought to limit the power of the legislature to require an oath and to guard against vacancies in appointed offices. Accordingly, we hold that Commissioner Bolch's official authority continued from 2 February 2007 until Commissioner McDonald was sworn in as his successor on 9 February 2007. The opinion and award of the Full Commission filed in this case on 5 February 2007 stands as a valid exercise of that authority.[2]

We reverse the Court of Appeals opinion and remand to that court for consideration of the substantive issues raised in defendant's appeal of the Full Commission's opinion and award in favor of plaintiff.

REVERSED AND REMANDED.

Justice BRADY concurring in the result only.

I agree with the ultimate holding of the majority opinion, but write further to clarify important constitutional principles and to emphasize the importance of the continuity in government that is essential for a stable and ordered society. I begin with an analysis of the relevant constitutional provisions because the "North Carolina Constitution expresses the will of the people of this State and is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. 291, 299, 245 S.E.2d 766, 771 (1978) (citation omitted).[3]

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2. The concurring opinion states that "Mr. Bolch's authority . . . could have been *displaced* by the actions of the newly appointed Mr. McDonald before Mr. McDonald took the oath." However, the validity of any actions taken by Commissioner McDonald is not at issue here. This case involves only Mr. Bolch's holdover authority to concur in a Full Commission opinion and award. As such, we decline to speculate on hypothetical actions taken by Mr. McDonald between 2 February and 9 February 2007, which issue is not before this Court.

3. Indeed, the Preamble to our Constitution affirms:

> *We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.*

N.C. Const. pmbl.

The North Carolina Constitution distinguishes between elected and appointed officials when providing for continuity of service in government offices. Article VI, Section 10 states: "In the absence of any contrary provision, all officers in this State, whether appointed or elected, shall hold their positions *until other appointments are made* or, if the offices are elective, until their successors are chosen and qualified." N.C. Const. art. VI, § 10 (emphasis added). This provision establishes that elected officials must be chosen through the appropriate elective processes "*and qualified*." *Id.* (emphasis added). Conversely, under the Constitution an appointed official holds the position until another appointment is made. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) ("In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." (citing *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 920-21 (1932))). Although the Constitution contains a host of other qualifications for certain elected officials, no other qualifications for appointed officials are constitutionally mandated. *See*, *e.g.*, N.C. Const. art. III, § 2 (listing qualifications for election to the office of Governor or Lieutenant Governor); *id.* art. IV, § 22 (listing qualifications for elected justices and judges).

The majority opinion cites *Baker v. Martin*, 330 N.C. 331, 410 S.E.2d 887 (1991) for the proposition that the General Assembly may add qualifications not found in the Constitution to the holding of appointed offices. *See id.* at 341-42, 410 S.E.2d at 893. This Court in *Baker* recognized that "[u]nless the Constitution expressly or *by necessary implication* restricts the actions of the legislative branch, the General Assembly is free to implement legislation as long as that legislation does not offend some specific constitutional provision." *Id.* at 338-39, 410 S.E.2d at 891-92 (emphasis added). I agree with "this general principle of constitutional interpretation," *id.* at 339, 410 S.E.2d at 892, although I find that when the taking of the oath is the issue under consideration, the Constitution expresses when that event occurs. The Constitution makes the oath a prerequisite to "entering upon the duties of an office" for appointed officials. N.C. Const. art. VI, § 7 ("Before entering upon the duties of an office, a person elected or appointed to the office shall take and subscribe the following oath: . . . ."). Moreover, this Court has long recognized that "[p]ublic officers are usually required to take an oath," but the oath is a "*mere incident[], and constitute[s] no part of the office*." *State ex rel. Clark v. Stanley*, 66 N.C. 59, 63 (1872) (emphasis added). As such,

when the taking of the oath is considered, it appears the Constitution provides that an appointed official holds the office to which he has been appointed first and then subsequently takes the oath, not as a qualification to being appointed to the office, but merely as a prerequisite to commencing the duties of the post. This view is in line with the statutory penalty recognized for someone who exercises the duties of an office before taking a required oath. *See* N.C.G.S. § 128-5 (2009) (requiring the taking of the oath "before entering on the duties of the office," but not requiring the oath as an added qualification to holding an appointed office). Thus, exercising the duties of the office before taking the oath cannot invalidate those acts, although doing so may subject the official to the possibility of the statutory penalties. *See Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 327, 72 S.E.2d 838, 842 (1952) (explaining that "failure to take an oath of office" may subject one to a penalty but would not invalidate official acts performed before taking the oath). In light of these constitutional considerations, N.C.G.S. § 11-7, which requires the oath for elected and appointed State officials, mandates a precursor to carrying out the duties of an appointed post but does not make the oath an added qualification to being appointed to an office.

Alongside the relevant constitutional provisions, this Court has long recognized that "sound public policy . . . is against vacancies in public offices and require[s] that there should always be some one in position to rightfully perform these important official duties for the benefit of the public." *State ex rel. Markham v. Simpson*, 175 N.C. 146, 148, 175 N.C. 135, 137, 95 S.E. 106, 107 (1918). The General Assembly has codified this public policy, stating: "All officers shall continue in their respective offices until their successors are elected or appointed, and duly qualified." N.C.G.S. § 128-7 (2009). Interpreting section 128-7 in such a way that it corresponds with the Constitution, *see Sessions v. Columbus Cty.*, 214 N.C. 634, 638, 200 S.E. 418, 420 (1939) (explaining that when possible, "[r]econciliation is a postulate of constitutional as well as of statutory construction" (citation omitted)), results in the view that the phrase "duly qualified" in regard to appointed officials taking the oath means "duly qualified to enter upon the duties of the office."

Turning to the case *sub judice*, "[t]he Industrial Commission is primarily an administrative agency of the State." *Hanks v. S. Pub. Utils. Co.*, 210 N.C. 312, 319, 186 S.E. 252, 257 (1936) (citation omitted). Members of the Commission are public officers. *See Stanley*, 66

N.C. at 63. When Mr. McDonald was appointed as a member of the Industrial Commission on 2 February 2007, under the Constitution and by statute, his appointment was effective immediately for purposes of holding the office. N.C. Const. art. VI, § 10; *see also* N.C.G.S. § 97-77 (2009) (stating that "[t]he Governor shall appoint the members of the [Industrial] Commission," implying immediate efficacy to the appointment). Moreover, as explained above, the Constitution provides the taking of the oath for appointed officials as a prerequisite to entering upon the duties of the position and not as a qualification to being appointed to office or for holding an office. The fact that Mr. McDonald did not attempt to enter upon the duties of his office before he took the oath on 9 February 2007 means he complied with Article VI, Section 7 of the Constitution and avoided the possibility of the penalties mentioned in N.C.G.S. § 128-5. Moreover, Mr. Bolch "continued in [his] respective office[]" under the statutory authority established in N.C.G.S. § 128-7—which provides continuity in government—until Mr. McDonald was qualified to enter upon the duties of his office after taking the oath on 9 February 2007.

Mr. Bolch's authority, although valid as a statutory holdover official, could have been *displaced* by the actions of the newly appointed Mr. McDonald before Mr. McDonald took the oath. *See Renner*, 236 N.C. at 327, 72 S.E.2d at 842. For reasons that do not require elaboration here, an official may need to begin making some decisions and performing certain duties immediately upon appointment out of necessity and for the good of the public, regardless of whether the oath has been administered at that point. The important principle of continuity in governance means that, even before taking the oath, a newly appointed official may need to make hiring or firing decisions or other administrative determinations that will enable him to "hit the ground running" as soon as the oath is taken. In this case, however, the employer introduced no evidence that Mr. McDonald entered into the performance of his duties of the office of commissioner before taking the oath. Consequently, the 5 February 2007 opinion and award of the Full Commission bearing Mr. Bolch's signature is valid, as the majority opinion recognizes.

Out of concern for clarifying the unique and paramount role of the Constitution in this matter and in order to stress the importance of continuity in government offices, I respectfully concur with the holding of the majority.

STATE OF NORTH CAROLINA v. KYLE JARON BUNCH

No. 203A09

(Filed 12 March 2010)

1. Criminal Law— instructions—elements of crime omitted—harmless error review

The trial court's omission of elements of a crime in its recitation of jury instructions is not structural error but is reviewed under the harmless error test.

2. Homicide— felony murder—instructions—omissions—harmless error

Any error in the instructions for felony murder was harmless where the trial court did not give an explicit instruction requiring the jury to find beyond a reasonable doubt that defendant was the killer or that defendant's acts proximately caused the victim's death, but, in the context of the entire charge, the trial court informed jurors of the two elements of felony murder and instructed on the underlying felonies of burglary and robbery with a dangerous weapon, and the evidence was overwhelming that defendant caused the victim's death. There was no reasonable possibility of a different outcome with complete instructions.

Justice EDMUNDS concurring in part and dissenting in part.

Chief Justice PARKER and Justice TIMMONS-GOODMAN joins in this concurring and dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 196 N.C. App. ——, 675 S.E.2d 103 (2009), finding no prejudicial error in a trial that resulted in judgments entered on 20 September 2006 by Judge Clifton W. Everett, Jr. in Superior Court, Pasquotank County. Heard in the Supreme Court 10 September 2009.

Roy Cooper, Attorney General, by Steven M. Arbogast, Special Deputy Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant-appellant.

BRADY, Justice.

In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court of the United States applied harmless error analysis to the trial court's instructional omission of elements of a crime. We apply the harmless error standard from *Neder* to defendant's challenge under Article I, Section 24 of the North Carolina Constitution and conclude that the trial court's instructional error in the present case was harmless beyond a reasonable doubt. We therefore affirm the decision of the Court of Appeals.

The State's evidence at trial tended to show that on the afternoon of 1 March 2004, defendant, along with Markie Riddick, Torando Simpson, Robert Hall, and Carl Scales, II met at the apartment of Crystal Wyatt in Elizabeth City, North Carolina. During the meeting, Hall devised a plan for the group to commit a robbery. All five men then dressed in dark clothing and masks that Hall created from a cut-up black T-shirt. After changing clothes, defendant and Scales drove to Scales's mobile home to retrieve a shotgun belonging to Scales's cousin, Julius Miller. Shortly thereafter, the five men met in the vicinity of the Robinson Funeral Home and traveled in Scales's Cadillac to the victims' Elizabeth City neighborhood. While the men drove around the block to familiarize themselves with the area, Hall pointed to the target residence, 1322 South Williams Circle. After parking the vehicle one street over from the target residence, Scales opened the trunk, and defendant retrieved the shotgun. Scales gave defendant two shotgun shells. Simpson exited the vehicle and approached the back of the house with a nine-millimeter Ruger handgun that Hall had provided him. All five men initially walked to the rear of the residence, but Scales and Hall left shortly thereafter.

James Arthur Bowen, Richard Preston Hewlin, Jr., and the murder victim Brian Jarrod Pender lived at 1322 South Williams Circle. Between 9:30 p.m. and 10:00 p.m., Hewlin walked outside to his vehicle. Upon Hewlin's return to the house, Simpson emerged from the corner of the garage and pressed a pistol into Hewlin's chest. Simpson shoved Hewlin into the house. After ordering Bowen to sit on a couch and Pender to lie down on the floor, Simpson walked Hewlin into the hallway.

Thereafter, Riddick, followed by defendant, entered the house. Both of the surviving victims testified that the third perpetrator, which additional testimony revealed to be defendant, entered the residence wielding a shotgun and then stood over or knelt on

Pender with the shotgun's barrel pointed at the back of Pender's head. Simpson then ordered Riddick and defendant to collect the victims' cell phones. The three perpetrators also searched through the pockets of all three victims and stole approximately sixty-five dollars. After Simpson stated, "[T]hat's all we are going to get," Bowen saw defendant "rack" the shotgun. Immediately thereafter the shotgun fired. Defendant then left the residence with the other two perpetrators.

On 29 March 2004, defendant was indicted for first-degree murder and robbery with a dangerous weapon arising from a home invasion. Defendant was tried capitally at the 11 September 2006 criminal session of Superior Court, Pasquotank County. At trial, the trial court instructed on felony murder as follows: "[T]he State must prove three [3] things beyond a reasonable doubt. First, that the Defendant or someone with whom he was acting in concert committed first degree burglary and/or robbery with a dangerous weapon." (Second set of brackets in original.) The remaining two elements of felony murder—killing of the victim during commission of a felony and defendant's act was a proximate cause of the victim's death—were only explained at length during the trial court's instructions on premeditated murder.

On 18 September 2006, a jury found defendant guilty of first-degree murder under the felony murder rule and robbery with a dangerous weapon. Based on the jury's binding recommendation, the trial court sentenced defendant to life imprisonment without parole. The trial court also sentenced defendant to a consecutive term of 103 to 133 months for the robbery with a dangerous weapon conviction.

On appeal, defendant argued that the trial court's failure to properly instruct the jury on felony murder violated his right to a trial by jury under Article I, Section 24 of the North Carolina Constitution. Applying harmless error analysis, the Court of Appeals found no prejudicial error in defendant's conviction and sentence. *State v. Bunch*, —— N.C. App. ——, 675 S.E.2d 103 (2009). The Court of Appeals concluded the challenged instructions were harmless beyond a reasonable doubt because the trial court adequately instructed the jury on felony murder when the charge was considered in its entirety. *Id.* at ——, 675 S.E.2d at 107-08. A dissenting judge opined that instructional errors of this nature should be reversible per se and not amenable to harmless error analysis. *Id.* at ——, 675 S.E.2d at 108 (Elmore, J., dissenting).

Defendant appeals to this Court and raises two issues for our review based on the dissenting opinion in the Court of Appeals. First, defendant argues that we should apply structural error analysis and treat the omission of elements of a crime from jury instructions as reversible per se. Second, even if harmless error analysis is applied, defendant argues that the instructional errors were not harmless beyond a reasonable doubt.

[1] Defendant first argues that the omission of elements of a crime from jury instructions constitutes per se or structural error. The North Carolina Constitution states that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. Though a defendant's right to be tried by a "jury of twelve" cannot be waived, *see State v. Ashe*, 314 N.C. 28, 35, 331 S.E.2d 652, 657 (1985) (stating Court's agreement with the defendant's argument that " 'having the right to a trial by a jury of twelve, [defendant] has the right to have all twelve jurors instructed consistently' "), harmless error analysis may still be applicable to Article I, Section 24 errors. *See*, *e.g.*, *State v. Wilson*, 363 N.C. 478, 487, 681 S.E.2d 325, 331 (2009) ("Where the error violates a defendant's right to a unanimous jury verdict under Article I, Section 24, we review the record for harmless error." (citations omitted)); *State v. Nelson*, 341 N.C. 695, 700-01, 462 S.E.2d 225, 227-28, (1995) (holding that although failure to require the presence of all jurors when requesting exhibits violates Article I, Section 24, the error was harmless error).

"In construing a provision of the state Constitution, we find highly persuasive the meaning given and the approach used by the United States Supreme Court in construing a similar provision of the federal Constitution." *State v. Huff*, 325 N.C. 1, 33, 381 S.E.2d 635, 653 (1989) (citation omitted), *sentence vacated on other grounds*, 497 U.S. 1021 (1990). In *Neder* the Supreme Court of the United States held that the trial court's unconstitutional failure to submit an essential element of the crime to the jury was subject to harmless error analysis. 527 U.S. at 4. Although the omission of the element from the jury instructions impermissibly "infringe[d] upon the jury's fact-finding role" in violation of the Sixth Amendment's jury trial guarantee, *id.* at 18, the Court held that the error was not a structural error that "*necessarily* render[ed] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. Accordingly, the Court reviewed the Sixth Amendment violation in *Neder* for harmlessness and concluded "that the omitted

element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Id.* at 17. Thus, the constitutional error was "properly found to be harmless." *Id.*

Considering the importance of "safeguarding the jury guarantee," the Supreme Court of the United States requires "a reviewing court [to] conduct a thorough examination of the record" before finding the omission harmless. 527 U.S. at 19. "If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant [1] contested the omitted element and [2] raised evidence sufficient to support a contrary finding—it should not find the error harmless." *Id.* Thus, the harmless error analysis under *Neder* is twofold: (1) if the element is uncontested and supported by overwhelming evidence, then the error is harmless, but (2) if the element is contested and the party seeking retrial has raised sufficient evidence to support a contrary finding, the error is not harmless. *See, e.g.*, *United States v. Brown*, 202 F.3d 691, 702 (4th Cir. 2000) (holding erroneous instruction not harmless when evidence of predicate offenses was contested and "there was a basis in the record for the jury to have rationally disbelieved the testimony of any of the Government's witnesses").

This Court has previously applied harmless error analysis to constitutional errors arising under Article I, Section 24. In *Wilson*, this Court stated that "[w]here the error violates a defendant's right to a unanimous jury verdict under Article I, Section 24, we review the record for harmless error." 363 N.C. at 487, 681 S.E.2d at 331 (citing, *inter alia*, *Nelson*, 341 N.C. at 700-01, 462 S.E.2d at 227-28). Additionally, we have applied harmless error review to violations of nonwaivable rights under the North Carolina Constitution. *See, e.g.*, *Huff*, 325 N.C. at 33-34, 381 S.E.2d at 653-54 (applying harmless error review to alleged violations of defendant's nonwaivable right to be present at all stages of his capital trial). Guided by this federal and state precedent, we hold that the trial court's omission of elements of a crime in its recitation of jury instructions is reviewed under the harmless error test.

[2] We now apply harmless error analysis to the circumstances of the present case. On a general level, "[a]n error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction." *Nelson*, 341 N.C. at 701, 462 S.E.2d at 228. "[T]he presence of overwhelming evidence of guilt may render error of constitutional dimen-

sion harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) (citing *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080 (1982)).

In its charge to the jury, the trial court only recited the first portion of the part of the North Carolina Pattern Jury Instruction that explains what the State must prove beyond a reasonable doubt to obtain a conviction of felony murder.[1] Defendant ardently stresses that the trial court failed to utilize the pattern instructions; however, "[u]se of the pattern instructions is encouraged, but is not required." *State v. Garcell*, 363 N.C. 10, 49, 678 S.E.2d 618, 642-43 (citation omitted), cert. denied, —— U.S. ——, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009). Failure to follow the pattern instructions does not automatically result in error. "In giving instructions the court is not required to follow any particular form," as long as the instruction adequately explains each essential element of an offense. *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985) (citation and quotation marks omitted).

This Court has repeatedly stated that felony murder is composed of two elements. Felony murder is defined by statute in N.C.G.S. § 14-17,[2] and this Court has confined the offense to "only two elements: (1) the defendant knowingly committed or attempted to commit one of the felonies indicated in N.C.G.S. § 14-7, and (2) a related killing." *State v. Thomas*, 325 N.C. 583, 603, 386 S.E.2d 555, 567 (1989) (citations omitted). Similarly, in *State v. Richardson*, this Court explained that "the elements necessary to prove felony murder are that [1] the killing took place [2] while the accused was perpetrating or attempting to perpetrate one of the enumerated

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1. The pertinent part of the pattern instructions states that "the State must prove [three] . . . things beyond a reasonable doubt:

> "First, that the defendant [committed] (or) [attempted to commit] (name felony, e.g., robbery). (Define the felony and enumerate its elements, using the Pattern Jury Instruction for that felony.)
>
> "Second, that while [committing] (or) [attempting to commit] (name felony), the defendant killed the victim with a deadly weapon.
>
> "[And Third] . . ., that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred."

1 N.C.P.I. Crim. 206.14 (Apr. 2003) (brackets in original) (italics omitted).

2. "A murder . . . which shall be 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 shall be deemed to be murder in the first degree . . . ." N.C.G.S. § 14-17 (2007).

felonies [in N.C.G.S. § 14-17]." 341 N.C. 658, 666, 462 S.E.2d 492, 498 (1995). Finally, this Court described felony murder in *State v. Jones* as follows: "[1] When a killing is committed [2] in the perpetration of an enumerated felony (arson, rape, etc.) or other felony committed with the use of a deadly weapon, murder in the first degree is established . . . ." 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (citations omitted). Moreover, in *State v. Collins*, this Court commented that "causation . . . must be established in order to sustain a conviction for any form of homicide, either murder or manslaughter." 334 N.C. 54, 57, 431 S.E.2d 188, 190 (1993); *id.* at 60-61, 431 S.E.2d at 192.

Here, upon explaining the verdict sheets during the jury charge, the trial court instructed the jury: "You may find the Defendant, Mr. Bunch, guilty of first degree murder . . . . under the first degree felony murder rule." Shortly thereafter, the trial court defined the offense, stating: "First degree murder under the first degree felony murder rule *is* [1] *the killing* of a human being [2] *in the perpetration* in this case of first degree burglary and/or robbery with a dangerous weapon." (Emphases added.) This instruction mirrors the definition stated by this Court for felony murder found in the *Thomas*, *Richardson*, and *Jones* opinions cited above.

Then, as reflected several pages later in the transcript, the trial court informed the jury that "the State must prove three [3] things beyond a reasonable doubt" to find defendant guilty of first-degree felony murder. (Brackets in original.) At this point, the trial court appears to have begun a modified recitation of the pattern instructions, stating: "First, that the Defendant or someone with whom he was acting in concert committed first degree burglary and/or robbery with a dangerous weapon." Next, as the pattern instructions recommend, the trial court explained the elements of first-degree burglary and then robbery with a dangerous weapon. After the instructions on burglary and robbery, the trial court inexplicably did not return to the "Second" or "Third" paragraphs of the pattern instructions. Consequently, the trial court failed to instruct that while committing burglary or robbery "the defendant killed the victim with a deadly weapon" and that "defendant's act was a proximate cause of the victim's death." 1 N.C.P.I. Crim. 206.14.

Construing the instructions within the context of the entire jury charge, *see, e.g.*, *State v. Hartman*, 344 N.C. 445, 467, 476 S.E.2d 328, 340 (1996), *cert. denied*, 520 U.S. 1201 (1997), the trial court informed jurors of two elements of felony murder and instructed them on the

underlying felonies of burglary and robbery with a dangerous weapon. Thus, defendant's argument rests on the fact that the trial court did not explicitly include a reference to the effect that defendant was the killer, or that defendant's acts were the proximate cause of the victim's death. The foundation on which defendant bases this argument is superficial in light of the overwhelming evidence that defendant caused the victim's death. Thus, even if the trial court's instructions were erroneous, any error is harmless.

A review of the record and transcripts reveals the strength of the State's case. For instance, the State's evidence included testimony from Bowen and Hewlin, the two surviving victims in the residence on the night of 1 March 2004. Both of them testified that the third person to enter the residence that evening wielded a shotgun and then stood over or knelt over Pender, who was lying facedown on the floor. Bowen testified to actually seeing the perpetrator "rack" the shotgun back, after which "B.J.'s eyes got big and then boom," and blood "c[a]me from all out of his head and face and everything and it formed like a big pool." Hewlin heard the shotgun discharge and immediately looked to see the shotgun kick out of the perpetrator's grasp, while blood from the victim went everywhere. The shooter then picked up the weapon and left with the other two men. Neither Bowen nor Hewlin saw the face of the person with the shotgun because he was wearing a mask, but both testified that the individual was the tallest of the three perpetrators.

Next, the jury heard from codefendants Simpson and Riddick, who admitted to being the other two perpetrators in the residence that night. Both identified defendant as the third person in the residence who stood over Pender and was holding the shotgun when it discharged. They also confirmed that defendant was taller than either of them, at least six feet, two inches tall. Their testimony regarding defendant's height connected defendant with the testimony of victims Bowen and Hewlin, who stated that the man with the shotgun was the tallest of the three. Additionally, Carl Scales, another codefendant who had remained in a vehicle nearby the victim's residence, confirmed defendant's participation in the crimes and testified that defendant possessed the shotgun that evening. Finally, Scales and another witness testified to hearing defendant state on several occasions that he "didn't mean to do it" and that he "didn't mean to shoot" the victim.

In the face of this overwhelming evidence of defendant's involvement in the crimes, defendant's attempts to cast doubt on the State's

evidence were insubstantial at best. Defendant attempted to challenge the witnesses' identification of the shooter by noting that Julius Miller, Scales's cousin, owned the shotgun that killed Pender. Like defendant, Julius Miller was described as taller than the other two codefendants who entered the house. However, no witness identified Julius Miller or anyone other than those charged as a participant in the robbery. Defendant also elicited testimony that the victims at one point suggested to law enforcement that the shooter had dreadlocks. However, the State offered evidence that the mask worn by the shooter could resemble dreadlocks, and a codefendant testified that Julius Miller did not have dreadlocks. Defendant also attempted to present an alibi defense through the testimony of his stepmother. She testified that defendant arrived at her residence between 10:15-10:30 p.m. on the night of the murder and that she remembers this because a commercial was on television while defendant was there. However, she could not name the show she was watching or remember what commercial was playing when defendant was in her house. In summary, defendant failed not only to controvert the State's evidence with credible evidence of his own, but he failed to present some viable alternative explanation for the crimes.

Therefore, even if the jurors had received the complete pattern instruction for felony murder, there is no reasonable probability that outcome would have been different. To whatever extent the trial court failed to adequately inform the jury and explain all the elements of felony murder, the overwhelming evidence forestalls any notion that this omission contributed to defendant's conviction. Accordingly, we hold that any potential error was harmless beyond a reasonable doubt, and the Court of Appeals decision is affirmed.

AFFIRMED.

Justice EDMUNDS concurring in part and dissenting in part.

I agree with the majority that the errors here were not structural. Nevertheless, I believe that the instructions on felony murder were prejudicially erroneous and accordingly, I respectfully dissent.

These errors pervaded the instructions given to the jury. After counsel completed their closing arguments, the trial court began its instructions relating to first-degree murder with a brief introductory description of the offense:

> Now as to the charge of first degree murder under the law in the evidence in this case, it is your duty to return one of the following verdicts: guilty of first degree murder or guilty of second degree murder or not guilty.
>
> You may find the Defendant, Mr. Bunch, guilty of first degree murder or [sic] either or both of two theories. Either or both of two theories. That is on the basis of malice, premeditation, and deliberation, or under the first degree felony murder rule.
>
> First degree murder on the basis of malice, premeditation, and deliberation is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. First degree murder under the felony murder rule is the killing of a human being in the perpetration in this case of first degree burglary and/or robbery with a dangerous weapon.

Following these and other preliminary remarks, the trial court provided a detailed instruction explaining the elements of first-degree murder based upon premeditation and deliberation. However, when the trial court undertook to provide a similarly detailed explanation of the elements of felony murder, it began by instructing the jury: "Now I further charge that for you to find the Defendant guilty of first degree murder under the first degree felony murder rule, the State must prove three things beyond a reasonable doubt." Having alerted the jurors to be on the lookout for three elements, the court defined only the first, that the killing was in the perpetration of an underlying felony. The court repeated this error in its mandate as to first-degree murder when it again defined only the element of felony murder relating to the commission of an underlying felony, omitting the rest. In addition, during another part of the instructions, the trial court apparently referred to the felony-murder rule as the "first degree murder rule."

Finally, in its concluding instructions as to murder, the trial court advised the jury:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant or someone with whom he was acting in concert intentionally and with malice wounded the victim with a deadly weapon and that this proximately caused the victim's death, it would be your duty to return a verdict of guilty of second degree murder.

> If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty. And I believe I said that—and I will go back and repeat it. As to the felony murder—first degree murder on the basis of a felony murder rule if you don't find that they committed those—either one of those two crimes one or the other or both neither—neither one and/or—and/or first-degree burglary or robbery with a dangerous weapon and if you don't find that, then he would not be guilty of first degree murder based on the felony murder rule.

The mistakes and omissions in these instructions, and the inevitable resulting perplexity, would seem to be self-evident. The majority purports to consider the entire jury charge and the strength of the evidence to find the error harmless. However, as the preceding analysis indicates, the instructions in their entirety are, at best, confusing. This Court has found no error when an isolated piece of a jury instruction was incorrect or improper but the instruction taken as a whole was an accurate statement of the law. *State v. McWilliams*, 277 N.C. 680, 684-85, 178 S.E.2d 476, 479 (1971). In contrast, here, one isolated sentence in the introductory instructions was an accurate statement of the law but the instructions as a whole were incomplete and muddled.

We have held that the trial court must instruct on all the elements of a criminal offense. *State v. Ramos*, 363 N.C. 352, 355-56, 678 S.E.2d 224, 226-27 (2009) (prejudicial error when trial court failed to instruct on element of willfulness when the defendant's evidence conflicted with the State's evidence on that issue). The purposes of jury instructions are to provide guidance for the jury and to " 'give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.' " *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006) (quoting *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971)). Thus, the trial court has "the obligation 'to instruct the jury on every substantive feature of the case.' " *Id.* at 347, 626 S.E.2d at 261 (quoting *State v. Mitchell*, 48 N.C. App. 680, 682, 270 S.E.2d 117, 118 (1980)). The guidance that our trial judges must provide juries of laypersons, unversed in the law but required to apply the law to the case at hand, was absent here. As a result, the jury had an insufficient basis for reaching a rational decision.

The strength of the evidence is the other leg on which the majority opinion stands. While the evidence here is indeed compelling, when erroneous and incomplete instructions have left an unguided, unchecked, and aroused jury to its own devices, mere strength of evidence provides an inadequate basis for a reliable verdict. If it did, we could dispense with the formality of trials. Accordingly, I respectfully dissent.

Chief Justice PARKER and Justice TIMMONS-GOODSON join in this concurring and dissenting opinion.

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

Barrett v. Cell Payment Servs., Inc. Case below: 201 N.C. App. —— (22 December 2009)	No. 035P10	1. Defs' Motion for Temporary Stay (COA09-541) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 01/22/10 363 N.C. 800 Stay Dissolved 03/11/10 2. Denied 03/11/10 3. Denied 03/11/10
Biggers v. Bald Head Island Case below: —— N.C. App. —— (15 September 2009)	No. 452P09	Plt's PWC to Review Decision of COA (COA08-249)	Denied 03/11/10 **Hudson, J., Recused**
Blaylock v. N.C. Dep't of Corr. Case below: 200 N.C. App. —— (3 November 2009)	No. 503P09	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-65) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 03/11/10 2. Dismissed as Moot 03/11/10
Blow v. DSM Pharms., Inc. Case below: 197 N.C. App. —— (16 June 2009)	No. 302P09	Plt's PDR (COA08-1500)	Denied 03/11/10 **Martin, J., Recused**
Boykin v. Wilson Med. Ctr. Case below: 201 N.C. App. —— (22 December 2009)	No. 040P10	Defs' (Wilson Medical Center and John Killgore) PDR Under N.C.G.S. § 7A-31 (COA09-450)	Denied 03/11/10
Boylan v. Verizon Wireless Case below: 201 N.C. App. —— (17 November 2009)	No. 498P09	1. Defs' Motion for Temporary Stay (COA09-350) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 12/08/09 363 N.C. 744 Stay Dissolved 03/11/10 2. Denied 03/11/10 3. Denied 03/11/10
Brackney v. Brackney Case below: 199 N.C. App. —— (1 September 2009)	No. 418P09	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA08-1044) 2. Plt's Motion to Withdraw PDR and/or Dismiss Appeal	1. —— 2. Allowed 03/11/10

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

Charlotte-Mecklenburg Hosp. Auth. v. N.C. Dep't of Health & Human Servs. Case below: 201 N.C. App. —— (17 November 2009)	No. 521P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-9)	Denied 03/11/10
Dalenko v. Peden Gen. Contr'rs, Inc. Case below: 197 N.C. App. —— (19 May 2009)	No. 259P09-2	Plt's PWC in Conjunction with Pending NOA (COA08-170)	Denied 03/11/10
Heflin v. G. R. Hammonds Roofing, Inc. Case below: 201 N.C. App. —— (8 December 2009)	No. 017P10	Defs' PDR Under N.C.G.S. § 7A-31 (COA08-1309)	Denied 03/11/10 **Hudson, J., Recused**
Hensley v. N.C. Dep't of Env't & Natural Res. Case below: 201 N.C. App. —— (17 November 2009)	No. 525A09	1. Respondent's (NCDENR) Motion for Judicial Notice of Declaratory Ruling by Sedimentation Control Commission (COA08-1307) 2. Petitioners' Motion to Strike 3. Petitioners' Alternative Motion for Judicial Notice	1. Allowed 03/11/10 2. Dismissed as Moot 03/11/10 3. Allowed 03/11/10
In re A.K., L.R., V.R., J.R. Case below: 201 N.C. App. —— (8 December 2009)	No. 006P10	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA09-892)	Denied 03/11/10
In re Appeal of: IBM Credit Corp. Case below: 201 N.C. App. —— (8 December 2009)	No. 011P10	1. Appellant's (Durham County) PDR Under N.C.G.S. § 7A-31 (COA08-1514) 2. Appellee's (IBM Credit) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 03/11/10 2. Dismissed as Moot 03/11/10
In re J.A.G. Case below: 202 N.C. App. —— (2 February 2010)	No. 069P10	State's Motion for Temporary Stay (COA09-462)	Allowed 02/22/10

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

In re M.L.T.H. Case below: 200 N.C. App. —— (3 November 2009)	No. 497P09	Appellant's (State of NC) Motion for Temporary Stay (COA08-1569)	Allowed 12/08/09
In re M.X. Case below: 200 N.C. App. —— (3 November 2009)	No. 527P09-2	Respondent's (Father) Petition for Writ of Mandamus (COA09-514)	Dismissed as Moot 03/11/10
In re Search Warrant In Death of Nancy Cooper Case below: 200 N.C. App. —— (6 October 2009)	No. 462P09	Plts' (Capitol Broadcasting Co. d/b/a WRAL-TV & The News & Observer d/b/a The News & Observer) PDR Under N.C.G.S. § 7A-31 (COA08-1280)	Denied 03/11/10
Jones v. Steve Jones Auto Grp. Case below: 200 N.C. App. —— (3 November 2009)	No. 502P09	1. Defs' Motion for Temporary Stay (COA08-1593) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 12/09/09 363 N.C. 745 Stay Dissolved 03/11/10 2. Denied 03/11/10 3. Denied 03/11/10
Lawyer v. City of Elizabeth City N.C. Case below: 199 N.C. App. —— (18 August 2009)	No. 012P10	Defs' PWC (COA08-765)	Denied 03/11/10
Lexington Furn. Indus., Inc. v. Furnco Int'l Corp Case below: 200 N.C. App. —— (20 October 2009)	No. 478P09	Plts' PDR Under N.C.G.S. § 7A-31 (COA09-265)	Denied 03/11/10
Pike v. D.A. Fiore Constr. Servs., Inc. Case below: 201 N.C. App. —— (8 December 2009)	No. 039P10	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA09-520) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 03/11/10 2. Dismissed as Moot 03/11/10

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

Pinewild Project Ltd. P'ship v. Village of Pinehurst Case below: 198 N.C. App. —— (21 July 2009)	No. 383P09	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA08-1288)	Denied 01/28/10
Pope v. Johns Manville Case below: 202 N.C. App. —— (19 January 2010)	No. 059P10	1. Defendant-Appellants' Motion for Temporary Stay (COA09-281) 2. Defs' Motion to Dissolve Rule 23 Temporary Stay	1. Allowed 02/09/10 2. Allowed 02/19/10
Schwartz v. Banbury Woods Homeowners Ass'n Case below: 196 N.C. App. —— (5 May 2009)	No. 243P09	Plts' PDR Under N.C.G.S. § 7A-31 (COA08-964)	Denied 03/11/10
Schwarz & Schwarz, LLC v. Caldwell Cty. R.R. Co. Case below: 197 N.C. App. —— (16 June 2009)	No. 295P09	Plt's PDR Under N.C.G.S. § 7A-31 (COA08-1458)	Denied 03/11/10
Self-Help Ventures Fund v. Custom Finish LLC Case below: —— N.C. App. —— (15 September 2009)	No. 434A09	Defs' (Clarence & Gladys Adams) Motion to Dismiss Appeal (COA08-1482)	Allowed 03/11/10
State v. Belk Case below: 201 N.C. App. —— (8 December 2009)	No. 530P09	State's Motion for Temporary Stay (COA09-187)	Allowed 12/28/09
State v. Berry Case below: New Hanover County Superior Court	No. 389A01-3	1. State's Motion for Temporary 2. State's Petition for Writ of Supersedeas 3. State's PWC to Review Order of the New Hanover Superior Court 4. Def's Motion to Dissolve the Stay and Expedite Dismissal of the State's PWC	1. Allowed 02/16/10 Stay Dissolved 03/11/10 2. Denied 03/11/10 3. Denied 03/11/10 4. Dismissed as Moot 03/11/10

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

State v. Boothe Case below: 201 N.C. App. —— (5 January 2010)	No. 050P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-264)	Denied 03/11/10
State v. Cruz Case below: 201 N.C. App. —— (22 December 2009)	No. 095P10	Def's Motion for PDR Under N.C.G.S. § 7A-30, 7A-31(c) (COA09-373)	Denied 03/11/10
State v. Graham Case below: 200 N.C. App. —— (6 October 2009)	No. 459P09	1. Def's NOA Based Upon a Constitutional Question (COA09-135) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/11/10 3. Denied 03/11/10
State v. Hernandez Case below: 200 N.C. App. —— (3 November 2009)	No. 045P10	Def's Motion for PDR (COA08-1446)	Denied 03/11/10
State v. Jenkins Case below: 202 N.C. App. —— (2 February 2010)	No. 068P10	State's Motion for Temporary Stay (COA09-546)	Allowed 02/19/10
State v. Little Case below: Anson County Superior Court	No. 057P10	Def's PWC to Review the Order of Anson County Superior Court	Denied 03/11/10
State v. McIntyre Case below: 201 N.C. App. —— (22 December 2009)	No. 046P10	Df's PDR Under N.C.G.S. § 7A-31 (COA09-414)	Denied 03/11/10
State v. Meadows Case below: 201 N.C. App. —— (5 January 2010)	No. 029P10	State's Motion for Temporary Stay (COA08-1576)	Allowed 01/19/10
State v. Moore Case below: 201 N.C. App. —— (8 December 2009)	No. 015P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-11)	Denied 03/11/10
State v. Moore Case below: 201 N.C. App. —— (8 December 2009)	No. 014P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-801)	Denied 03/11/10

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

State v. Mumford Case below: 201 N.C. App. —— (5 January 2010)	No. 032P10	State's Motion for Temporary Stay (COA09-300)	Allowed 01/22/10
State v. Palestino Case below: 179 N.C. App. 656	No. 055P10	1. Def's PWC to Review Decision of COA (COA06-185) 2. Def's PWC to Review Order of COA (COAP09-837) 3. Def's PWC to Review Order of Forsyth County Superior Court	1. Dismissed 03/11/10 2. Dismissed 03/11/10 3. Dismissed 03/11/10
State v. Plemmons Case below: Buncombe County Superior Court	No. 448PA09	Defs' PDR (Prior to Determination) (COA09-1323)	Allowed 02/18/10
State v. Robinson Case below: 199 N.C. App. —— (18 August 2009)	No. 349P09	1. Def's NOA Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 (COA08-1495)	1. Dismissed *Ex Mero Motu* 03/11/10 2. Denied 03/11/10
State v. Rogers Case below: 194 N.C. App. 131	No. 003P09-2	Def's Motion for Appropriate Relief (COA08-188)	Dismissed Without Prejudice 03/11/10
State v. Roughton Case below: 201 N.C. App. —— (22 December 2009)	No. 009P10	State's Motion for Temporary Stay (COA09-536)	Allowed 01/12/10
State v. Rouse Case below: Randolph County Superior Court	No. 120A92-5	Def's PWC to Review Order of Randolph County Superior Court	Denied 03/11/10
State v. Sanders Case below: 201 N.C. App. —— (5 January 2010)	No. 041P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-443)	Denied 03/11/10
State v. Smith Case below: 202 N.C. App. —— (19 January 2010)	No. 058P10	State's Motion for Temporary Stay (COA09-467)	Allowed 02/05/10

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

State v. Smith Case below: 202 N.C. App. ___ (19 January 2010)	No. 065P10	1. Def's NOA Based Upon a Constitutional Question (COA09-708) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/11/10 3. Denied 03/11/10
State v. Williams Case below: 201 N.C. App. —— (17 November 2009)	No. 520P09	Def's PDR Under N.C.G.S. § 7A-31 (COA09-354)	Denied 03/11/10
State v. Williams Case below: 201 N.C. App. —— (22 December 2009)	No. 047P10	Def's PDR Under N.C.G.S. § 7A-31 (COA09-388)	Denied 03/11/10
State v. Williams Case below: 201 N.C. App. —— (5 January 2009)	No. 033P10	State's Motion for Temporary Stay (COA08-1334)	Allowed 01/22/10
Steinkrause v. Tatum Case below: 201 N.C. App. —— (8 December 2009)	No. 018A10	1. Petitioner's (Steinkrause) NOA (Dissent) (COA08-1080) 2. Petitioner's (Steinkrause) PDR As to Additional Issues 3. Petitioner's (Steinkrause) Motion for Temporary Stay 4. Petitioner's (Steinkrause) Petition for Writ of Supersedeas	1. —— 2. Denied 03/11/10 3. Allowed 01/21/10 363 N.C. 812 Stay Dissolved 03/11/10 4. Denied 03/11/10
Williams v. Craft Dev., LLC Case below: 199 N.C. App. —— (1 September 2009)	No. 446P09	1. Def's & Third-Party Plts' Motion for Temporary Stay 2. Def's & Third-Party Plts' Petition for Writ of Supersedeas 3. Def's & Third-Party Plts' PDR Under N.C.G.S. § 7A-31 (COA09-3)	1. Allowed 11/05/09 363 N.C. 663 Stay Dissolved 03/11/10 2. Denied 03/11/10 3. Denied 03/11/10

APPENDIXES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LEGAL SPECIALIZATION PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING
PARALEGAL CERTIFICATION

ORDER ADOPTING SUPPLEMENTAL RULES OF
PRACTICE AND PROCEDURE FOR THE
NORTH CAROLINA eFILING PILOT PROJECT

ORDER ADOPTING THE 2009
NORTH CAROLINA RULES OF
APPELLATE PROCEDURE

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING THE
DISCIPLINE AND DISABILITY
OF ATTORNEYS

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING
DISCIPLINE AND DISABILITY
OF ATTORNEYS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PROCEDURES FOR ADMINISTRATIVE SUSPENSION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL ETHICS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ATTORNEY CLIENT ASSISTANCE PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PROCEDURES FOR FEE DISPUTE RESOLUTION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

ORDER ADOPTING AMENDMENTS TO THE RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

ORDER ADOPTING AMENDMENTS TO THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 23, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.1519 Accreditation Standards

The board shall approve continuing legal education activities which meet the following standards and provisions.

(a)~~(1)~~ . . .

(b)~~(2)~~ . . .

(c)~~(3)~~ . . .

(d)~~(4)~~ Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience. ~~in a setting physically suitable to the educational activity of the program and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes~~. Credit shall not be given for any continuing legal education activity taught or presented by a disbarred lawyer except a course on professional responsibility (including a course or program on the effects of substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities). The advertising for the activity shall disclose the lawyer's disbarment.

(e) Continuing legal education activities shall be conducted in a setting physically suitable to the educational activity of the program and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.

(f) ~~(5) . . .~~

(g)~~(6)~~ …

(h)~~(7)~~ …

(i) ~~(8)~~ …

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 23, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of February, 2009.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 5th day of February, 2009.

s/Hudson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 24, 2008.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

.1606 Fees

(a) Sponsor Fee— . . .

(b) Attendee Fee—The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney will be invoiced for any attendees fees owed following the submission of the attorney's annual report form pursuant to Rule .1522(a) of this subchapter. Payment shall be remitted within 30 (thirty) days of the date of the invoice ~~should remit the fees along with his or her affidavit before February 28 following the calendar year for which the report is being submitted~~. The amount of the fee, per approved CLE hour for which the attorney claims credit, is set at $1.25 plus such additional amount as determined by the council as necessary to support the Chief Justice's Commission on Professionalism but not to exceed $1.00. It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit and that the fee-per-hour is $2.25 which includes an assessment of $1.00 for the Chief Justice's Commission on Professionalism:

Fee: $2.25 x Total Approved CLE hours (3.0) = Total Attendee Fee ($6.75)

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 24, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of February, 2009.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 5th day of February, 2009.

s/Hudson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

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 23, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning IOLTA, as particularly set forth in 27 N.C.A.C. 1D, Section .1300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts

Rule .1312 Source of Funds

Funding for the program carried out by the board shall come from funds remitted from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 1.15-4 of the Rules of Professional Conduct and Rule .1316 of this subchapter, voluntary contributions from lawyers, and interest, dividends, or other proceeds earned on the board's funds from investments or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 23, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

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

This the 5th day of February, 2009.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 5th day of February, 2009.

s/Hudson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

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 October 24, 2008.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the IOLTA program, as particularly set forth in 27 N.C.A.C. 1D, Section .1300, and the Rules of Professional Responsibility, as set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts

.1316 IOLTA Accounts

(a) . . .

(e) Every lawyer or law firm maintaining IOLTA accounts <u>for North Carolina client funds</u> shall direct the bank in which an IOLTA account is maintained to:

> (1) remit interest or dividends, less any deduction for <u>permissible</u> bank service charges, fees, and taxes collected with respect to the deposited funds, at least quarterly to NC IOLTA at the North Carolina State Bar. If the bank does not waive service charges or fees on IOLTA accounts, reasonable customary account maintenance fees may be assessed, but only against accrued interest ~~and funds belonging to the law firm or lawyer maintaining the account~~. <u>Business costs or costs billable to others are the responsibility of the lawyer or law firm and may not be charged against client funds or the interest earned by an IOLTA account but may be deducted from the firm's operating account, billed to the firm, or deducted from funds maintained or deposited by the lawyer in the IOLTA account for that purpose. Such costs include but are not limited to NSF fees,</u> ~~Fees for~~ wire transfer <u>fees</u>, ~~insufficient funds, bad checks,~~ stop payment orders, account reconciliation, negative collected balances, <u>and business services, such as remote capture capability, on-line banking, digital imaging, and CD-ROM statements</u> ~~and check printing are business costs or costs billable to others and may not be charged against the interest earned by an IOLTA account~~.

. . .

.1319 Certification

Every lawyer admitted to practice in North Carolina shall certify annually on or before June 30 to the North Carolina State Bar that all general trust accounts maintained by the lawyer or his or her law firm ~~in North Carolina~~ are established and maintained as IOLTA accounts as prescribed by Rule 1.15 of the Rules of Professional Conduct and Rule .1316 of ~~the Rules and Regulations of the NC State Bar~~ this subchapter or that the lawyer is exempt from this provision because he or she does not maintain any general trust account(s) ~~in~~ for North Carolina client funds.

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 1.15, Safekeeping Property

This rule has ~~four~~ three subparts, Rule 1.15-1, Definitions; Rule 1.15-2, General Rules; and Rule 1.15-3, Records and Accountings~~; and Rule 1.15-4, Interest on Lawyers' Trust Accounts.~~ The ~~first three~~ subparts set forth the requirements for preserving client property, including the requirements for preserving client property in a lawyer's trust account. The comment for all three subparts as well as the annotations appear after the text for Rule 1.15-3**.**

. . .

Rule 1.15-2: General Rules

(a) . . .

(p) Interest on Deposited Funds. Under no circumstances shall the lawyer be entitled to any interest earned on funds deposited in a trust account or fiduciary account. Except as authorized by ~~Rule 1.15-4,~~ Rule .1316 of subchapter 1D of the Rules and Regulations of the North Carolina State Bar, any interest earned on a trust account or fiduciary account, less any amounts deducted for bank service charges and taxes, shall belong to the client or other person or entity entitled to the corresponding principal amount. ~~Under no circumstances shall the lawyer be entitled to any interest earned on funds deposited in a trust account or fiduciary account.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 24, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of February, 2009.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 5th day of February, 2009.

s/Hudson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LEGAL SPECIALIZATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 24, 2008.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the legal specialization program, as particularly set forth in 27 N.C.A.C. 1D, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization

.1721 Minimum Standards for Continued Certification of Specialists

(a) . . .

(b) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for continued certification. Before or after taking a continuing legal education course that is not in the specialty or a related field, a specialist may petition the board to approve the program as satisfying the continuing legal education criteria for recertification. The petition shall show the relevancy of the program to the specialist's proficiency as a specialist, and be referred to the specialty committee for its recommendation prior to a decision by the board.

(c) . . .

.1725 Areas of Specialty

There are hereby recognized the following specialties:

(1) . . .

(9) elder law.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were

duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 24, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of February, 2009.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 5th day of February, 2009.

s/Hudson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

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 23, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1800, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization; Section .1900, Continuing Legal Education for the Purposes of the Board of Legal Specialization

.1801 Reconsideration of Applications, Failure of Written Examinations, and Appeals

(a) Applications Incomplete and/or Applicants Not in Compliance with Standards for Certification

(b) Failure of a Written Examination Prepared and Administered by a Certification Committee

> (1) Review of Examination—Within 30 days of the mailing of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant will be given the applicant's scores for each question on the examination. The applicant shall not remove the examination from the board's office.
>
> (2) Petition for Grade Review—If, after reviewing the examination, the applicant feels an error or errors were made in the grading, ~~he or she~~ the applicant may file with the executive director a petition for grade review. The petition must be filed within 45 days of the mailing of the notice of failure and should set out in detail the ~~area or areas~~ examination questions and answers which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed

to substantiate the applicant's claim. ~~At the time of filing the petition, the applicant must either~~

~~(A) request a hearing before a three member panel of the board; or~~

~~(B) waive his or her right to a hearing before the board and request that the board render a decision based upon its review of the applicant's examination, supporting documents, and the recommendations of the review committee of the specialty committee.~~

(3) Review Procedure—The applicant's examination and petition shall be submitted to a panel consisting of a minimum of at least three members of the specialty committee (the review committee of the specialty committee). All information will be submitted in blind form, the staff being responsible for deleting any identifying information on the examination or the petition. The review committee of the specialty committee shall review the ~~entire examination~~ petition of the applicant and determine whether ~~. The review committee of the specialty committee shall recommend to the board that~~ the grade of the examination should remain the same or be changed. The review committee shall make a written report to the board setting forth its recommendation relative to the grade on the applicant's examination and an explanation of its recommendation.

(4) Decision of the Board—~~A panel of the board shall consider the applicant's petition for grade review either by hearing or by a review only of the applicant's submitted materials.~~ The board shall consider the petition and the report and recommendation of the review committee and shall certify the applicant if it determines that the applicant has satisfied all of the standards for certification.

~~(5) Hearing Procedures. The rules set forth in Rule .1801(a)(8) above shall be followed when an applicant petitions for a hearing before the board for a grade review of his or her examination.~~

~~(6) Burden of Proof: Preponderance of the Evidence. The panel of the board shall apply the preponderance of the evidence rule in determining whether the applicant's grade on the examination should remain the same or be changed. The burden of proof is upon the applicant.~~

(c) . . .

.1905 Alternatives to Lecture-Type CLE Course Instruction

(a) Teaching—Preparation and presentation of written materials at an accredited CLE course will qualify for CLE credit at the rate of six hours of credit for each hour of presentation as computed under Rule .1904 of this subchapter. In the case of joint preparation and/or presentation, each preparer and presenter will receive a proportionate share of the total credit available. Repeat presentations of substantially the same materials will ~~not~~ qualify for ~~additional~~ one-half the credit available for the initial presentation. Instruction at an academic institution will qualify for three hours of CLE credit per semester hour taught in the specialty field.

(b) Publication—. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 23, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of February, 2009.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 5th day of February, 2009.

s/Hudson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

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 October 24, 2008.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, be amended by adding the following new section:

27 N.C.A.C. 1D, Section .2900 Certification Standards for the Elder Law Specialty

.2901 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates elder law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

.2902 Definition of Specialty

The specialty of elder law is the practice of law involving the counseling and representation of older persons and their representatives relative to the legal aspects of health and long term care planning; public benefits; surrogate decision-making, legal capacity; the conservation, disposition, and administration of the estates of older persons; and the implementation of decisions of older persons and their representatives relative to the foregoing with due consideration to the applicable tax consequences of an action, or the need for more sophisticated tax expertise.

Lawyers certified in elder law must be capable of recognizing issues that arise during counseling and representation of older persons, or their representatives, with respect to abuse, neglect, or exploitation of the older person, insurance, housing, long term care, employment, and retirement. The elder law specialist must also be familiar with professional and non-legal resources and services publicly and privately available to meet the needs of the older persons, and be capable of recognizing the professional conduct and ethical issues that arise during representation.

.2903 Recognition as a Specialist in Elder Law

If a lawyer qualifies as a specialist in elder law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Elder Law."

.2904 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in elder law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

.2905 Standards for Certification as a Specialist in Elder Law

Each applicant for certification as a specialist in elder law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in elder law:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of elder law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 700 hours a year to the practice of elder law, but not less than 400 hours in any one year. Practice shall mean substantive legal work done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) Practice equivalent shall mean service as a law professor concentrating in the teaching of elder law (or such other related fields as approved by the specialty committee and the board) for one year or more. Such service may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2905(b)(1) above.

(c) Substantial Involvement Experience Requirements—In addition to the showing required by Rule .2905(b), an applicant shall show substantial involvement in elder law by providing information regard-

ing the applicant's participation, during the five years immediately preceding the date of the application, in at least sixty (60) elder law matters in the categories set forth in Rule .2905(c)(3) below.

(1) As used in this section, an applicant will be considered to have participated in an elder law matter if the applicant:

(A) provided advice (written or oral, but if oral, supported by substantial documentation in the client's file) tailored to and based on facts and circumstances specific to a particular client;

(B) drafted legal documents such as, but not limited to, wills, trusts, or health care directives, provided that those legal documents were tailored to and based on facts and circumstances specific to the particular client;

(C) prepared legal documents and took other steps necessary for the administration of a previously prepared legal directive such as, but not limited to, a will or trust; or

(D) provided representation to a party in contested litigation or administrative matters concerning an elder law issue.

(2) Of the 60 elder law matters:

(A) forty (40) must be in the experience categories listed in Rule .2905(c)(3)(A) through (E) with at least five matters in each category;

(B) ten (10) must be in experience categories listed in Rule .2905(c)(3)(F) through (M), with no more than five in any one category; and

(C) the remaining ten (10) may be in any category listed in Rule .2905(c)(3), and are not subject to the limitations set forth in Rule .2905(c)(2)(B) or (C).

(3) Experience Categories:

(A) health and Personal Care Planning including giving advice regarding, and preparing, advance medical directives (medical powers of attorney, living wills, and health care declarations) and counseling older persons, attorneys-in-fact, and families about medical and life-sustaining choices, and related personal life choices.

(B) pre-Mortem Legal Planning including giving advice and preparing documents regarding wills, trusts, durable general

or financial powers of attorney, real estate, gifting, and the financial and tax implications of any proposed action.

(C) fiduciary Representation including seeking the appointment of, giving advice to, representing, or serving as executor, personal representative, attorney-in-fact, trustee, guardian, conservator, representative payee, or other formal or informal fiduciary.

(D) legal Capacity Counseling including advising how capacity is determined and the level of capacity required for various legal activities, and representing those who are or may be the subject of guardianship/conservatorship proceedings or other protective arrangements.

(E) public Benefits Advice including planning for and assisting in obtaining Medicaid, supplemental security income, and veterans benefits.

(F) advice on Insurance Matters including analyzing and explaining the types of insurance available, such as health, life, long term care, home care, COBRA, medigap, long term disability, dread disease, and burial/funeral policies.

(G) resident Rights Advocacy including advising patients and residents of hospitals, nursing facilities, continuing care retirement communities, assisted living facilities, adult care facilities, and those cared for in their homes of their rights and appropriate remedies in matters such as admission, transfer and discharge policies, quality of care, and related issues.

(H) housing Counseling including reviewing the options available and the financing of those options such as: mortgage alternatives, renovation loan programs, life care contracts, and home equity conversion.

(I) employment and Retirement Advice including pensions, retiree health benefits, unemployment benefits, and other benefits.

(J) income, Estate, and Gift Tax Advice, including consequences of plans made and advice offered.

(K) public Benefits Advice, including planning for and assisting in obtaining Medicare, social security, and food stamps.

(L) counseling with regard to age and/or disability discrimination in employment and housing.

(M) litigation and Administrative Advocacy in connection with any of the above matters, including will contests, contested capacity issues, elder abuse (including financial or consumer fraud), fiduciary administration, public benefits, nursing home torts, and discrimination.

(d) Continuing Legal Education—An applicant must earn no less than forty-five (45) hours of accredited continuing legal education (CLE) credits in elder law and related fields during the three full calendar years preceding application and the year of application, with not less than nine (9) credits earned in any of the three calendar years. Related fields shall include the following: estate planning and administration, trust law, health and long term care planning, public benefits, surrogate decision-making, older persons' legal capacity, social security disability, Medicaid/Medicare claims and taxation. No more than twenty-four (24) credits may be earned in the related fields of estate taxation or estate administration.

(e) Peer Review—An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina and have substantial practice or judicial experience in elder law or in a related field as set forth in Rule .2905(d). An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned directly to the specialty committee.

(f) Examination—An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of elder law to justify the representation of special competence to the legal profession and the public. The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee or by any ABA accred-

ited elder law certification organization with which the board contracts pursuant to Rule .1716(10) of this subchapter.

.2906 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2906(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2905(b) of this subchapter.

(b) Continuing Legal Education—The specialist must earn seventy-five (75) hours of accredited continuing legal education (CLE) credits in elder law or related fields during the five calendar years preceding application, with not less than ten (10) credits earned in any calendar year. Related fields shall include the following: estate planning and administration, trust law, health and long term care planning, public benefits, surrogate decision-making, older persons' legal capacity, social security disability, Medicaid/Medicare claims and taxation. No more than forty (40) credits may be earned in the related fields of estate taxation or estate administration.

(c) Peer Review—The specialist must comply with the requirements of Rule .2905(e) of this subchapter.

(d) Time for Application—Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2905 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2905 of this subchapter.

.2907 Applicability of Other Requirements

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

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 24, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of February, 2009.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 5th day of February, 2009.

s/Hudson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

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 October 24, 2008.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning paralegal certification, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0119 Standards for Certification of Paralegals

(a) . . .

(c) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) or (b), no individual may be certified as a paralegal if:

(1) . . .

(3) the individual has been convicted of a criminal act that reflects adversely on the individual's honesty, trustworthiness, or fitness as a paralegal, provided, however, the board may certify an applicant if, after consideration of mitigating factors, including remorse, reformation of character, and the passage of time, the board determines that the individual is honest, trustworthy, and fit to be a certified paralegal; or

(4) . . .

.0122 Right to Review and Appeal to Council

(a) . . .

(e) Failure of Written Examination. Within 30 days of the mailing of the notice from the board's executive director that an individual has failed the written examination, the individual may review his or her examination upon the condition that the individual will not take the examination again until such time as the entire con-

tent of the examination has been replaced. Review of the examination shall be at the office of the board at a time designated by the executive director. The individual shall be allowed not more than three hours for such review and shall not remove the examination from the board's office or make photocopies of any part of the examination.

(f) ~~(1)~~ Request for Review by the Board. . . .

~~(2) Regrading Subcommittee. Upon receipt of a request for review of a failed examination, the chair of the Certification Committee shall appoint a subcommittee consisting of at least three members of the Certification Committee. All information shall be submitted to the subcommittee in blind form by the staff. The subcommittee shall re-grade the entire examination and shall make a report and recommendation on whether to change the grade to passing to the panel appointed by the chair of the board to hear the review. The review shall thereafter follow the procedures set forth in paragraph (d) of this rule.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 24, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of February, 2009.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 5th day of February, 2009.

s/Hudson J.
For the Court

Order Adopting Supplemental Rules of Practice and Procedure For the North Carolina eFiling Pilot Project

Supplemental Rules for the North Carolina eFiling Pilot Project are hereby adopted as described below:

SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE NORTH CAROLINA eFILING PILOT PROJECT FOR CHOWAN AND DAVIDSON COUNTIES INITIALLY, AND THEN ALSO FOR WAKE COUNTY

Adopted May 26, 2009, *nunc pro tunc* May 15, 2009

RULE 1—INTRODUCTION

1.1—Citation to Rules. These rules shall be known as the "Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project," and may be cited as the "eFiling Rules." A particular rule may be cited as "eFiling Rule ——."

1.2—Authority and Effective Date. The eFiling Rules are promulgated by the Supreme Court of North Carolina pursuant to G.S. 7A-49.5. They are effective as of May 15, 2009.

1.3—Scope and Purpose. The eFiling Rules apply to civil superior court cases and to foreclosures under power of sale filed on or after the effective date in Chowan and Davidson Counties. Upon addition of Wake County to the pilot project by the North Carolina Administrative Office of the Courts (the "AOC"), these rules shall apply to civil superior court cases and to foreclosures under power of sale filed in Wake County on or after the effective date of the implementation of the pilot project in Wake County, and the public announcement thereof by AOC. In general, these rules initially allow, but do not mandate, electronic filing by North Carolina licensed attorneys of pleadings and other documents required to be filed with

the court by the North Carolina Rules of Civil Procedure (the "Rules of Civil Procedure") and permit electronic notification of the electronic filing of documents between attorneys. Initially, they do not permit electronic filing by *pro se* parties or attorneys not licensed by the State of North Carolina, and they do not permit electronic filing of documents in cases not initially filed electronically.

1.4—Integration with Other Rules. These rules supplement the Rules of Civil Procedure and the General Rules of Practice for Superior and District Courts (the "General Rules"). The filing and service of documents in accordance with the eFiling Rules is deemed to comply with the Rules of Civil Procedure and the General Rules. If a conflict exists between the eFiling Rules and the Rules of Civil Procedure or the General Rules, the eFiling Rules shall control.

RULE 2—DEFINITIONS

2.1—"Cloak" means the process by which portions of an original document within the court's document management system are obscured when viewed electronically by all non-court personnel other than parties to the case.

2.2—"Document" means data that may be filed electronically under the eFiling Rules.

2.3—"eFiler" means a holder who makes, or who attempts, under eFiling Rule 5, to make an electronic filing or who authorizes another person to make an electronic filing using the holder's electronic identity.

2.4—"Electronic Identity" means the combination of username and password issued to a person by the AOC under eFiling Rule 3.1.

2.5—"Holder" means a person with an AOC approved electronic identity.

RULE 3—ELECTRONIC IDENTITIES

3.1—Issuance. Upon application and upon completion of the training, if any, required by the AOC, the AOC shall issue an electronic identity to any attorney who

(a) is licensed to practice law in this state;

(b) has pending or intends to file or appear in a civil superior court case or a foreclosure under power of sale in a pilot county;

(c) designates a valid and operational email address; and

(d) provides all other information required by the AOC.

3.2—Scope of Electronic Identity. Electronic identities are not case specific.

3.3—Responsibility of Holder. Each holder is responsible for the confidentiality, security, and use of the holder's electronic identity. If an electronic identity becomes compromised, or any organization or affiliation change occurs, the holder shall immediately notify the AOC and request a change to the holder's user name, password or profile information as appropriate.

3.4—Effect of Use. Use of an electronic identity constitutes:

(a) an agreement by the holder to comply with the eFiling Rules;

(b) an appearance in the matter by the holder; and

(c) acknowledgement by the holder that the holder's designated email address is current.

3.5—Use by Others. If a holder authorizes another person to file using the holder's electronic identity, the holder retains full responsibility for any filing by the authorized person, and the filing has the same effect as use by the holder. An electronic filing by use of an electronic identity is deemed to have been made with the authorization of the holder unless the contrary is shown by the holder to the satisfaction of the trier of fact by clear and convincing evidence. A filing made by use of an electronic identity without authorization of the holder is void.

RULE 4—SIGNATURES AND AUTHENTICITY

4.1—Signatures. An electronically filed document requiring a signature is deemed to be signed by the eFiler pursuant to Rule 11 of the Rules of Civil Procedure, regardless of the existence of a handwritten signature on the paper, and must contain the name, postal address, e-mail address, and State Bar number of the eFiler, and the name of the eFiler preceded by the symbol "/s/" in the location at which a handwritten signature normally would appear. However, affidavits and exhibits to pleadings with the original handwritten signatures must be scanned and filed in Portable Document Format (PDF) or TIFF format.

4.2—Signature of Person(s) Other than eFiler. An eFiler who files a document signed by two or more persons representing different parties shall confirm that all persons signing the document have agreed to its content, represent to the court in the body of the document or in an accompanying affidavit that the agreement has been obtained, and insert in the location where each handwritten signature otherwise would appear the typed signature of each person,

other than the person filing, preceded by the symbol "/s/" and followed by the words "by permission." Thus, the correct format for the typed signature of a person other than the person filing is: "/s/ Jane Doe by permission." Unless required by these Rules, a document filed electronically should not be filed in an optically scanned format displaying an actual signature.

4.3—Authenticity. Documents filed electronically in accordance with the eFiling Rules and accurate printouts of such documents shall be deemed authentic.

4.4—Preservation of Originals. The eFiler shall retain originals of each filed document until a final determination of the case is made by a court of competent jurisdiction. The court may order the eFiler to produce the original document.

RULE 5—ELECTRONIC FILING AND SERVICE

5.1—Permissive Electronic Filing. Pending implementation of revised rules by the North Carolina Supreme Court, electronic filing by a licensed North Carolina attorney is permitted only to commence a proceeding or in a proceeding that was commenced electronically. Electronic filing is not required to commence a proceeding. Subsequent filings made in a proceeding commenced electronically may be electronic or non-electronic at the option of the filer.

5.2—Exceptions to Electronic Delivery. Pleadings required to be served under Rule 4 and subpoenas issued pursuant to Rule 45 of the Rules of Civil Procedure must be served as provided in those rules and not by use of the electronic filing and service system. Unless otherwise provided in a case management order or by stipulation, filing by or service upon a *pro se* party is governed by eFiling Rule 5.3.

5.3—*Pro se* Parties. A party not represented by counsel shall file, serve and receive documents pursuant to the Rules of Civil Procedure and the General Rules.

5.4—Format. Documents must be filed in PDF or TIFF format, or in some other format approved by the court, in black and white only, unless color is required to protect the evidentiary value of the document, and scanned at 300 dots per inch resolution.

5.5—Cover Sheet Not Required. Completion of the case initiation requirements of the electronic filing and service system, if it contains all the required fields and critical elements of the filing, shall constitute compliance with the General Rules as well as G.S. 7A-34.1, and no separate AOC cover sheet is required.

5.6—Payment of Filing Fees. Payment of any applicable filing and convenience fees must be done at the time of filing through the

electronic payment component of the electronic filing and service system. Payments shall not include service of process fees or any other fees payable to any entity other than the clerk of superior court.

5.7—Effectiveness of Filing. Transmission of a document to the electronic filing system in accordance with the eFiling Rules, together with the receipt by the eFiler of the automatically generated notice showing electronic receipt of the submission by the court, constitutes filing under the North Carolina General Statutes, the Rules of Civil Procedure, and the General Rules. An electronic filing is not deemed to be received by the court without receipt by the eFiler of such notice. If, upon review by the staff of the clerk of superior court, it appears that the filing is inaccessible or unreadable, or that prior approval is required for the filing under G.S. 1-110, or for any other authorized reason, the clerk's office shall send an electronic notice thereof to the eFiler. Upon review and acceptance of a completed filing, personnel in the clerk's office shall send an electronic notice thereof to the eFiler. If the filing is of a case initiating pleading, personnel in the clerk's office shall assign a case number to the filing and include that case number in said notice. As soon as reasonably possible thereafter, the clerk's office shall index or enter the relevant information into the court's civil case processing system (VCAP).

5.8—Certificate of Service. Pending implementation of the court's document management system, and the integration of the electronic filing and service system with the court's civil case processing system, a notice to the eFiler showing electronic receipt by the court of a filing does not constitute proof of service of a document upon any party. A certificate of service must be included with all documents, including those filed electronically, indicating thereon that service was or will be accomplished for applicable parties and indicating how service was or will be accomplished as to those parties.

5.9—Procedure When No Receipt Is Received. If a receipt with the status of "Received" is not received by the eFiler, the eFiler should assume the filing has not occurred. In that case, the eFiler shall make a paper filing with the clerk and serve the document on all other parties by the most reasonably expedient method of transmission available to the eFiler, except that pleadings required to be served under Rule 4 and subpoenas issued pursuant to Rule 45 of the Rules of Civil Procedure must be served as provided in those rules.

5.10—Retransmission of Filed Document. After implementation of the court's document management system, if, after filing a document electronically, a party discovers that the version of

the document available for viewing through the electronic filing and service system is incomplete, illegible, or otherwise does not conform to the document as transmitted when filed, the party shall notify the clerk immediately and, if necessary, transmit an amended document, together with an affidavit explaining the necessity for the transmission.

5.11—Determination of Filing Date and Time. Documents may be electronically filed 24 hours a day, except when the system is down for maintenance, file saves or other causes. For the purpose of determining the timeliness of a filing received pursuant to Rule 5.7, the filing is deemed to have occurred at the date and time recorded on the receipt showing a status of "Received."

5.12.—Issuance of Summons. At case initiation, the eFiler shall include in the filing one or more summons to be issued by the clerk. Upon the electronic filing of a counterclaim, crossclaim, or third-party complaint, the eFiler may include in the filing one or more summons to be issued by the clerk. Pursuant to Rule 4 of the Rules of Civil Procedure, the clerk shall sign and issue those summons and scan them into the electronic filing and service system. The eFiler shall print copies of the filed pleading and summons to be used for service of process. Copies of documents to be served, any summons, and all fees associated with service shall be delivered by the eFiler to the process server. Documents filed subsequent to the initial pleading shall contain a certificate of service as provided in Rule 5.8.

RULE 6—SEALED DOCUMENTS AND PRIVATE INFORMATION

6.1—Filing of Sealed Documents. A motion to file a document under seal may be filed electronically or in paper form and designated "Motion to Seal." A document which is the subject of a motion to seal must be submitted to the court in paper form for *in camera* review. Documents submitted under seal in paper form shall be retained by the clerk under seal until a final ruling is made on the motion to seal. The court may partially grant the motion and order the submission of a redacted version to be made a part of the record. If the court authorizes the filing of a redacted version, the filer shall perform the redaction authorized by the court, and re-file the redacted version in paper form. A paper copy of any order authorizing the filing of a document under seal or the filing of a redacted document must be attached to the document and delivered to the clerk's office. Upon implementation of the court's document management system, documents for which a motion to seal was denied, documents unsealed by order of the court, and redacted versions ordered filed by the court shall be scanned into the electronic filing and service system by personnel in

the clerk's office as soon as reasonably possible. Sealed documents and original versions of documents later ordered filed in redacted form shall be retained in paper form under seal pending further orders of the court.

6.2—Requests by a Party for Sealing of Previously Filed Documents. Any attorney licensed in North Carolina and representing a party may file, electronically or in paper form, a motion to seal all or part of any previously filed document, regardless of who previously filed that document. A party not represented by counsel may file such a motion in paper form only. The court may partially grant the motion and order the movant to submit a redacted version to be made a part of the record. A paper copy of any order authorizing the filing of a redacted replacement document must be attached to the redacted version and delivered to the clerk's office. As soon as practicable after receiving the order sealing a previously filed document or replacing it with a newly filed redacted version, the clerk shall print, seal and retain the original document in paper form pending further orders of the court, and, when so ordered, remove and replace the original document in the electronic filing and service system with the redacted version.

6.3—Private Information. Except where otherwise expressly required by law, filers must comply with G.S. 132-1.10(d) to exclude or partially describe sensitive, personal or identifying information such as any social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords from documents filed with the court. In addition, minors may be identified by initials, and, unless otherwise required by law, social security numbers may be identified by the last four numbers. It is the sole responsibility of the filer to omit or redact non-public and unneeded sensitive information within a document. The clerk of superior court will not review any document to determine whether it includes personal information.

6.4—Requests for Redaction or Removal of a Document by a Non-party. Any person not a party to a proceeding has the right to request the removal or redaction of all or part of a document previously filed and available on-line for public viewing in the electronic filing and service system, if the document contains sensitive, personal or identifying information about the requester, by filing a request in compliance with G.S. 132-1.10(f). As soon as practicable after the receipt of such a request, the clerk shall (1) prepare a redacted version of the electronic document removing the identifying information identified by the requester, or (2) otherwise cloak the affected portions of the document in the electronic filing and service system, so

that the designated portions of the document are not viewable by the public on-line. The request for redaction or removal is not a public record and access thereto is restricted to the clerk of superior court or the clerk's staff, or upon order of the court. The original unredacted or uncloaked electronic version of the document shall remain available to parties to the proceeding.

RULE 7—COMMUNICATION OF MATERIAL NOT FILED

7.1—Communication with Court. A communication with the court that is not filed electronically must be simultaneously sent by the author to all attorneys for parties in the case. If a party is not represented by counsel, or if an attorney cannot receive e-mail, the communication shall be sent to such party or attorney by the most reasonably expedient method available to the sending party. The communication to other parties shall contain an indication, such as "cc via e-mail," indicating the method of transmission.

7.2—Discovery. Discovery and other materials required to be served on other counsel or a party, and not required to be filed with the court, shall not be electronically filed with the court**.**

RULE 8—GOOD FAITH EFFORTS

Parties shall endeavor reasonably, and in good faith, to resolve technical incompatibilities or other obstacles to electronic communications among them, provided that no extensive manual reformatting of documents is required. If a party asserts that it did not receive an e-mail communication or could not fully access its contents, the sending party shall promptly forward the communication to the party by other means. Any attempt or effort to avoid, compromise or alter any security element of the electronic filing and service system is strictly prohibited and may subject the offending party to civil and criminal liability. Any person becoming aware of evidence of such an occurrence shall immediately notify the court.

RULE 9—ORDERS, DECREES AND JUDGMENTS

9.1—Proposed Order or Judgment. Any proposed order or judgment shall be tendered to the court in paper form or as an electronic filing in Microsoft Office Word 2000 format or other file format approved by the court.

9.2—Entry of Order, Judgment and Other Matters. Upon implementation of the document management component of the electronic filing and service system, a judge, or the clerk of superior court when acting as the trier of fact, may file electronically all orders, decrees, judgments and other docket matters. Such filing shall con-

stitute entry of the order, decree, judgment or other matter pursuant to Rule 58 of the Rules of Civil Procedure. Each order, judgment, or decree must bear the date and the name of the judge or clerk issuing the order. Signed orders, decrees and judgments in paper form shall be forwarded as soon as reasonably possible by the judge to the clerk of superior court, and shall be deemed entered under Rule 58 of the Rules of Civil Procedure when filed with the clerk. As soon as reasonably possible, personnel in the clerk's office shall scan the document into the electronic filing and service system.

9.3—Notice of Entry. After implementation of the court's document management system and the integration of the electronic filing and service system with the court's civil case processing system, immediately upon the electronic entry of an order, decree, judgment or other matter, the electronic filing and service system shall broadcast a notification of electronic filing to all persons registered electronically to participate in the case. Transmission of the notice of entry constitutes service pursuant to Rule 58 of the Rules of Civil Procedure.

These Supplemental Rules for the North Carolina eFiling Pilot Project shall be effective on the 15th day of May, 2009.

Adopted by the Court in Conference this 26th day of May, 2009, *nunc pro tunc* 15 May 2009. These rules shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These rules shall also be published as quickly as practicable on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Hudson, J.
For the Court

ORDER ADOPTING THE 2009 NORTH CAROLINA RULES OF APPELLATE PROCEDURE

These rules are promulgated by the Court under the rule-making authority conferred by Article IV, Section 13(2) of the Constitution of North Carolina. They shall be effective with respect to all appeals taken from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give. As to such appeals, these rules supersede the North Carolina Rules of Appellate Procedure, 287 N.C. 672 (1975), as amended. These rules shall be effective on the 1st day of October, 2009, and shall apply to all cases appealed on or after that date.

Appendixes, as revised, are published with the rules for their possible helpfulness to the profession. Although authorized to be published for this purpose, they are not an authoritative source on parity with the rules.

Adopted by the Court in Conference this 2nd day of July, 2009. These rules shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals and shall be published as quickly as practicable on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Hudson, J.
For the Court

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Adopted 13 June 1975, with amendments received through 2 July 2009.

These rules are promulgated by the Court under the rule-making authority conferred by Article IV, Section 13(2) of the Constitution of North Carolina. They shall be effective with respect to all appeals taken from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give. As to such appeals, these rules supersede the North Carolina Rules of Appellate Procedure, 287 N.C. 672 (1975), as amended. These rules shall be effective on the 1st day of October, 2009, and shall apply to all cases appealed on or after that date.

Appendixes, as revised, are published with the rules for their possible helpfulness to the profession. Although authorized to be published for this purpose, they are not an authoritative source on parity with the rules.

Article I

Applicability of Rules

Article II

Appeals from Judgments and Orders of Superior Courts and District Courts

Article III
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NORTH CAROLINA RULES OF APPELLATE PROCEDURE

ARTICLE I
APPLICABILITY OF RULES

RULE 1
TITLE; SCOPE OF RULES; TRIAL TRIBUNAL DEFINED

(a) *Title.* The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "N.C. R. App. P. ___," is also appropriate.

(b) *Scope of Rules.* These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applica-

tions to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(c) *Rules Do Not Affect Jurisdiction.* These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(d) *Definition of Trial Tribunal.* As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—1(a), (c)—effective 1 February 1985.
Reenacted and
Amended: 2 July 2009—added 1(a) and renumbered remaining subsections—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 2
SUSPENSION OF RULES

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Reenacted: 2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

ARTICLE II

APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

RULE 3
APPEAL IN CIVIL CASES—HOW AND WHEN TAKEN

(a) *Filing the Notice of Appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing

notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

(b) *Special Provisions.* Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and appellate rules sections noted:

(1) Juvenile matters pursuant to N.C.G.S. § 7B-2602; the identity of persons under the age of eighteen at the time of the proceedings in the trial division shall be protected pursuant to Rule 3.1(b).

(2) Appeals pursuant to N.C.G.S. § 7B-1001 shall be subject to the provisions of Rule 3.1.

(c) *Time for Taking Appeal.* In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

In computing the time for filing a notice of appeal, the provision for additional time after service by mail in Rule 27(b) of these rules and Rule 6(e) of the N.C. Rules of Civil Procedure shall not apply.

If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within ten days after the first notice of appeal was served on such party.

(d) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subsection (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or par-

ties taking the appeal, or by any such party not represented by counsel of record.

(e) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 14 April 1976;
8 December 1988—3(a), (b), (c), (d)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—3(b)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
28 July 1994—3(c)—1 October 1994;
6 March 1997—3(c)—effective upon adoption 6 March 1997;
18 October 2001—3(c)—effective 31 October 2001;
1 May 2003—3(b)(1), (2);
6 May 2004—3(b)—effective 12 May 2004;
27 April 2006—3(b)—effective 1 May 2006 and applies to all cases appealed on or after that date.
Reenacted and
Amended: 2 July 2009—amended 3(b)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 3.1
APPEAL IN QUALIFYING JUVENILE CASES—HOW AND WHEN TAKEN; SPECIAL RULES

(a) *Filing the Notice of Appeal.* Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to N.C.G.S. § 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) *Protecting the Identity of Juveniles.* For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which this rule applies, the identity of involved persons under the age of eighteen at the time of the proceedings in the trial division (covered juveniles) shall be referenced only by the use of initials or pseudonyms in briefs, petitions, and all other filings, and shall be similarly redacted from all documents, exhibits, appendixes, or arguments submitted with such filings. If the parties desire to use pseudonyms, they shall stipulate in the record on appeal to the pseudonym to be used for each covered juvenile. Courts of the appellate division are not bound by the stipulation, and case captions will utilize initials. Further, the addresses and social security numbers of all covered juveniles shall be excluded from all filings and documents, exhibits, appendixes, and arguments. In cases subject to this rule, the first document filed in the appellate courts and the record on appeal shall contain the notice required by Rule 9(a).

The substitution and redaction requirements of this rule shall not apply to settled records on appeal; supplements filed pursuant to Rule 11(c); objections, amendments, or proposed alternative records on appeal submitted pursuant to Rule 3.1(c)(2); and any verbatim transcripts submitted pursuant to Rule 9(c). Pleadings and filings not subject to substitution and redaction requirements shall include the following notice on the first page of the document immediately underneath the title and in uppercase typeface: FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.

Filings in cases governed by this rule that are not subject to substitution and redaction requirements will not be published on the Court's electronic filing site and will be available to the public only with the permission of a court of the appellate division. In addition, the juvenile's address and social security number shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c).

(c) *Expediting Filings.* Appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) *Transcripts.* Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names

of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcriptionist to the case.

When there is an order establishing the indigency of the appellant, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within thirty-five days from the date of assignment.

When there is no order establishing the indigency of the appellant, the appellant shall have ten days from the date that the transcriptionist is assigned to make written arrangements with the assigned transcriptionist for the production and delivery of the transcript of the designated proceedings. If such written arrangement is made, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within forty-five days from the date of assignment. The non-indigent appellant shall bear the cost of the appellant's copy of the transcript.

When there is no order establishing the indigency of the appellee, the appellee shall bear the cost of receiving a copy of the requested transcript.

Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) *Record on Appeal.* Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties:

1. a notice of approval of the proposed record;
2. specific objections or amendments to the proposed record on appeal, or
3. a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal

and the parties cannot agree to the settled record within thirty days after receipt of the transcript, each party shall file three legible copies of the following documents in the office of the clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement:

1. the appellant shall file his or her proposed record on appeal, and
2. an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the clerk of the Court of Appeals as provided herein.

(3) *Briefs.* Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the clerk of the Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(d) *No-Merit Briefs.* In an appeal taken pursuant to N.C.G.S. § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues

lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel shall also advise the appellant in writing that the appellant has the option of filing a *pro se* brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

(e) *Calendaring Priority.* Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

ADMINISTRATIVE HISTORY

Adopted: 28 April 2006—effective 1 May 2006 and applies to all cases appealed on or after that date.
Amended: 11 June 2008—3A(b)(1)—effective 1 December 2008;
Recodified former Rule 3A as Rule 3.1 and
Reenacted Rule 3.1 as amended: 2 July 2009—rewrote 3.1(b); renumbered subsections (c) & (e); amended 3.1(c)(1) & (2); added 3.1(d)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 4
APPEAL IN CRIMINAL CASES—HOW AND WHEN TAKEN

(a) *Manner and Time.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order or within fourteen days after a ruling on a motion for appropriate relief made during the fourteen day period following entry of the judgment or order. Appeals from district court to superior court are governed by N.C.G.S. §§ 15A-1431 and -1432.

(b) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or

order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26.

(d) *To Which Appellate Court Addressed.* An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

(e) *Protecting the Identity of Juvenile Victims of Sexual Offenses.* For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which this rule applies, the identities of all victims of sexual offenses the trial court record shows were under the age of eighteen when the trial division proceedings occurred, including documents or other materials concerning delinquency proceedings in district court, shall be protected pursuant to Rule 3.1(b).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 4 October 1978—4(a)(2)—effective 1 January 1979; 13 July 1982—4(d);

3 September 1987—4(d)—effective for all judgments of the superior court entered on or after 24 July 1987;

8 December 1988—4(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;

8 June 1989—4(a)—8 December 1988 amendment rescinded prior to effective date;

18 October 2001—4(a)(2), (d) (subsection (d) amended to conform with N.C.G.S. § 7A-27)—effective 31 October 2001;

1 May 2003—4(a)(2).

Reenacted and Amended: 2 July 2009—added 4(e)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 5
JOINDER OF PARTIES ON APPEAL

(a) *Appellants.* If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, or in a criminal case they may give a joint oral notice of appeal.

(b) *Appellees.* Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) *Procedure after Joinder.* After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Reenacted and Amended:	2 July 2009—amended 5(a)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 6
SECURITY FOR COSTS ON APPEAL

(a) *In Regular Course.* Except in pauper appeals, an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of N.C.G.S. §§ 1-285 and -286.

(b) *In Forma Pauperis Appeals.* A party in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of N.C.G.S. § 1-288.

(c) *Filed with Record on Appeal.* When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a cash deposit made in lieu of bond.

(d) *Dismissal for Failure to File or Defect in Security.* For failure of the appellant to provide security as required by subsection (a) or to file evidence thereof as required by subsection (c), or for a sub-

stantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within ten days after service of the motion upon appellant or before the case is called for argument, whichever first occurs.

(e) *No Security for Costs in Criminal Appeals.* Pursuant to N.C.G.S. § 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 November 1984—6(e)—effective 1 February 1985; 26 July 1990—6(c)—effective 1 October 1990.
Reenacted and Amended:	2 July 2009—amended 6(b)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 7
PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) *Ordering the Transcript.*

(1) *Civil Cases.* Within fourteen days after filing the notice of appeal the appellant shall contract for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to prepare the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript contract with the clerk of the trial

tribunal, and serve a copy of it upon all other parties of record and upon the person designated to prepare the transcript. If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall cite in the record on appeal the volume number, page number, and line number of all evidence relevant to such finding or conclusion. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within fourteen days after the service of the written documentation of the appellant, shall contract for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed and the name and address of the court reporter or other neutral person designated to prepare the transcript.

In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2).

(2) *Criminal Cases.* In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall contract for the transcription of the proceedings as in civil cases.

When there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to prepare the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the name, address, telephone number and e-mail address of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.

(b) *Production and Delivery of Transcript.*

(1) *Production.* In civil cases: from the date the requesting party serves the written documentation of the transcript contract on the person designated to prepare the transcript, that person shall have sixty days to prepare and electronically deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript contract upon the person designated to prepare the transcript, that person shall have sixty days to produce and electronically deliver the transcript in non-capital cases and one hundred twenty days to produce and electronically deliver the transcript in capitally tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date listed on the appeal entries as the "Date order delivered to transcriptionist," that person shall have sixty-five days to produce and electronically deliver the transcript in non-capital cases and one hundred twenty-five days to produce and electronically deliver the transcript in capitally tried cases.

The transcript format shall comply with Appendix B of these rules.

Except in capitally tried criminal cases which result in the imposition of a sentence of death, the trial tribunal, in its discretion and for good cause shown by the appellant, may extend the time to produce the transcript for an additional thirty days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally tried cases resulting in the imposition of a sentence of death shall be made directly to the Supreme Court by the appellant.

(2) *Delivery.* The court reporter, or person designated to prepare the transcript, shall electronically deliver the completed transcript, with accompanying PDF disk to the parties including the district attorney and Attorney General of North Carolina in criminal cases, as ordered,

within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the transcript has been so delivered and shall send a copy of such certification to the appellate court to which the appeal is taken. The appellant shall promptly notify the court reporter when the record on appeal has been filed. Once the court reporter, or person designated to prepare the transcript, has been notified by the appellant that the record on appeal has been filed with the appellate court to which the appeal has been taken, the court reporter must electronically file the transcript with that court using the docket number assigned by that court.

(3) *Neutral Transcriptionist.* The neutral person designated to prepare the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
REPEALED:	1 July 1978. (See note following Rule 17.)
Re-adopted:	8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.
Amended:	8 June 1989—effective for all judgments of the trial tribunal entered on or after 1 July 1989; 26 July 1990—7(a)(1), (a)(2), and (b)(1)—effective 1 October 1990; 21 November 1997—effective 1 February 1998; 8 April 1999—7(b)(1), para. 5; 18 October 2001—7(b)(1), para. 4—effective 31 October 2001; 15 August 2002—7(a)(1), para. 2; 25 January 2007—7(b)(1), paras. 3, 5; 7(b)(2)—effective 1 March 2007 and applies to all cases appealed on or after that date.
Reenacted and Amended:	2 July 2009—amended 7(a)(1) & (2), 7(b)(1) & (2)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 8
STAY PENDING APPEAL

(a) *Stay in Civil Cases.* When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a temporary stay and a writ of supersedeas in accordance with Rule 23. In any appeal which is allowed by law to be taken from an agency to the appellate division, application for the temporary stay and writ of supersedeas may be made to the appellate court in the first instance. Application for the temporary stay and writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

(b) *Stay in Criminal Cases.* When a defendant has given notice of appeal, those portions of criminal sentences which impose fines or costs are automatically stayed pursuant to the provisions of N.C.G.S. § 15A-1451. Stays of imprisonment or of the execution of death sentences must be pursued under N.C.G.S. § 15A-536 or Rule 23.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 November 1984—8(b)—effective 1 February 1985; 6 March 1997—8(a)—effective 1 July 1997.
Reenacted and Amended:	2 July 2009—amended 8(a)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 9
THE RECORD ON APPEAL

(a) *Function; Notice in Cases Involving Juveniles; Composition of Record.* In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9. Parties may cite any of these items in their briefs and arguments before the appellate courts.

All filings involving juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) shall include the following notice in uppercase typeface:

FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.

(1) *Composition of the Record in Civil Actions and Special Proceedings.* The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pretrial order on which the case or any part thereof was tried;

e. so much of the litigation, set out in the form provided in Rule 9(c)(l), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the

record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (c)(3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

k. proposed issues on appeal set out in the manner provided in Rule 10;

l. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

n. any order (issued prior to the filing of the record on appeal) ruling upon a motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(2) *Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies*. The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing, or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all issues presented on appeal;

f. so much of the litigation in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

g. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

h. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (c)(3);

i. proposed issues on appeal relating to the actions of the superior court, set out in the manner provided in Rule 10; and

j. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(3) *Composition of the Record in Criminal Actions*. The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the litigation, set out in the form provided in Rule 9(c)(l), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

j. proposed issues on appeal set out in the manner provided in Rule 10;

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

m. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(4) *Exclusion of Social Security Numbers from Record on Appeal.* Social security numbers shall be deleted or redacted from any document before including the document in the record on appeal.

(b) *Form of Record; Amendments*. The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) *Order of Arrangement.* The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) *Inclusion of Unnecessary Matter; Penalty*. It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the issues presented on appeal, such as social security numbers referred to in Rule 9(a)(4). The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) *Filing Dates and Signatures on Papers.* Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) *Pagination; Counsel Identified.* The pages of the printed record on appeal shall be numbered consecutively, be referred to as "record pages," and be cited as "(R p ___)."

Pages of the Rule 11(c) or Rule 18(d)(3) supplement to the record on appeal shall be numbered consecutively with the pages of the record on appeal, the first page of the record supplement to bear the next consecutive number following the number of the last page of the printed record on appeal. These pages shall be referred to as "record supplement pages" and be cited as "(R S p ___)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and be cited as "(T p ___)." At the end of the record on appeal shall appear the names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel of record for all parties to the appeal.

(5) *Additions and Amendments to Record on Appeal.*

(a) *Additional Materials in the Record on Appeal.* If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief or the issues presented in an appellee's brief pursuant to Rule 10(c), the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9. The responding party shall serve a copy of those items on opposing counsel and shall file three copies of the items in a volume captioned "Rule 9(b)(5) Supplement to the Printed Record on Appeal." The supplement shall be filed no later than the responsive brief or within the time allowed for filing such a brief if none is filed.

(b) *Motions Pertaining to Additions to the Record.* On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be filed by any party in the trial court.

(c) *Presentation of Testimonial Evidence and Other Proceedings.* Testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings necessary to be presented for review by the appellate court may be

included either in the record on appeal in the form specified in Rule 9(c)(l) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). When an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal. Verbatim transcripts or narration utilized in a case subject to Rules 3(b)(1), 3.1(b), or 4(e) initiated in the trial division under the provisions of Subchapter I of Chapter 7B of the General Statutes shall be prepared and delivered to the office of the clerk of the appellate court to which the appeal has been taken in the manner specified by said rules.

(1) *When Testimonial Evidence, Voir Dire, Statements and Events at Evidentiary and Non-Evidentiary Hearings, and Other Trial Proceedings Narrated—How Set Out in Record.* When an issue is presented on appeal with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the record on appeal shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Parties shall use that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. Parties may object to particular narration on the basis that it does not accurately reflect the true sense of testimony received, statements made, or events that occurred; or to particular questions and answers on the basis that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, the judge or referee shall settle the form in the course of settling the record on appeal.

(2) *Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.* Appellant may designate in the record on appeal that the testimonial evidence will be presented in the verbatim transcript of the evidence of the trial tribunal in lieu of narrating the evidence and other trial proceedings as permitted by Rule 9(c)(1).

When a verbatim transcript of those proceedings has been made, appellant may also designate that the verbatim transcript will be used to present voir dire, statements and events at evidentiary and non-evidentiary hearings, or other trial proceedings when those proceedings are the basis for one or more issues presented on appeal. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript that has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all issues presented on appeal. When appellant has narrated the evidence and other trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) *Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.* Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled record on appeal and transcript to be filed pursuant to Rule 7 with the clerk of the appellate court in which the appeal has been docketed;

c. in criminal appeals, upon settlement of the record on appeal, the district attorney shall notify the Attorney General of North Carolina that the record on appeal and transcript have been settled; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) *Presentation of Discovery Materials.* Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances in which discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be

treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to issues presented on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(5) *Electronic Recordings*. When a narrative or transcript has been prepared from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

(d) *Models, Diagrams, and Exhibits of Material.*

(1) *Exhibits*. Maps, plats, diagrams, and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. When such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal. Social security numbers shall be deleted or redacted from exhibits prior to filing the exhibits in the appellate court.

(2) *Transmitting Exhibits*. Three legible copies of each documentary exhibit offered in evidence and required for understanding issues presented on appeal shall be filed in the appellate court; the original documentary exhibit need not be filed with the appellate court.

(3) *Removal of Exhibits from Appellate Court.* All models, diagrams, and exhibits of material placed in the custody of the clerk of the appellate court must be taken away by the parties within ninety days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the clerk. When this is not done, the clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to the clerk may seem best.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;
12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;
27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—9(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—9(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—9(a)(3)(h), 9(d)(2)—effective 1 October 1990;
6 March 1997—9(b)(5)—effective upon adoption 6 March 1997;
21 November 1997—9(a)(1)(j)-(l), 9(a)(3)(i)-(k), 9(c)(5)—effective 1 February 1998;
18 October 2001—9(d)(2)—effective 31 October 2001;
6 May 2004—9(a), 9(a)(4), 9(b)(2), 9(b)(6), 9(c), 9(c)(2), 9(c)(3)(c), 9(d)(1), 9(d)(3)—effective 12 May 2004;
25 January 2007—added 9(a)(1)(m) & 9(a)(3)(*l*); amended 9(b)(4)—effective 1 March 2007 and applies to all cases appealed on or after that date.

Reenacted and Amended: 2 July 2009—amended and rewrote portions of 9(a), (b), (c), & (d)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 10
PRESERVATION OF ISSUES AT TRIAL; PROPOSED ISSUES ON APPEAL

(a) *Preserving Issues During Trial Proceedings.*

(1) *General.* In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the con-

text. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

(2) *Jury Instructions*. A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) *Sufficiency of the Evidence*. In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action, or for judgment as in case of nonsuit, is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(4) *Plain Error.* In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

(b) *Appellant's Proposed Issues on Appeal*. Proposed issues that the appellant intends to present on appeal shall be stated without argument at the conclusion of the record on appeal in a numbered list. Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief.

(c) *Appellee's Proposed Issues on Appeal as to an Alternative Basis in Law*. Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief.

Portions of the record or transcript of proceedings necessary to an understanding of such proposed issues on appeal as to an alternative basis in law may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 10 June 1981—10(b)(2), applicable to every case the trial of which begins on or after 1 October 1981;
7 July 1983—10(b)(3);
27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;

8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

Reenacted and Amended: 2 July 2009—changed title of rule; deleted former 10(a); renumbered and amended remaining subsections as (a)—(c)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 11
SETTLING THE RECORD ON APPEAL

(a) *By Agreement.* This rule applies to all cases except those subject to expedited schedules in Rule 3.1.

Within thirty-five days after the reporter or transcriptionist certifies delivery of the transcript, if such was ordered (seventy days in capitally tried cases), or thirty-five days after appellant files notice of appeal, whichever is later, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within thirty days (thirty-five days in capitally tried cases) after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) *By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.* Within thirty days (thirty-five days in capitally tried cases) after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of

an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it are the responsibility of the appellant.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in three copies of a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9(d); provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record,

the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to Rule 9(c) or 9(d) were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than fifteen days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

Provided that, nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) *Multiple Appellants; Single Record on Appeal.* When there are multiple appellants (two or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal. The proposed issues on appeal of the several appellants shall be set out separately in the single record on appeal and attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) *Extensions of Time.* The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 November 1984—11(a), (c), (e), (f)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985.
	8 December 1988—11(a), (b), (c), (e), (f)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
	26 July 1990—11(b), (c), (d)—effective 1 October 1990;
	6 March 1997—11(c)—effective upon adoption 6 March 1997;
	21 November 1997—11(a)—effective 1 February 1998;
	6 May 2004—11(b), (c), (d)—effective 12 May 2004;
	25 January 2007—11(c), paras. 1, 2, 5, 6; added paras. 3, 4, 8—effective 1 March 2007 and applies to all cases appealed on or after that date.
Reenacted and Amended:	2 July 2009—amended 11(a) & (d); added 11(e)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 12
FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF THE RECORD

(a) *Time for Filing Record on Appeal.* Within fifteen days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) *Docketing the Appeal.* At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to N.C.G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in N.C.G.S. §§ 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) *Copies of Record on Appeal.* The appellant shall file one copy of the record on appeal, three copies of each exhibit designated pursuant to Rule 9(d), three copies of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3) and shall cause the transcript to be filed electronically pursuant to Rule 7. The clerk will reproduce and distribute copies as directed by the court, billing the parties pursuant to these rules.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985; 8 December 1988—12(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989; 6 March 1997—12(c)—effective upon adoption 6 March 1997; 1 May 2003—12(c); 25 January 2007—12(a), (c)—effective 1 March 2007 and applies to all cases appealed on or after that date.
Reenacted and Amended:	2 July 2009—amended 12(c)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 13
FILING AND SERVICE OF BRIEFS

(a) *Time for Filing and Service of Briefs.*

(1) *Cases Other Than Death Penalty Cases.* Within thirty days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file a brief in the office of the clerk of the appellate court and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore, the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief. Within thirty days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of a brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.

(2) *Death Penalty Cases.* Within sixty days after the clerk of the Supreme Court has mailed the printed record to the parties, the appellant in a criminal appeal which includes a sentence of death shall file a brief in the office of the clerk and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore, the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief. Within sixty days after appellant's brief has been served, the appellee shall similarly file and serve copies of a brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule, except that reply briefs filed pursuant to Rule 28(h)(2) or (h)(3) shall be filed and served within twenty-one days after service of the appellee's brief.

(b) *Copies Reproduced by Clerk.* A party need file but a single copy of a brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

(c) *Consequence of Failure to File and Serve Briefs.* If an appellant fails to file and serve a brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve its brief within the time

allowed, the appellee may not be heard in oral argument except by permission of the court.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	7 October 1980—13(a)—effective 1 January 1981; 27 November 1984—13(a), (b)—effective 1 February 1985; 30 June 1988—13(a)—effective 1 September 1988; 8 June 1989—13(a)—effective 1 September 1989; 1 May 2003—13(a)(1), (b); 23 August 2005—13(a)(1), (2)—effective 1 September 2005.
Reenacted and Amended:	2 July 2009—amended 13(a)(1) & (2)—effective 1 October 2009 and applies to all cases appealed on or after that date.

ARTICLE III

REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

RULE 14
APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER N.C.G.S. § 7A-30

(a) *Notice of Appeal; Filing and Service.* Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the clerk of the Court of Appeals and with the clerk of the Supreme Court and serving notice of appeal upon all other parties within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chair of the Industrial Commission. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days after the first notice

of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) *Content of Notice of Appeal.*

(1) *Appeal Based Upon Dissent in Court of Appeals.* In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under N.C.G.S. § 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) *Appeal Presenting Constitutional Question.* In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) *Record on Appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Transmission; Docketing; Copies.* Upon the filing of a notice of appeal, the clerk of the Court of Appeals will forthwith transmit the original record on appeal to the clerk of the Supreme Court, who shall thereupon file the

record and docket the appeal. The clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction.

(d) *Briefs.*

(1) *Filing and Service; Copies.* Within thirty days after filing notice of appeal in the Supreme Court, the appellant shall file with the clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those issues upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within thirty days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within thirty days after service of the appellant's brief upon appellee, the appellee shall similarly file and serve copies of a new brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.

The parties need file but single copies of their respective briefs. The clerk will reproduce and distribute copies as directed by the Court, billing the parties pursuant to these rules.

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

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 31 January 1977—14(d)(1);
7 October 1980—14(d)(1)—effective 1 January 1981;

27 November 1984—14(a), (b), (d)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
30 June 1988—14(b)(2), (d)(1)—effective 1 September 1988;
8 June 1989—14(d)(1)—effective 1 September 1989;
6 March 1997—14(a)—effective 1 July 1997;
1 May 2003—14(c)(2), (d)(1);
23 August 2005—14(d)(1)—effective 1 September 2005.

Reenacted and Amended: 2 July 2009—amended 14(d)(1) & (2)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 15
DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER N.C.G.S. § 7A-31

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

(b) *Same; Filing and Service.* A petition for review prior to determination by the Court of Appeals shall be filed with the clerk of the Supreme Court and served on all other parties within fifteen days after the appeal is docketed in the Court of Appeals. For cases that arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following

determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within ten days after the first petition for review was filed.

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

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

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

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

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

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

upon entry of an order of certification by the clerk of the Supreme Court.

(f) *Record on Appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

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

(g) *Filing and Service of Briefs.*

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

(2) *Cases Certified for Review of Court of Appeals Determinations.* When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within thirty days after the case is docketed in the Supreme Court by entry

of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within thirty days after a copy of appellant's brief is served upon the appellee. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.

(3) *Copies.* A party need file, or the clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The clerk of the Supreme Court will thereupon procure from the Court of Appeals or will reproduce copies for distribution as directed by the Supreme Court. The clerk may require a deposit by any party to cover the costs of reproducing copies of its brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing its original new brief shall also deliver to the clerk two legible copies thereof.

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

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

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

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

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or

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

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	7 October 1980—15(g)(2)—effective 1 January 1981; 18 November 1981—15(a). 30 June 1988—15(a), (c), (d), (g)(2)—effective 1 September 1988; 8 December 1988—15(i)(2)—effective 1 January 1989; 8 June 1989—15(g)(2)—effective 1 September 1989; 6 March 1997—15(b)—effective 1 July 1997; 18 October 2001—15(d)—effective 31 October 2001; 23 August 2005—15(g)(2)—effective 1 September 2005.
Reenacted and Amended:	2 July 2009—amended 15(c) & (d)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 16
SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS

(a) *How Determined.* Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except when the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the issues stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

(b) *Scope of Review in Appeal Based Solely Upon Dissent.* When the sole ground of the appeal of right is the existence of a dis-

sent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other issues in the case may properly be presented to the Supreme Court through a petition for discretionary review pursuant to Rule 15, or by petition for writ of certiorari pursuant to Rule 21.

(c) *Appellant, Appellee Defined.* As used in this Rule 16, the terms "appellant" and "appellee" have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, "appellant" means the petitioner and "appellee" means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, "appellant" means the party aggrieved by the decision of the Court of Appeals and "appellee" means the opposing party; provided that, in its order of certification, the Supreme Court may designate either party an "appellant" or "appellee" for purposes of proceeding under this Rule 16.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	3 November 1983—16(a), (b)—applicable to all notices of appeal filed in the Supreme Court on and after 1 January 1984. 30 June 1988—16(a), (b)—effective 1 September 1988; 26 July 1990—16(a)—effective 1 October 1990.
Reenacted and Amended:	2 July 2009—amended 16(a) & (b)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 17
APPEAL BOND IN APPEALS UNDER N.C.G.S. §§ 7A-30, 7A-31

(a) *Appeal of Right.* In all appeals of right from the Court of Appeals to the Supreme Court in civil cases, the party who takes appeal shall, upon filing the notice of appeal in the Supreme Court, file with the clerk of that Court a written undertaking, with good and

sufficient surety in the sum of $250, or deposit cash in lieu thereof, to the effect that all costs awarded against the appealing party on the appeal will be paid.

(b) *Discretionary Review of Court of Appeals Determination.* When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subsection (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) *Discretionary Review by Supreme Court Before Court of Appeals Determination.* When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) *Appeals in Forma Pauperis.* No undertakings for costs are required of a party appealing in forma pauperis.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	19 June 1978—effective 1 July 1978; 26 July 1990—17(a)—effective 1 October 1990.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

ARTICLE IV

DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO APPELLATE DIVISION

RULE 18
TAKING APPEAL; RECORD ON APPEAL—COMPOSITION AND SETTLEMENT

(a) *General.* Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under N.C.G.S. § 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as provided in this Article.

(b) *Time and Method for Taking Appeals.*

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within thirty days after receipt of a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made by the agency as part of the process leading up to the final agency determination, the appealing party may contract with the reporter for production of such parts of the proceedings not already on file as it deems necessary, pursuant to the procedures prescribed in Rule 7.

(c) *Composition of Record on Appeal.* The record on appeal in appeals from any agency shall contain:

(1) an index of the contents of the record on appeal, which shall appear as the first page thereof;

(2) a statement identifying the commission or agency from whose judgment, order, or opinion appeal is taken; the session at which the judgment, order, or opinion was rendered, or if rendered out of session, the time and place of rendition; and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed

with the agency to present and define the matter for determination, including a Form 44 for all workers' compensation cases which originate from the Industrial Commission;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(6) so much of the litigation before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(l), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (c)(3);

(7) when the agency has reviewed a record of proceedings before a division or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all issues presented on appeal;

(8) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings being filed pursuant to Rule 9(c)(2) and (c)(3);

(9) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (c)(3);

(10) proposed issues on appeal relating to the actions of the agency, set out as provided in Rule 10;

(11) a statement, when appropriate, that the record of proceedings was made with an electronic recording device;

(12) a statement, when appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is filed with the record on appeal; and

(13) any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(d) *Settling the Record on Appeal.* The record on appeal may be settled by any of the following methods:

(1) *By Agreement.* Within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within thirty days after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal or objections, amendments, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the proposed

record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial settlement is not appropriate for disputes concerning only the formatting or the order in which items appear in the settled record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) *By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.* If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. If a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the record on appeal in a volume captioned "Rule 18(d)(3) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 18(b) or 18(c); provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly

encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the record on appeal, the first page of the supplement to bear the next consecutive number following the number of the last page of the record on appeal. These pages shall be referred to as "record supplement pages," and shall be cited as "(R S p ___)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to Rule 18(b) or 18(c) were not filed, served, submitted for consideration, admitted, or offered into evidence, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have filed amendments, objections, or a proposed alternative record on appeal, may in writing request that the agency head convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. Each party shall promptly provide to the agency head a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the agency head in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 18(c)(6), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by

either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than fifteen days after service of the request upon the agency head. The agency head or a delegate appointed in writing by the agency head shall settle the record on appeal by order entered not more than twenty days after service of the request for settlement upon the agency. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these rules and the appointing order.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten day period within which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) *Further Procedures and Additional Materials in the Record on Appeal.* Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

(f) *Extensions of Time.* The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 21 June 1977;
7 October 1980—18(d)(3)—effective 1 January 1981;
27 February 1985—applicable to all appeals in which the notice of appeal is filed on or after 15 March 1985;
26 July 1990—18(b)(3), (d)(1), (d)(2)—effective 1 October 1990;
6 March 1997—18(c)(2), (c)(4)—effective 1 July 1997;
21 November 1997—18(c)(11)—effective 1 February 1998;
6 May 2004—18(c)(1), (d)(2)-(3)—effective 12 May 2004;
25 January 2007—18(d)(2); 18(d)(3), paras. 1, 4, 5; added 18(d)(3), paras. 2, 3, 8—effective 1 March 2007 and applies to all cases appealed on or after that date.
Reenacted and Amended: 2 July 2009—amended 18(c)(6), (7), (8) & (10); added 18(c)(13); amended title of 18(e)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 19
[RESERVED]

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 21 June 1977—19(d).
REPEALED: 27 February 1985—effective 15 March 1985.

RULE 20
MISCELLANEOUS PROVISIONS OF LAW GOVERNING AGENCY APPEALS

Specific provisions of law pertaining to stays pending appeals from any agency to the appellate division, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules that may prescribe a different procedure.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 February 1985—effective 15 March 1985.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

ARTICLE V

EXTRAORDINARY WRITS

RULE 21
CERTIORARI

(a) *Scope of the Writ.*

(1) *Review of the Judgments and Orders of Trial Tribunals.* The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

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

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

(c) *Same; Filing and Service; Content.* The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues pre-

sented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

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

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

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

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 November 1981—21(a), (e);
27 November 1984—21(a)—effective 1 February 1985;
3 September 1987—21(e)—effective for all judgments of the superior court entered on and after 24 July 1987;

8 December 1988—21(f)—applicable to all cases in which the superior court order is entered on or after 1 July 1989;
6 March 1997—21(c), (f)—effective 1 July 1997;
15 August 2002—21(e).

Reenacted: 2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 22
MANDAMUS AND PROHIBITION

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

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

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

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Reenacted: 2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 23
SUPERSEDEAS

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

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

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

(b) *Pending Review by Supreme Court of Court of Appeals Decisions.* Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order, or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

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

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which

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

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

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

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	2 December 1980—23(b)—effective 1 January 1981; 6 March 1997—23(e)—effective 1 July 1997.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 24
FORM OF PAPERS; COPIES

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

ARTICLE VI

GENERAL PROVISIONS

RULE 25
PENALTIES FOR FAILURE TO COMPLY WITH RULES

(a) *Failure of Appellant to Take Timely Action.* If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court, motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court, motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions heard under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chair of the commission; or if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N.C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, the procedure shall be that provided by Rule 37 of these rules.

(b) *Sanctions for Failure to Comply with Rules.* A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	8 December 1988—effective 1 July 1989; 6 March 1997—25(a)—effective upon adoption 6 March 1997.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 26
FILING AND SERVICE

(a) *Filing.* Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail or by electronic means as set forth in this rule.

(1) *Filing by Mail.* Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, the record on appeal, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.

(2) *Filing by Electronic Means.* Filing in the appellate courts may be accomplished by electronic means by use of the electronic filing site at www.ncappellatecourts.org. All documents may be filed electronically through the use of this site. A document filed by use of the official electronic web site is deemed filed as of the time that the document is received electronically.

Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court.

In all cases in which a document has been filed by facsimile machine pursuant to this rule, counsel must

forward the following items by first class mail, contemporaneously with the transmission: the original signed document, the electronic transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission, and neither they nor the electronic transmission fee may be recovered as costs of the appeal. When a document is filed to the electronic filing site at www.ncappellatecourts.org, counsel may either have his or her account drafted electronically by following the procedures described at the electronic filing site, or counsel must forward the applicable filing fee for the document by first class mail, contemporaneously with the transmission.

(b) *Service of All Papers Required.* Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) *Manner of Service.* Service may be made in the manner provided for service and return of process in Rule 4 of the N.C. Rules of Civil Procedure and may be so made upon a party or upon its attorney of record. Service may also be made upon a party or its attorney of record by delivering a copy to either or by mailing a copy to the recipient's last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the official web site, service also may be accomplished electronically by use of the other counsel's correct and current electronic mail address(es), or service may be accomplished in the manner described previously in this subsection.

(d) *Proof of Service.* Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) *Joint Appellants and Appellees.* Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) *Numerous Parties to Appeal Proceeding Separately.* When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal, upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) *Documents Filed with Appellate Courts.*

(1) *Form of Papers.* Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. All printed matter must appear in at least 12-point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. No more than twenty-seven lines of double-spaced text may appear on a page, even if proportional type is used. Lines of text shall be no wider than 6½ inches. The format of all papers presented for filing shall follow the additional instructions found in the appendixes to these rules. The format of briefs shall follow the additional instructions found in Rule 28(j).

(2) *Index required.* All documents presented to either appellate court other than records on appeal, which in this respect are governed by Rule 9, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

(3) *Closing.* The body of the document shall at its close bear the printed name, post office address, telephone number, State Bar number and e-mail address of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. If the document

has been filed electronically by use of the official web site at www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.

(4) *Protecting the Identity of Certain Juveniles.* Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 5 May 1981—26(g)—effective for all appeals arising from cases filed in the court of original jurisdiction after 1 July 1982;
11 February 1982—26(c);
7 December 1982—26(g)—effective for documents filed on and after 1 March 1983;
27 November 1984—26(a)—effective for documents filed on and after 1 February 1985;
30 June 1988—26(a), (g)—effective 1 September 1988;
26 July 1990—26(a)—effective 1 October 1990;
6 March 1997—26(b), (g)—effective 1 July 1997;
4 November 1999—effective 15 November 1999;
18 October 2001—26(g), para. 1—effective 31 October 2001;
15 August 2002—26(a)(1);
3 October 2002—26(g)—effective 7 October 2002;
1 May 2003—26(a)(1);
6 May 2004—26(g)(4)—effective 12 May 2004.

Reenacted and Amended: 2 July 2009—amended 26(g)(3) & (4)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 27
COMPUTATION AND EXTENSION OF TIME

(a) *Computation of Time.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) *Additional Time After Service by Mail.* Except as to filing of notice of appeal pursuant to Rule 3(c), whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper and the notice or paper is served by mail, three days shall be added to the prescribed period.

(c) *Extensions of Time; By Which Court Granted.* Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules, or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing or the responses thereto prescribed by these rules or by law.

(1) *Motions for Extension of Time in the Trial Division.* The trial tribunal for good cause shown by the appellant may extend once for no more than thirty days the time permitted by Rule 11 or Rule 18 for service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial division may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chair of the commission; or if to a commissioner, then by that commissioner.

(2) *Motions for Extension of Time in the Appellate Division.* All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may be made only to the appellate court to which appeal has been taken.

(d) *Motions for Extension of Time; How Determined.* Motions for extension of time made in any court may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time; provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had an opportunity to be heard.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 7 March 1978—27(c);
4 October 1978—27(c)—effective 1 January 1979;
27 November 1984—27(a), (c)—effective 1 February 1985;
8 December 1988—27(c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—27(c), (d)—effective 1 October 1990;
18 October 2001—27(c)—effective 31 October 2001.
Reenacted and Amended: 2 July 2009—amended 27(b)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 28
BRIEFS: FUNCTION AND CONTENT

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

Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

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

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

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the record on appeal

shall not limit the scope of the issues that an appellant may argue in its brief.

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

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

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

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

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

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

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

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

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

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

(c) *Content of Appellee's Brief; Presentation of Additional Issues*. An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It need contain no statement of the issues presented, of the procedural history of the case, of the grounds for appellate review, of the facts, or of the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present issues in addition to those stated by the appellant.

Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

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

(d) *Appendixes to Briefs*. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d). Parties must modify verbatim portions of the transcript filed pursuant to this rule in a manner consistent with Rules 3(b)(1), 3.1(b), or 4(e).

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

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

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

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

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

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

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

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

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

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

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

b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the

appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal as if it were the appellant with respect to each such new or additional issue.

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

(e) *References in Briefs to the Record.* References in the briefs to parts of the printed record on appeal and to parts of the verbatim transcript or parts of documentary exhibits shall be to the pages where those portions appear.

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

(g) *Additional Authorities.* Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and fourteen copies of the memorandum.

(h) *Reply Briefs.* No reply brief will be received or considered by the court, except in the following circumstances:

(1) The court, upon its own initiative, may order a reply brief to be filed and served.

(2) If the appellee has presented in its brief new or additional issues as permitted by Rule 28(c), an appellant may, within fourteen days after service of such brief, file and serve a reply brief limited to those new or additional issues.

(3) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record and briefs, an appellant may, within fourteen days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief or in a reply brief filed pursuant to Rule 28(h)(1).

(4) If the parties are notified that the case has been scheduled for oral argument, an appellant may, within fourteen days after service of such notification, file and serve a motion for leave to file a reply brief. The motion shall state concisely the reasons why a reply brief is believed to be desirable or necessary and the issues to be addressed in the reply brief. The proposed reply brief may be submitted with the motion for leave and shall be limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief. Unless otherwise ordered by the court, the motion for leave will be determined solely upon the motion and without responses thereto or oral argument. The clerk of the appellate court will notify the parties of the court's action upon the motion, and, if the motion is granted, the appellant shall file and serve the reply brief within ten days of such notice.

(5) Motions for extensions of time in relation to reply briefs are disfavored.

(i) *Amicus Curiae Briefs.* A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the court a motion for leave to file, served upon all parties. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the issues of law to be addressed in the amicus curiae brief, and the applicant's position on those issues. The proposed amicus curiae brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the court, the application for leave will be determined solely upon the motion and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless

other time limits are set out in the order of the court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Motions for leave to file an amicus curiae brief submitted to the court after the time within which the amicus curiae brief normally would be due are disfavored in the absence of good cause. Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

(j) *Length Limitations Applicable to Briefs Filed in the Court of Appeals.* Each brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, formatted according to Rule 26 and the appendixes to these rules, shall have either a page limit or a word-count limit, depending on the type style used in the brief:

(1) *Type.*

(A) *Type style.* Documents must be set in a plain roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined. Documents may be set in either proportionally spaced or nonproportionally spaced (monospaced) type.

(B) *Type size.*

1. Nonproportionally spaced type (e.g., Courier or Courier New) may not contain more than ten characters per inch (12-point).

2. Proportionally spaced type (e.g., Times New Roman) must be 14-point or larger.

3. Documents set in Courier New 12-point type or Times New Roman 14-point type will be deemed in compliance with these type size requirements.

(2) *Document.*

(A) *Page limits for briefs using nonproportional type.* The page limit for a principal brief that uses nonproportional type is thirty-five pages. The page limit for a reply brief permitted by Rule 28(h)(1), (2), or (3) is fifteen pages, and the page limit for a reply brief per-

mitted by Rule 28(h)(4) is twelve pages. Unless otherwise ordered by the court, the page limit for an amicus curiae brief is fifteen pages. A page shall contain no more than twenty-seven lines of double-spaced text of no more than sixty-five characters per line. Covers, indexes, tables of authorities, certificates of service, and appendixes do not count toward these page limits. The court may strike or require resubmission of briefs with excessive single-spaced passages or footnotes that are used to circumvent these page limits.

(B) *Word-count limits for briefs using proportional type.* A principal brief that uses proportional type may contain no more than 8,750 words. A reply brief permitted by Rule 28(h)(1), (2), or (3) may contain no more than 3,750 words, and a reply brief permitted by Rule 28(h)(4) may contain no more than 3,000 words. Unless otherwise ordered by the court, an amicus curiae brief may contain no more than 3,750 words. Covers, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, and appendixes do not count against these word-count limits. Footnotes and citations in the text, however, do count against these word-count limits. Parties who file briefs in proportional type shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of parties filing briefs *pro se*, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 January 1981—repeal 28(d)—effective 1 July 1981;

10 June 1981—28(b), (c)—effective 1 October 1981;

12 January 1982—28(b)(4)—effective 15 March 1982;

7 December 1982—28(i)—effective 1 January 1983;

27 November 1984—28(b), (c), (d), (e), (g), (h)—effective 1 February 1985;
30 June 1988—28(a), (b), (c), (d), (e), (h), (i)—effective 1 September 1988;
8 June 1989—28(h), (j)—effective 1 September 1989;
26 July 1990—28(h)(2)—effective 1 October 1990;
18 October 2001—28(b)(4)-(10), (c), (j)—effective 31 October 2001;
3 October 2002—28(j)—effective 7 October 2002;
6 May 2004—28(d), (h), (j)(2), (k)—effective 12 May 2004;
23 August 2005—28(b)(6), (c), (h)(4)—effective 1 September 2005;
25 January 2007—28(b)(6), para. 1; 28(c), para. 1; 28(d)(3)(a), (b); 28(i), paras. 2, 3; 28(j)(2)(A)(1) & (2); added 28(d)(1)(d)—effective 1 March 2007 and applies to all cases appealed on or after that date.

Reenacted and Amended: 2 July 2009—amended 28(a), (b), (c), (d), (e), (h), (i), (j); deleted former 28(k) and replaced with new language in 28(a)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 29
SESSIONS OF COURTS; CALENDAR OF HEARINGS

(a) *Sessions of Court.*

(1) *Supreme Court.* The Supreme Court shall be in continuous session for the transaction of business. Unless otherwise scheduled by the Court, hearings in appeals will be held during the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) *Court of Appeals.* Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) *Calendaring of Cases for Hearing.* Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are

docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than thirty days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	3 March 1982—29(a)(1); 3 September 1987—29(a)(1); 26 July 1990—29(b)—effective 1 October 1990.
Reenacted and Amended:	2 July 2009—amended 29(a)(1)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 30
ORAL ARGUMENT AND UNPUBLISHED OPINIONS

(a) *Order and Content of Argument.*

(1) The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(2) In cases involving juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e), counsel shall refrain from using a juvenile's name in oral argument and shall refer to the juvenile pursuant to said rules.

(b) *Time Allowed for Argument.*

(1) *In General.* Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an

extension. The court of its own initiative may direct argument on specific points outside the times limited.

Counsel is not obliged to use all the time allowed, and should avoid unnecessary repetition; the court may terminate argument whenever it considers further argument unnecessary.

(2) *Numerous Counsel.* Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) *Non-Appearance of Parties.* If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) *Submission on Written Briefs.* By agreement of the parties, a case may be submitted for decision on the written briefs, but the court may nevertheless order oral argument before deciding the case.

(e) *Unpublished Opinions.*

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) The text of a decision without published opinion shall be posted on the Administrative Office of the Courts' North Carolina Court System Internet web site and reported only by listing the case and the decision in the advance sheets and the bound volumes of the North Carolina Court of Appeals Reports.

(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpub-

lished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

(4) Counsel of record and *pro se* parties of record may move for publication of an unpublished opinion, citing reasons based on Rule 30(e)(1) and serving a copy of the motion upon all other counsel and *pro se* parties of record. The motion shall be filed and served within ten days of the filing of the opinion. Any objection to the requested publication by counsel or *pro se* parties of record must be filed within five days after service of the motion requesting publication. The panel that heard the case shall determine whether to allow or deny such motion.

(f) *Pre-Argument Review; Decision of Appeal Without Oral Argument.*

(1) any time that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on the record and briefs. Counsel will be notified not to appear for oral argument.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 December 1975—30(e);
3 May 1976—30(f);

5 February 1979—30(e);
10 June 1981—30(f)—effective 1 July 1981;
18 October 2001—-30(e)(2), (4)—effective 1 January 2002;
3 October 2002—30(e)(3)—effective 7 October 2002;
6 May 2004—30(a)(2)—effective 12 May 2004;
23 August 2005—30, 30(e) (titles)—effective 1 September 2005.

Reenacted and Amended: 2 July 2009—amended 30(a)(2), 30(b)(1)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 31
PETITION FOR REHEARING

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

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

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

(d) *Procedure When Granted.* Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been

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

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

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

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

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 November 1984—31(a)—effective 1 February 1985; 3 September 1987—31(d); 8 December 1988—31(b), (d)—effective 1 January 1989; 18 October 2001—31(b)—effective 31 October 2001.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 32
MANDATES OF THE COURTS

(a) *In General.* Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from

the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) *Time of Issuance.* Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 November 1984—32(b)—effective 1 February 1985.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 33
ATTORNEYS

(a) *Appearances.* An attorney will not be recognized as appearing in any case unless he or she is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that the attorney represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in argument.

(b) *Signatures on Electronically Filed Documents.* If more than one attorney is listed as being an attorney for the party(ies) on an electronically filed document, it is the responsibility of the attorney actually filing the document by computer to (1) list his or her name first on the document, and (2) place on the document under the signature line the following statement: "I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it."

(c) *Agreements.* Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court.

(d) *Limited Practice of Out-of-State Attorneys.* Attorneys who are not licensed to practice law in North Carolina, but desire to appear before the appellate courts of North Carolina in a matter shall submit a motion to the appellate court fully complying with the re-

quirements set forth in N.C.G.S. § 84-4.1. This motion shall be filed prior to or contemporaneously with the out-of-state attorney signing and filing any motion, petition, brief, or other document in any appellate court. Failure to comply with this provision may subject the attorney to sanctions and shall result in the document being stricken, unless signed by another attorney licensed to practice in North Carolina. If an attorney is admitted to practice before the Court of Appeals in a matter, the attorney shall be required to file another motion should the case proceed to the Supreme Court. However, if the required fee has been paid to the Court of Appeals, another fee shall not be due at the Supreme Court.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	18 October 2001—33(a)-(c)—effective 31 October 2001.
Reenacted and Amended:	2 July 2009—added 33(d)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 33.1
SECURE LEAVE PERIODS FOR ATTORNEYS

(a) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the appellate division, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this rule.

(b) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts shall not exceed, in the aggregate, three calendar weeks.

(c) *Designation, Effect.* To designate a secure leave period, an attorney shall file a written designation containing the information required by subsection (d), with the official specified in subsection (e), and within the time provided in subsection (f). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any argument or other in-court proceeding in the appellate division during that secure leave period.

(d) *Content of Designation.* The designation shall contain the following information: (1) the attorney's name, address, telephone number, State Bar number, and e-mail address; (2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end; (3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts; (4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering, or interfering with the timely disposition of any matter in any pending action or proceeding; (5) a statement that no argument or other in-court proceeding has been scheduled during the designated secure leave period in any matter pending in the appellate division in which the attorney has entered an appearance; and (6) a listing of all cases, by caption and docket number, pending before the appellate court in which the designation is being filed. The designation shall apply only to those cases pending in that appellate court on the date of its filing. A separate designation shall be filed as to any cases on appeal subsequently filed and docketed.

(e) *Where to File Designation.* The designation shall be filed as follows: (1) if the attorney has entered an appearance in the Supreme Court, in the office of the clerk of the Supreme Court, even if the designation was filed initially in the Court of Appeals; (2) if the attorney has entered an appearance in the Court of Appeals, in the office of the clerk of the Court of Appeals.

(f) *When to File Designation.* The designation shall be filed: (1) no later than ninety days before the beginning of the secure leave period, and (2) before any argument or other in-court proceeding has been scheduled for a time during the designated secure leave period.

ADMINISTRATIVE HISTORY

Adopted: 6 May 1999—effective 1 January 2000 for all actions and proceedings pending in the appellate division on and after that date.

Recodified former Rule 33A as Rule 33.1 and
Reenacted Rule 33.1 as amended: 2 July 2009—amended 33.1(d) & (e)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 34
FRIVOLOUS APPEALS; SANCTIONS

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or

both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under subdivisions (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under subsection (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	8 December 1988—effective 1 July 1989; 8 April 1999—34(d).
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 35
COSTS

(a) *To Whom Allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) *Direction as to Costs in Mandate.* The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and a designation of the party against whom such costs are taxed.

(c) *Costs of Appeal Taxable in Trial Tribunals.* Any costs of an appeal that are assessable in the trial tribunal shall, upon receipt of the mandate, be taxed as directed therein and may be collected by execution of the trial tribunal.

(d) *Execution to Collect Costs in Appellate Courts.* Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the state; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is subject to the penalties prescribed by law for failure to make due and proper return.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Reenacted: 2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 36
TRIAL JUDGES AUTHORIZED TO ENTER ORDERS UNDER THESE RULES

(a) *When Particular Judge Not Specified by Rule.* When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have such authority with respect to causes docketed in their respective divisions:

(1) *Superior Court.* The judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special superior judge resident in the district or assigned to hold court in the district wherein the cause is docketed;

(2) *District Court.* The judge who entered the judgment, order, or other determination from which appeal was taken; the chief district court judge of the district wherein the cause is docketed; and any judge designated by such chief district court judge to enter interlocutory orders under N.C.G.S. § 7A-192.

(b) *Upon Death, Incapacity, or Absence of Particular Judge Authorized.* When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will, upon motion of any party, designate another judge to act in the matter. Such designation will be by order entered *ex parte*, copies of which will be mailed forthwith by the clerk of the Supreme Court to the judge designated and to all parties.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 37
MOTIONS IN APPELLATE COURTS

(a) *Time; Content of Motions; Response.* An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within ten days after a motion is served or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers

in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) *Determination.* Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties and without awaiting a response thereto. A party who has not received actual notice of such a motion, or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation, or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

(c) *Protecting the Identity of Certain Juveniles.* Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

(d) *Withdrawal of Appeal in Criminal Cases.* Withdrawal of appeal in criminal cases shall be in accordance with N.C.G.S. § 15A-1450. In addition to the requirements of N.C.G.S. § 15A-1450, after the record on appeal in a criminal case has been filed in an appellate court but before the filing of an opinion, the defendant shall also file a written notice of the withdrawal with the clerk of the appropriate appellate court.

(e) *Withdrawal of Appeal in Civil Cases.*

(1) Prior to the filing of a record on appeal in the appellate court, an appellant or cross-appellant may, without the consent of the other party, file a notice of withdrawal of its appeal with the tribunal from which appeal has been taken. Alternatively, prior to the filing of a record on appeal, the parties may file a signed stipulation agreeing to dismiss the appeal with the tribunal from which the appeal has been taken.

(2) After the record on appeal has been filed, an appellant or cross-appellant or allparties jointly may move the appellate court in which the appeal is pending, prior to the filing of an opinion, for dismissal of the appeal. The motion must specify the reasons therefor, the positions of all parties on the motion to dismiss, and the positions of all parties on the allocation of taxed costs. The appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court.

(f) *Effect of Withdrawal of Appeal.* The withdrawal of an appeal shall not affect the right of any other party to file or continue such party's appeal or cross-appeal.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	6 May 2004—37(c)—effective 12 May 2004; 25 January 2007—added 37(d)-(f)—effective 1 March 2007 and applies to all cases appealed on or after that date.
Reenacted and Amended:	2 July 2009—rewrote 37(c)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 38
SUBSTITUTION OF PARTIES

(a) *Death of a Party.* No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by the personal representative, or, if there is no personal representative, by the attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) *Substitution for Other Causes.* If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subsection (a).

(c) *Public Officers; Death or Separation from Office.* When a person is a party to an appeal in an official or representative capacity

and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the person's successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Reenacted: 2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 39
DUTIES OF CLERKS; WHEN OFFICES OPEN

(a) *General Provisions.* The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) *Records to Be Kept.* The clerk of each of the courts of the appellate division shall keep and maintain the records of that court on paper, microfilm, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion, and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—39(b)—effective 1 January 1989.
Reenacted: 2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 40
CONSOLIDATION OF ACTIONS ON APPEAL

Two or more actions that involve common issues of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by Rule 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended: 1	8 October 2001—effective 31 October 2001.
Reenacted and Amended:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 41
APPEAL INFORMATION STATEMENT

(a) The Court of Appeals has adopted an Appeal Information Statement (Statement) which will be revised from time to time. The purpose of the Statement is to provide the Court the substance of an appeal and the information needed by the Court for effective case management.

(b) Each appellant shall complete, file, and serve the Statement as set out in this rule.

(1) The clerk of the Court of Appeals shall furnish a Statement form to all parties to the appeal when the record on appeal is docketed in the Court of Appeals.

(2) Each appellant shall complete and file the Statement with the clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the statement upon all other parties to the appeal pursuant to Rule 26. The Statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

(3) If any party to the appeal concludes that the Statement is in any way inaccurate or incomplete, that party may file

with the Court of Appeals a written statement setting out additions or corrections within seven days of the service of the Statement and shall serve a copy of the written statement upon all other parties to the appeal pursuant to Rule 26. The written statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

ADMINISTRATIVE HISTORY

Adopted:	3 March 1994—effective 15 March 1994.
Amended:	6 May 2004—41(b)(2)—effective 12 May 2004.
Reenacted and Amended:	2 July 2009—amended 41(b)(2)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 42
[RESERVED]

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Renumbered:	Effective 15 March 1994.
Amended:	18 October 2001—effective 31 October 2001.
Recodified as Rule 1(a):	2 July 2009—effective 1 October 2009.

APPENDIXES TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Adopted 1 July 1989
Including Amendments through 2 July 2009.

APPENDIX A
TIMETABLES FOR APPEALS

TIMETABLE OF APPEALS FROM TRIAL DIVISION AND ADMINISTRATIVE AGENCIES UNDER ARTICLES II AND IV OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking appeal (civil)	30	entry of judgment (unless tolled)	3(c)
Cross appeal	10	service and filing of a timely notice of appeal	3(c)
Taking appeal (agency)	30	receipt of final agency order (unless statutes provide otherwise)	18(b)(2)
Taking appeal (criminal)	14	entry of judgment (unless tolled)	4(a)
Ordering transcript (civil, agency)	14	filing notice of appeal	7(a)(1) 18(b)(3)
Ordering transcript (criminal indigent)	14	order filed by clerk of superior court	7(a)(2)
Preparing & delivering transcript (civil, non-capital criminal) (capital criminal)	 60 120	service of order for transcript	7(b)(1)
Serving proposed record on appeal (civil, non-capital criminal) (agency)	 35 35	notice of appeal (no transcript) or reporter's certificate of delivery of transcript	11(b) 18(d)
Serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Serving objections or proposed alternative record on appeal (civil, non-capital criminal) (capital criminal) (agency)	 30 35 30	service of proposed record service of proposed record	11(c) 18(d)(2)
Requesting judicial settlement of record	10	expiration of the last day within which an appellee served could serve objections, etc.	11(c) 18(d)(3)
Judicial settlement of record	20	service on judge of request for settlement	11(c) 18(d)(3)

Filing record on appeal in appellate court	15	settlement of record on appeal	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record (60 days in Death Cases)	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief (60 days in Death Cases)	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	issuance of opinion	32
Petition for Rehearing (civil action only)	15	mandate	31(a)

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II, RULE 3.1, OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking appeal	10	entry of judgment	3.1(a); N.C.G.S. § 7B-1001
Notifying court reporting coordinator (clerk of superior court)	1 (business)	filing notice of appeal	3.1(c)(1)
Assigning transcriptionist (court reporting coordinator)	2 (business)	receipt of notification court reporting coordinator	3.1(c)(1)
Preparing and delivering a transcript of designated proceedings (indigent appellant)	35	assignment by court reporting coordinator	3.1(c)(1)
Preparing and delivering a transcript of designated proceedings (non-indigent appellant)	45	assignment of transcriptionist	3.1(c)(1)
Serving proposed record on appeal	10	receipt of transcript	3.1(c)(2)
Serving notice of approval, or objections, or proposed alternative record on appeal	10	service of proposed record	3.1(c)(2)
Filing record on appeal when parties agree to a settled record within 20 days of receipt of transcript	5 (business)	settlement of record	3.1(c)(2)

Filing record on appeal if *all* appellees fail either to serve notices of approval, or objections, or proposed alternative records on appeal	5 (business)	last date on which *any* appellee could so serve	3.1(c)(2)
Appellant files proposed record on appeal and appellee(s) files objections and amendments or an alternative proposed record on appeal when parties cannot agree to a settled record on appeal within 30 days after receipt of the transcript	5 (business)	last date on which the record could be settled by agreement	3.1(c)(2)
Filing appellant's brief	30	filing of record on appeal	3.1(c)(3)
Filing appellee's brief	30	service of appellant's brief	3.1(c)(3)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(b)
Notice of Appeal and/or Petition for Discretionary Review	15	mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a) 15(b)
Cross-Notice of Appeal	10	filing of first notice of appeal1	4(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	filing notice of appeal certification of review	14(d) 15(g)(2)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief	14(d) 15(g)
Oral Argument	30	filing appellee's brief (usual minimum time)	29
Certification or Mandate	20	issuance of opinion	32

Petition for Rehearing (civil action only)	15	mandate	31(a)

NOTES

All of the critical time intervals outlined here except those for taking an appeal, petitioning for discretionary review, responding to a petition for discretionary review, or petitioning for rehearing may be extended by order of the court in which the appeal is docketed at the time. Note that Rule 7(b)(1) authorizes the trial tribunal to grant only one extension of time for production of the transcript and that the trial tribunal lacks such authority in criminal cases in which a sentence of death has been imposed. Note also that Rule 27 authorizes the trial tribunal to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in these rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c)).

Appendix A amended effective 1 October 1990; 6 March 1997; 31 October 2001; 1 May 2003; 1 September 2005; 1 October 2009.

APPENDIX B
FORMAT AND STYLE

All documents for filing in either appellate court are prepared on 8½ x 11", plain, white unglazed paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using at least 12-point type so as to produce a clear, black image. Documents shall be set either in nonproportional type or in proportional type, defined as follows: Nonproportional type is defined as 10-character-per-inch Courier (or an equivalent style of Pica) type that devotes equal horizontal space to each character. Proportional type is defined as any non-italic, nonscript font, other than nonproportional type, that is 14-point or larger. Under Appellate Rule 28(j), briefs in nonproportional type are governed by a page limit, and briefs in proportional type are governed by a word-count limit. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches

long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action, except as provided by Rules 3(b)(1), 3.1(b), and 4(e); the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and again on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	No. _____
v	)	
	)	
(Name of Defendant)	)	

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named except as provided by Rules 3(b)(1), 3.1(b), and 4(e)) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative positions of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the trial division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents, except a petition for writ of certiorari or other petitions and

motions in which no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition that is ten pages or more in length and all appendixes to briefs (Rule 28) must contain an index to the contents.

The index should be indented approximately 3/4" from each margin, providing a 5" line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page#), and bound in (# of volumes) volumes is filed contemporaneously with this record."

The transcript should be prepared with a clear, black image on 8½ x 11" paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy and one file copy in the appellate court. In criminal appeals, the district attorney is responsible for conveying a copy to the Attorney General (Rule 9(c)).

The transcript should not be inserted into the record on appeal, but rather should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated as a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions that are ten pages or greater in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to the most recent edition of A Uniform System of Citation. Citations to regional reporters shall include parallel citations to official state reporters.

FORMAT OF BODY OF DOCUMENT

The body of the record on appeal should be single-spaced with double spaces between paragraphs. The body of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, issues, and long quotes single-spaced.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾" from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetic entry in the text. (R pp 38-40) References to the transcript, if used, should be made in similar manner. (T p 558, line 21)

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½" from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in records on appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lowercase roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g. -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

Unless filed *pro se*, all original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, State Bar number, and e-mail address of the person signing, together with the capacity in which that person signs the paper, will be included. When counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) [LAW FIRM NAME]

By: _____
[Name]

By: _____
[Name]
Attorneys for Plaintiff-Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

(Appointed) _____
[Name]
Attorney for Defendant-Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

Appendix B amended effective 31 October 2001; 15 August 2002; 7 October 2002; 12 May 2004; 1 September 2005; 1 October 2009.

APPENDIX C
ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables and that are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions for including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the printed record if the transcript option of Rule 9(c) is used and a transcript of the items exists.

Table 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(1)a
3. Statement of organization of trial tribunal, per Rule 9(a)(1)b
4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c
5. Complaint

6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pretrial order
*10. Plaintiff's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
*11. Motion for directed verdict, with ruling thereon
*12. Defendant's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
*13. Plaintiff's rebuttal evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(a)(1)f
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Items, including Notice of Appeal, required by Rule 9(a)(1)i
21. Statement of transcript option as required by Rule 9(a)(1)i and 9(a)(1)*l*
22. Statement required by Rule 9(a)(1)m when a record supplement will be filed
23. Entries showing settlement of record on appeal, extensions of time, etc.
24. Proposed Issues on Appeal per Rule 9(a)(1)k
25. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY DECISION

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(2)a
3. Statement of organization of superior court, per Rule 9(a)(2)b
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence
*8. Evidence taken in superior court, in order received
9. Copies of findings of fact, conclusions of law, and judgment of superior court

10. Items required by Rule 9(a)(2)h
11. Entries showing settlement of record on appeal, extensions of time, etc.
12. Proposed issues on appeal, per Rule 9(a)(2)i
13. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(3)a
3. Statement of organization of trial tribunal, per Rule 9(a)(3)b
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. *Voir dire* of jurors
*10. State's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
11. Motions at close of State's evidence, with rulings thereon (* if oral)
*12. Defendant's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
13. Motions at close of defendant's evidence, with rulings thereon (* if oral)
*14. State's rebuttal evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
15. Motions at close of all evidence, with rulings thereon (* if oral)
16. Court's instructions to jury, per Rules 9(a)(3)f and 10(a)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Entries showing settlement of record on appeal, extensions of time, etc.
22. Proposed issues on appeal, per Rule 9(a)(3)j
23. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 4

PROPOSED ISSUES ON APPEAL

A. Examples related to pretrial rulings in civil actions

1. Did the trial court err in denying defendant's motion to dismiss for lack of personal jurisdiction under N.C. R. Civ. P. 12(b)(2)?

2. Did the trial court err in denying defendant's motion to dismiss for failure to state a claim upon which relief may be granted under N.C. R. Civ. P. 12(b)(6)?

3. Did the trial court err in denying defendant's motion to require plaintiff to submit to an independent physical examination under N.C. R. Civ. P. 35?

4. Did the trial court err in denying defendant's motion for summary judgment under N.C. R. Civ. P. 56?

B. Examples related to civil jury trial rulings

1. Did the trial court err in admitting the hearsay testimony of E.F.?

2. Did the trial court err in denying defendant's motion for a directed verdict?

3. Did the trial court err in instructing the jury on the doctrine of last clear chance?

4. Did the trial court err in instructing the jury on the doctrine of sudden emergency?

5. Did the trial court err in denying defendant's motion for a new trial?

C. Examples related to civil non-jury trials

1. Did the trial court err in denying defendant's motion to dismiss at the close of plaintiff's evidence?

2. Did the trial court err in its finding of fact No. 10?

3. Did the trial court err in its conclusion of law No. 3?

Appendix C amended effective 1 October 1990; 31 October 2001; 1 October 2009.

APPENDIX D

FORMS

Captions for all documents filed in the appellate division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

1. NOTICES OF APPEAL

a. To Court of Appeals from trial division

Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF
NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment)(from the order) entered on (date) in the (District)(Superior) Court of (name) County, (describing it).

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

b. To Supreme Court from a Judgment of the Superior Court Including a Sentence of Death

(Caption)

****

TO THE HONORABLE SUPREME COURT OF
NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment entered by (name of Judge) in the Superior Court of (name) County on (date), which judgment included a conviction of murder in the first degree and a sentence of death.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Defendant-Appellant
(Address, Telephone Number, State
Bar Number, and E-mail Address)

c. To Supreme Court from a Judgment of the Court of Appeals

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under N.C.G.S. § 7A-30. The appealing party shall enclose a clear copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describe it), which judgment . . .

(Constitutional question—N.C.G.S. § 7A-30(1)) . . . directly involves a substantial question arising under the Constitution(s) (of the United States)(and)(or)(of the State of North Carolina) as follows:

(Here describe the specific issues, citing constitutional provisions under which they arise and showing how such issues were timely raised below and are set out in the record of appeal, e.g.:)

Issue 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's challenge to the denial of (his)(her) Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving defendant of the constitutional right to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial

tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp 7-10). This constitutional issue was determined erroneously by the Court of Appeals.

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(Dissent—N.C.G.S. § 7A-30(2)) . . . was entered with a dissent by Judge (name), based on the following issue(s):

(Here state the issue or issues that are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues. Any additional issues desired to be raised in the Supreme Court when the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

2. [Reserved.]

3.PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31

To seek review of the opinion and judgment of the Court of Appeals when petitioner contends the case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant contends that such appeal lies of right due to substantial constitutional questions under N.C.G.S. § 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant),(Name of Party), respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from N.C.G.S. § 7A-31 that provide the basis for the petition). In support of this petition, (Plaintiff)(Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal arguments to justify certification of the case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is significant to the jurisprudence of the State or of significant public interest. If the Court is persuaded to take the case, the appellant may deal thoroughly with the substantive issues in the new brief.)

Issues to be Briefed

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those that are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in the case.

4. PETITION FOR WRIT OF CERTIORARI

To seek review: (1) by the appropriate appellate court of judgments or orders of trial tribunals when the right to prosecute an

appeal has been lost or when no right to appeal exists; and (2) by the Supreme Court of decisions and orders of the Court of Appeals when no right to appeal or to petition for discretionary review exists or when such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT)(COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the (judgment)(order)(decree) of the [Honorable (name), Judge Presiding, (Superior)(District) Court, (name) County][North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from court reporter, statement should include estimate of date of availability and supporting affidavit from the reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments to justify issuance of writ: e.g., reasons why interlocutory order makes it impracticable for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed issues, etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment)(order)(decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [(Superior)(District) Court (name) County][North Carolina Court of Appeals] to permit review of the (judgment)(order)(decree) above specified, upon issues stated as follows: (here list the issues, in the manner provided for in the petition for discretionary review); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of service upon opposing parties)

(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in the petition.)

5. PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23 AND MOTION FOR TEMPORARY STAY

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Appellate Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g. fines, are stayed automatically pending an appeal of right).

A motion for temporary stay under Rule 23(e) is appropriate to seek an immediate stay of execution on an *ex parte* basis pending the Court's decision on the petition for supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution) (enforcement) of the (judgment)(order)(decree) of the [Honorable _____, Judge Presiding, (Superior)(District) Court, _____ County][North Carolina Court of Appeals] dated _____, pending review by this Court of said (judgment)(order)(decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition and justifying its filing under Rule 23: e.g., trial judge has vacated the entry upon finding security deposited

under N.C.G.S. § _____ inadequate; trial judge has refused to stay execution upon motion therefor by petitioner; circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments for justice of issuing the writ; e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if it is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment)(order)(decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior)(District) Court, _____ County)][North Carolina Court of Appeals] staying (execution) (enforcement) of its (judgment) (order)(decree) above specified, pending issuance of the mandate to this Court following its review and determination of the(appeal)(discretionary review)(review by extraordinary writ)(now pending)(the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel.)

(Certificate of Service upon opposing party.)

Rule 23(e) provides that in conjunction with a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included as part of the main petition or filed separately.

Motion for Temporary Stay

(Plaintiff)(Defendant) respectfully applies to the Court for an order temporarily staying (execution)(enforcement) of the (judgment)(order)(decree) that is the subject of (this)(the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual arguments for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the Superior Court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding, Superior Court, _____ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to N.C.G.S. § 15A-2000(d)(1), there is an automatic appeal of this matter to the Supreme Court of North Carolina, and defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the date scheduled for execution.

WHEREFORE, the defendant prays the Court to enter an Order staying the execution pending judgment and further orders of this Court.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Defendant-Appellant
(Address, Telephone Number, State
Bar Number, and E-mail Address)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison)

6. PROTECTING THE IDENTITY OF CERTAIN JUVENILES; NOTICE

In cases governed by Rules 3(b), 3.1(b), and 4(e), the notice requirement of Rules 3.1(b) and 9(a) is as follows:

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:

FILED PURSUANT TO RULE [3(b)(1)][3.1(b)][4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.

Appendix D amended effective 6 March 1997; 31 October 2001; 1 March 2007; 1 October 2009.

APPENDIX E

CONTENT OF BRIEFS

CAPTION

Briefs should use the caption as shown in Appendix B. The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, e.g., DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF, or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, e.g., DEFENDANT-APPELLEE'S NEW BRIEF (when the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

INDEX OF THE BRIEF

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

I N D E X

* * * * *

TABLE OF CASES AND AUTHORITIES

This table should begin at the top margin of the page following the index. Page references should be made to each citation of authority, as shown in the example below.

TABLE OF CASES AND AUTHORITIES

* * * * *

ISSUES PRESENTED

The inside caption is on page 1 of the brief, followed by the Issues Presented. The phrasing of the issues presented need not be identical to that set forth in the proposed issues on appeal in the record. The appellee's brief need not restate the issues unless the appellee desires to present additional issues to the Court.

ISSUES PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

* * *

STATEMENT OF THE CASE

If the Issues Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Issues Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

STATEMENT OF THE CASE

The defendant, [name], was convicted of first-degree rape at the [date], Criminal Session of the Superior Court, [name] County, the Honorable [name] presiding, and received _____ sentence for

the _____ felony. The defendant gave written notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment on [date]. The transcript was ordered on [date] and was delivered to the parties on [date].

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on [date]. The record was filed and docketed in the Supreme Court on [date].

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Set forth the statutory basis for permitting appellate review. For example, in an appeal from a final judgment to the Court of Appeals, the appellant might state that the ground for appellate review is a final judgment of the superior court under N.C.G.S. § 7A-27(b). If the appeal is based on N.C. R. Civ. P. 54(b), the appellant must also state that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. If the appeal is from an interlocutory order or determination based on a substantial right, the appellant must present, in addition to the statutory authorization, facts and argument showing the substantial right that will be lost, prejudiced, or less than adequately protected absent immediate appellate review.

STATEMENT OF THE FACTS

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the issues presented. The facts should be stated objectively and concisely and should be limited to those that are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used instead. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute over the facts, may restate the facts as they appear from the appellee's viewpoint.

ARGUMENT

Each issue will be set forth in uppercase typeface as the party's contention, e.g.,

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

The standard of review for each issue presented shall be set out in accordance with Rule 28(b)(6).

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Rule 9(c), the appendix to the brief may be needed, as described in Rule 28 and below.

When statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument or placed in the appendix to the brief, as required by Rule 28(d)(1)c.

CONCLUSION

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

SIGNATURE AND CERTIFICATE OF SERVICE

Following the conclusion, the brief must be dated and signed, with the attorney's typed or printed name, mailing address, telephone number, State Bar number, and e-mail address, all indented to the center of the page.

The Certificate of Service is then shown with a centered, uppercase heading. The certificate itself, describing the manner of service upon the opposing party with the complete mailing address of the party or attorney served, is followed by the date and the signature of the person certifying the service.

APPENDIX TO THE BRIEF UNDER THE TRANSCRIPT OPTION

Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts from the transcript considered essential to the understanding of the arguments presented.

Counsel are encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be compiled into an appendix to the brief to be placed at the end of the brief, following all signatures and certificates. Counsel should not attach the entire transcript as an appendix to support issues involving a directed verdict, sufficiency of the evidence, or the like.

The appendix should be prepared to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed.

The appendix should include a table of contents, showing the items contained in the appendix and the pages in the appendix where those items appear. The appendix shall be paginated separately from the text of the brief. For example:

CONTENTS OF APPENDIX

* * * * *

The appendix will be printed as submitted with the brief to which it is appended. Therefore, clarity of image is extremely important.

Appendix E amended effective 31 October 2001; 15 August 2002; 1 September 2005; 1 October 2009.

APPENDIX F

FEES AND COSTS

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows and should be submitted with the document to which they pertain, made payable to the clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document, i.e., docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

An appeal bond or cash deposit of $250.00 is required in civil cases per Rules 6 and 17. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The bond will not be required in cases

brought by petition for discretionary review or certiorari unless and until the court allows the petition.

Costs for printing documents are $1.75 per printed page. The appendix to a brief under the transcript option of Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief. Both appellate courts will bill the parties for the costs of printing their documents.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed, or when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. The facsimile transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first twenty-five pages and $.20 for each page thereafter.

The fee for a certified copy of an appellate court decision, in addition to photocopying charges, is $10.00.

Appendix F amended effective 31 October 2001; 1 October 2009.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING 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 October 24, 2008.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

.0111 Grievances: Form and Filing

(a) . . .

~~(e) Grievances must be instituted by the filing of a written or oral grievance with the North Carolina State Bar Grievance Committee or a district bar Grievance Committee within six years from the accrual of the offense, provided that grievances alleging fraud by a lawyer or an offense the discovery of which has been prevented by concealment by the accused lawyer shall not be barred until six years from the accrual of the offense or one year after discovery of the offense by the aggrieved party or by the North Carolina State Bar counsel, whichever is later. Notwithstanding the foregoing, grievances which allege felonious criminal misconduct may be filed with the Grievance Committee at any time.~~

~~(f)~~ (e) The counsel may decline to investigate the following allegations: . . .

(f) Limitation of Grievances.

(1) There is no time limitation for initiation of any grievance based upon a plea of guilty to a felony or upon conviction of a felony.

(2) There is no time limitation for initiation of any grievance based upon allegations of conduct that constitutes a felony, without regard to whether the lawyer is charged, prosecuted, or convicted of a crime for the conduct.

(3) There is no time limitation for initiation of any grievance based upon conduct that violates the Rules of Professional Conduct and has been found by a court to be intentional conduct by the lawyer. As used in this Rule, "court" means a state court of general jurisdiction of any state or of the District of Columbia or a federal court.

(4) All other grievances must be initiated within six years after the last act giving rise to the grievance.

.0113 Proceedings before the Grievance Committee

(a) . . .

(h) If probable cause is found and the committee determines that a hearing is necessary, the chairperson will direct the counsel to prepare and file a complaint against the ~~defendant~~ respondent. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the chairperson's signature an admonition, reprimand, or censure. If no probable cause is found, the grievance will be dismissed or dismissed with a letter of warning or a letter of caution.

(i) . . .

(k) Admonitions, Reprimands, and Censures

(1) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the committee shall issue an admonition in cases in which the respondent has committed a minor violation of the Rules of Professional Conduct, a reprimand in cases in which the respondent's conduct has violated one or more provisions of the Rules of Professional Conduct and caused harm or potential harm to a client, the administration of justice, the profession, or members of the public, or a censure in cases in which the respondent has violated one or more provisions of the Rules of Professional Conduct and the harm or potential harm caused by the respondent is significant and protection of the public requires more serious discipline. To determine whether more serious discipline is necessary to protect the public or whether the violation is minor and less serious discipline is sufficient to protect the public, the committee shall consider the factors delineated in subparagraphs (2) and (3) below.

(2) Factors that shall be considered in determining whether protection of the public requires a censure include, but are not limited to, the following:

(A) prior discipline for the same or similar conduct;

(B) prior notification by the North Carolina State Bar of the wrongfulness of the conduct;

(C) refusal to acknowledge wrongful nature of conduct;

(D) lack of indication of reformation;

(E) likelihood of repetition of misconduct;

(F) uncooperative attitude toward disciplinary process;

(G) pattern of similar conduct;

(H) violation of the Rules of Professional Conduct in more than one unrelated matter;

(I) lack of efforts to rectify consequences of conduct;

(J) imposition of lesser discipline would fail to acknowledge the seriousness of the misconduct and would send the wrong message to members of the Bar and the public regarding the conduct expected of members of the Bar;

(K) notification contemporaneous with the conduct at issue of the wrongful nature of the conduct and failure to take remedial action.

(3) factors that shall be considered in determining whether the violation of the Rules is minor and warrants issuance of an admonition include, but are not limited to, the following:

(A) lack of prior discipline for same or similar conduct;

(B) recognition of wrongful nature of conduct;

(C) indication of reformation;

(D) indication that repetition of misconduct not likely;

(E) isolated incident;

(F) violation of the Rules of Professional Conduct in only one matter;

(G) lack of harm or potential harm to client, administration of justice, profession, or members of the public;

(H) efforts to rectify consequences of conduct;

(I) inexperience in the practice of law;

(J) imposition of admonition appropriately acknowledges the minor nature of the violation(s) of the Revised Rules of Professional Conduct;

(K) notification contemporaneous with the conduct at issue of the wrongful nature of the conduct resulting in efforts to take remedial action;

(L) personal or emotional problems contributing to the conduct at issue;

(M) successful participation in and completion of contract with Lawyer's Assistance Program where mental health or substance abuse issues contributed to the conduct at issue.

~~(k)~~ (l) Procedures for Admonitions and Reprimands

(1) ~~If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the committee may issue an admonition or reprimand to the defendant, depending upon the seriousness of the violation of the Rules of Professional Conduct.~~ A record of ~~such~~ any admonition or reprimand issued by the Grievance Committee will be maintained in the office of the secretary.

(2) A copy of the admonition or reprimand will be served upon the ~~defendant~~ respondent in person or by certified mail. A ~~defendant~~ respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the admonition or reprimand to the ~~defendant's~~ respondent's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the admonition or reprimand in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(3) Within 15 days after service the ~~defendant~~ respondent may refuse the admonition or reprimand and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition or reprimand is refused.

(4) In cases in which the ~~defendant~~ respondent refuses an admonition or reprimand, the counsel will prepare and file a

complaint against the ~~defendant~~ respondent pursuant to Rule .0114 of this subchapter. If a refusal and request are not served upon the secretary within 15 days after service upon the ~~defendant~~ respondent of the admonition or reprimand, the admonition or reprimand will be deemed accepted by the ~~defendant~~ respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(~~l~~) (m) Procedure for Censures

(1) If ~~probable cause is found and~~ the Grievance Committee determines that the imposition of a censure is appropriate, ~~the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or significant potential 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 license~~, the committee will issue a notice of proposed censure and a proposed censure to the ~~defendant~~ respondent.

(2) A copy of the notice and the proposed censure will be served upon the ~~defendant~~ respondent in person or by certified mail. A ~~defendant~~ respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the notice and proposed censure to the ~~defendant's~~ respondent's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the notice and proposed censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. The ~~defendant~~ respondent must be advised that he or she may accept the censure within 15 days after service upon him or her or a formal complaint will be filed before the commission.

(3) The ~~defendant's~~ respondent's acceptance must be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. Once the censure is accepted by the ~~defendant~~ respondent, the discipline becomes public and must be filed as provided by Rule .0123(a)(3) of this subchapter.

(4) If the ~~defendant~~ respondent does not accept the censure, the counsel will file a complaint against the defendant pursuant to Rule .0114 of this subchapter.

(~~m~~) (n) . . .

.0114 Formal Hearing

(a) . . .

~~(w) If the charges of misconduct are established, the hearing committee will then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this state or any other jurisdiction and any evidence in aggravation or mitigation of the offense.~~

~~(1) The hearing committee may consider aggravating factors in imposing discipline in any disciplinary case, including the following factors:~~

~~(A) prior disciplinary offenses;~~

~~(B) dishonest or selfish motive;~~

~~(C) a pattern of misconduct;~~

~~(D) multiple offenses;~~

~~(E) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;~~

~~(F) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;~~

~~(G) refusal to acknowledge wrongful nature of conduct;~~

~~(H) vulnerability of victim;~~

~~(I) substantial experience in the practice of law;~~

~~(J) indifference to making restitution;~~

~~(K) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint.~~

~~(2) The hearing committee may consider mitigating factors in imposing discipline in any disciplinary case, including the following factors:~~

~~(A) absence of a prior disciplinary record;~~

~~(B) absence of a dishonest or selfish motive;~~

~~(C) personal or emotional problems;~~

~~(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;~~

~~(E) full and free disclosure to the hearing committee or cooperative attitude toward proceedings;~~

~~(F) inexperience in the practice of law;~~

~~(G) character or reputation;~~

~~(H) physical or mental disability or impairment;~~

~~(I) delay in disciplinary proceedings through no fault of the defendant attorney;~~

~~(J) interim rehabilitation;~~

~~(K) imposition of other penalties or sanctions;~~

~~(L) remorse;~~

~~(M) remoteness of prior offenses.~~

(w) I f the charges of misconduct are established, the hearing committee will then consider any evidence relevant to the discipline to be imposed.

(1) Suspension or disbarment is appropriate where there is evidence that the defendant's actions resulted in significant harm or potential significant harm to the clients, the public, the administration of justice, or the legal profession, and lesser discipline is insufficient to adequately protect the public. The following factors shall be considered in imposing suspension or disbarment:

(A) intent of the defendant to cause the resulting harm or potential harm;

(B) intent of the defendant to commit acts where the harm or potential harm is foreseeable;

(C) circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;

(D) elevation of the defendant's own interest above that of the client;

(E) negative impact of defendant's actions on client's or public's perception of the profession;

(F) negative impact of the defendant's actions on the administration of justice;

(G) impairment of the client's ability to achieve the goals of the representation;

(H) effect of defendant's conduct on third parties;

(I) acts of dishonesty, misrepresentation, deceit, or fabrication;

(J) multiple instances of failure to participate in the legal profession's self-regulation process.

(2) Disbarment shall be considered where the defendant is found to engage in:

(A) acts of dishonesty, misrepresentation, deceit, or fabrication;

(B) impulsive acts of dishonesty, misrepresentation, deceit, or fabrication without timely remedial efforts;

(C) misappropriation or conversion of assets of any kind to which the defendant or recipient is not entitled, whether from a client or any other source;

(D) commission of a felony.

(3) In all cases, any or all of the following factors shall be considered in imposing the appropriate discipline:

(A) prior disciplinary offenses in this state or any other jurisdiction, or the absence thereof;

(B) remoteness of prior offenses;

(C) dishonest or selfish motive, or the absence thereof;

(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;

(E) indifference to making restitution;

(F) a pattern of misconduct;

(G) multiple offenses;

(H) effect of any personal or emotional problems on the conduct in question;

(I) effect of any physical or mental disability or impairment on the conduct in question;

(J) interim rehabilitation;

(K) full and free disclosure to the hearing committee or cooperative attitude toward the proceedings;

(L) delay in disciplinary proceedings through no fault of the defendant attorney;

(M) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;

(N) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(O) refusal to acknowledge wrongful nature of conduct;

(P) remorse;

(Q) character or reputation;

(R) vulnerability of victim;

(S) degree of experience in the practice of law;

(T) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint;

(U) imposition of other penalties or sanctions;

(V) any other factors found to be pertinent to the consideration of the discipline to be imposed.

(x) . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 24, 2008.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

This the 8th day of October, 2009.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 8th day of October, 2009.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING 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 April 24, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

Substitute the word "panel" for the word "committee" whenever the latter word appears in the rules listed below in reference to the three-member "hearing committees" of the Disciplinary Hearing Commission that preside over public hearings.

Rule .0103, Definitions

Rule .0104, State Bar Council: Powers and Duties in Discipline and Disability Matters

Rule .0107, Counsel: Powers and Duties

Rule .0108, Chairperson of the Hearing Commission: Powers and Duties

Rule .0109, Hearing Panel ~~Committee~~: Powers and Duties

Rule .0110, Secretary: Powers and Duties in Discipline and Disability Matters

Rule .0114, Formal Hearing

Rule .0118, Disability Hearings

Rule .0119, Enforcement of Powers

Rule .0123, Imposition of Discipline; Finding of Incapacity or Disability; Notice to the Courts

Rule .0125, Reinstatement

NORTH CAROLINA
WAKE COUNTY

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This the 8th day of October, 2009.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PROCEDURES FOR ADMINISTRATIVE SUSPENSION

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 April 24, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the procedures for administrative suspension, as particularly set forth in 27 N.C.A.C. 1D, Section 0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedure for Enforcement of Obligations of Membership

. . .

(b) Notice

Whenever it appears that a member has failed to comply, in a timely fashion, with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the secretary shall prepare a written notice directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law.

(c) Service of the Notice

The notice shall be served on the member by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person effecting the service. Notice may also be by personal service ~~pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served~~ by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause.

Whenever a member fails to respond in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the council may enter an order suspending the member from the practice of law. The order shall be effective 30 days after proof of service on the member. ~~A copy of the~~ The order shall be served on the member by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person effecting the service. Notice may also be by personal service ~~pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served~~ by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process. Unless the member complies with or fulfills the obligation of membership within 30 days after service of the order, the obligations of a disbarred or suspended member to wind-down the member's law practice within 30 days set forth in Rule .0124 of Subchapter 1B of these rules shall apply to the member upon the effective date of the order of suspension. If the member fails to fulfill the obligations set forth in Rule .0124 of Subchapter 1B within 30 days of the effective date of the order, the member shall be subject to professional discipline.

(e) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) . . .

(3) Order of Suspension

Upon the recommendation of the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be effective 30 days after proof of service on the member. ~~A copy of the~~ The order shall be served on the member by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person effecting the service. Notice may also be by personal service ~~pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served~~ by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process. Unless the member complies with or fulfills the obligation of membership within 30 days after service of the order, the obligations of a disbarred or suspended member to wind

down the member's law practice within 30 days set forth in Rule .0124 of Subchapter 1B of these rules shall apply to the member upon the effective date of the order of suspension. If the member fails to fulfill the obligations set forth in Rule .0124 of Subchapter 1B within 30 days of the effective date of the order, the member shall be subject to professional discipline.

(f) Late Compliance

. . .

.0904 Compliance After Suspension for Failure to Fulfill Obligations of Membership ~~Pay Fees or Assessed Costs, or to File Certificate of Insurance Coverage~~

(a) Reinstatement Within 30 Days of Service of Suspension Order. A member who receives an order of suspension for failure to comply with an obligation of membership ~~nonpayment of the annual membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar, and/or failure to file a certificate of insurance coverage as required by Rule .0204 of Subchapter A, and/or a pro hac vice registration statement as required by Rule .0101 of subchapter H~~, may preclude the order from becoming effective by submitting a written request and satisfactory showing within 30 days after service of the suspension order that the member has complied with or fulfilled the obligations of membership set forth in the order ~~of certification of insurance coverage, registration of pro hac vice admission, and/or payment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, assessed costs~~, and has paid the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay a $125 reinstatement fee.

(b) Reinstatement More than 30 Days after Service of Suspension Order. At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for failure to comply with an obligation of membership ~~nonpayment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar and/or failure to file a certificate of insurance coverage, and/or file a pro hac vice registration statement~~, may petition the council for an order of reinstatement.

(c) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) . . .

(5) that the member has filed a certificate of insurance coverage for the current year; ~~and~~

(6) that the member has filed any overdue pro hac vice registration statement for which the member was responsible, and

(7) that, during the 30 day period after the effective date of the order of suspension, the member fulfilled the obligations of a disbarred or suspended member set forth in Rule .0124 of Subchapter 1B, or that such obligations do not apply to the member due to the nature of the member's legal employment.

(d) Procedure for Review of Reinstatement Petition

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 24, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

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Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State

Bar be spread upon the minutes of the Supreme Court and that they 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 8th day of October, 2009.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 24, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

.1606 Fees

(a) Sponsor Fee—The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved activities presented in North Carolina and by accredited sponsors located in North Carolina for approved activities wherever presented, except that no sponsor fee is required where approved activities are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee, per approved CLE hour per active member of the North Carolina State Bar in attendance, is ~~$1.25~~ $3.00. This amount shall be allocated as follows: $1.25 to the Board of Continuing Legal Education to administer the CLE program; $1.00 to ~~plus such additional amount as determined by the council as necessary to support~~ the Chief Justice's Commission on Professionalism ~~but not to exceed $1.00~~; $.050 to the North Carolina Equal Access to Justice Commission; and $0.25 to the State Bar to administer the funds distributed to the commissions. The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by 100 North Carolina lawyers seeking CLE credit ~~and further assumes that the fee per hour is $2.25 which includes as assessment of $1.00 for the Chief Justice's Commission on Professionalism~~:

> Fee: ~~$2.25~~ $3.00 x Total Approved CLE Hours (6) x Number of NC Attendees (100) = Total Sponsor Fee ~~($1350)~~($1800)

(b) Attendee Fee—The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney will be invoiced for any attendees fees owed following the submission of the attorney's annual report form pur-

suant to Rule .1522(a) of this subchapter. Payment shall be remitted within 30 (thirty) days of the date of the invoice. The amount of the fee, per approved CLE hour for which the attorney claims credit, is ~~set at $1.25~~ $3.00. This amount shall be allocated as follows: $1.25 to the Board of Continuing Legal Education to administer the CLE program; $1.00 to ~~plus such additional amount as determined by the council as necessary to support~~ the Chief Justice's Commission on Professionalism ~~but not to exceed $1.00~~; $.050 to the North Carolina Equal Access to Justice Commission; and $0.25 to the State Bar to administer the funds distributed to the commissions. It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit ~~and that the fee per hour is $2.25 which includes an assessment of $1.00 for the Chief Justice's Commission on Professionalism~~:

Fee: ~~$2.25~~ $3.00 x Total Approved CLE hours (3.0) = Total Attendee Fee ~~($6.75)~~ ($9.00)

(c) Fee Review—The board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the board in a nonprofit manner. ~~The fee charged to sponsors and attendees will be increased only to the extent necessary for those fees to pay the costs of administration of the CLE program.~~ The council shall annually review the assessments for the Chief Justice's Commission on Professionalism and the North Carolina Equal Access to Justice Commission and adjust ~~it~~ them as necessary to maintain adequate finances for the operation of the ~~commission~~ commissions.

(d). . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 24, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

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

This the 8th day of October, 2009.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 8th day of October, 2009.

Hudson, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 24, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0120 Standards for Continued Certification of Paralegals

(a) . . .

(c) A late fee of $25.00 will be charged to any certified paralegal who fails to file the renewal application within forty-five (45) days of the due date; provided, however, a renewal application will not be accepted more than ninety (90) days after the due date. Failure to renew shall result in lapse of certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 24, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

L. Thomas Lunsford
L. Thomas Lunsford, II, 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 8th day of October, 2009.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it 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 8th day of October, 2009.

Hudson, J.
For the Court

AMENDMENT TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendment to the Rules of Professional Conduct was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 24, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 1.15, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 1.15, Safeguarding Property

Rule 1.15-1, *Definitions*

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" denotes a bank~~,~~ or savings and loan association~~, or credit union~~ chartered under North Carolina or federal law.

(b) . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules of Professional Conduct was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 24, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2009.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules of Professional Conduct 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 8th day of October, 2009.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules of Professional Conduct be spread upon the

minutes of the Supreme Court and that it 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 8th day of October, 2009.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

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 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning IOLTA, as particularly set forth in 27 N.C.A.C. 1D, Section .1300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts

.1316 IOLTA Accounts

(a) **IOLTA Account Defined.** Pursuant to order of the North Carolina Supreme Court, every general trust account, as defined in the Rules of Professional Conduct, ~~maintained by a lawyer or law firm~~ must be an interest or dividend-bearing account. (As used herein, "interest" shall refer to both interest and dividends.) Funds deposited in a general, interest-bearing trust account must be available for withdrawal upon request and without delay (subject to any notice period that the bank is required to reserve by law or regulation). For the purposes of these rules, ~~these general, interest bearing trust~~ such accounts shall be known as "IOLTA ~~a~~Accounts~~.~~"(also referred to as "Accounts").

(b) **Eligible Banks.** ~~Every lawyer must insure that all general trust accounts maintained by the lawyer or law firm are interest bearing.~~ Lawyers may maintain one or more IOLTA Account(s) only at banks and savings and loan associations chartered under North Carolina or federal law, as required by Rule 1.15 of the Rules of Professional Conduct, that offer and maintain IOLTA Accounts that comply with the requirements set forth in this subchapter (Eligible Banks). The determination of whether a bank is eligible shall be made by NC IOLTA, which shall maintain a list of participating Eligible Banks available to all members of the State Bar. A bank that fails to meet the requirements of this subchapter shall be subject only to termination of its eligible status by NC IOLTA. A violation of this rule shall not be the basis for civil liability.

~~(c) Every lawyer must comply with all the administrative requirements of this rule, including the certification required in Rule .1318 below~~

(~~d~~c) **Notice Upon Opening or Closing IOLTA Account.** Every lawyer or law firm maintaining IOLTA ~~a~~Accounts shall advise NC IOLTA of the establishment or closing of each IOLTA ~~a~~Account. Such notice shall include (i) the name of the bank where the ~~a~~Account is ~~established~~ maintained~~,~~; (ii) the name of the ~~a~~Account~~,~~; (iii) the ~~bank~~ ~~a~~Account number~~,~~; and (iv) the name and bar number of the lawyer(s) in the firm. The North Carolina State Bar shall furnish to each lawyer or law firm maintaining an IOLTA ~~a~~Account~~s~~ a suitable plaque ~~or scroll~~ explaining the program, which plaque ~~or scroll~~ shall be exhibited in the office of the lawyer or law firm.

(~~e~~d) **Directive to Bank.** Every lawyer or law firm maintaining North Carolina IOLTA ~~a~~Accounts f~~or North Carolina client funds~~ shall direct ~~the~~ any bank in which an IOLTA ~~a~~Account is maintained to:

(1) remit interest ~~or dividends~~, less any deduction for ~~permissible~~ allowable reasonable bank service charges~~,~~ or fees, ~~and taxes~~ (as used herein, "service charges" shall include any charge or fee charged by a bank on an IOLTA Account) as defined in paragraph (e), ~~collected with respect to the deposited funds,~~ at least quarterly to NC IOLTA; ~~at the North Carolina State Bar. If the bank does not waive service charges or fees on IOLTA accounts, reasonable customary account maintenance fees may be assessed, but only against accrued interest. Business costs or costs billable to others are the responsibility of the lawyer or law firm and may not be charged against client funds or the interest earned by an IOLTA account but may be deducted from the firm's operating account, billed to the firm, or deducted from funds maintained or deposited by the lawyer in the IOLTA account for that purpose. Such costs include but are not limited to NSF fees, wire transfer fees, stop payment orders, account reconciliation, negative collected balances, and business services, such as remote capture capability, on-line banking, digital imaging, and CD ROM statements.~~

(2) transmit with each remittance to NC IOLTA ~~at the North Carolina State Bar~~ a statement showing for each Account: (i) the name of the law firm or lawyer maintaining the ~~a~~Account ~~with respect to which the remittance is sent~~, (ii) the lawyer or law firm's IOLTA Account number, (iii) the earnings period, (iv) the average balance of the Account for the earnings period, (v) the type of Account, (vi) ~~and~~ the rate of interest applied in computing the remittance~~,~~; (vii) the amount of any service charges for the

earnings period, and (viii) the net remittance for the earnings period; and

(3) transmit to the law firm or lawyer maintaining the ~~a~~Account ~~at the same time~~ a report showing the amount remitted to NC IOLTA ~~at the North Carolina State Bar~~, the earnings period, and the rate of interest applied in computing the remittance.

(e) **Allowable Reasonable Service Charges.** Eligible Banks may elect to waive any or all service charges on IOLTA Accounts. If a bank does not waive service charges on IOLTA Accounts, allowable reasonable service charges may be assessed but only against interest earned on the IOLTA Account or funds deposited by the lawyer or law firm in the IOLTA Account for the purpose of paying such charges. Allowable reasonable service charges may be deducted from interest on an IOLTA Account only at the rates and in accordance with the bank's standard practice for comparable non-IOLTA accounts. Allowable reasonable service charges for IOLTA Accounts are: (i) a reasonable Account maintenance fee, (ii) per check charges, (iii) per deposit charges, (iv) a fee in lieu of a minimum balance, (v) federal deposit insurance fees, and (vi) automated transfer (Sweep) fees. All service charges other than allowable reasonable service charges assessed against an IOLTA Account are the responsibility of and shall be paid by the lawyer or law firm. No service charges in excess of the interest earned on the Account for any month or quarter shall be deducted from interest earned on other IOLTA Accounts or from the principal of the Account.

.1317 Comparability Requirements for IOLTA Accounts

This rule shall take effect on July 1, 2010.

(a) **Comparability of Interest Rate.** Eligible Banks that offer and maintain IOLTA Accounts must pay to an IOLTA Account the highest interest rate generally available from the bank to non-IOLTA Accounts (Comparable Rate) when the IOLTA Account meets or exceeds the same minimum balance or other account eligibility qualifications, if any. In determining the highest interest rate generally available from the bank to non-IOLTA accounts, an Eligible Bank may consider factors, in addition to the IOLTA account balance, customarily considered by the bank when setting interest rates for its customers, provided that such factors do not discriminate between IOLTA accounts and non-IOLTA accounts.

(b) **Options for Satisfying Requirement.** An Eligible Bank may satisfy the Comparable Rate requirement by electing one of the following options:

(1) use an account product that has a Comparable Rate;

(2) without actually changing the IOLTA Account to the bank's Comparable Rate product, pay the Comparable Rate on the IOLTA Account; or

(3) pay the benchmark rate (Benchmark), which shall be determined by NC IOLTA periodically, but not more frequently than every six months, to reflect the overall Comparable Rate for the NC IOLTA program. The Benchmark shall be a rate equal to the greater of: (i) 0.65% or (ii) 65% of the Federal Funds Target Rate as of the first business day of the IOLTA remitting period, and shall be net of allowable reasonable service charges. When applicable, NC IOLTA will express the Benchmark in relation to the Federal Funds Target Rate.

(c) **Options for Account Types.** An IOLTA Account may be established as:

(1) subject to paragraph (d), a business checking account with an automated investment feature (Sweep Account), such as an overnight investment in financial institution daily repurchase agreements or money market funds invested solely in or fully collateralized by US government securities, which are US Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof;

(2) a checking account paying preferred interest rates, such as market based or indexed rates;

(3) a public funds interest-bearing checking account, such as accounts used for governmental agencies and other non-profit organizations;

(4) an interest-bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or

(5) any other suitable interest-bearing deposit account offered by the bank to its non-IOLTA customers.

(d) **Financial Requirements for Sweep Accounts.** If a bank establishes an IOLTA Account as described in paragraph (c)(1), the following requirements must be satisfied: an overnight investment in a financial institution daily repurchase agreement shall be fully collateralized by United States government securities, as described in this Rule, and may be established only with an Eligible Bank that is

"well capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. A "money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund shall be invested solely in United States government securities or repurchase agreements fully collateralized by United States government securities, as described in this Rule, and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000.00).

(e) **Interest Calculation.** Interest shall be calculated in accordance with an Eligible Bank's standard practice for comparable non-IOLTA Accounts.

(f) **Higher Rates and Waiver of Service Charges Allowed.** Nothing in this rule shall preclude a participating bank from paying a higher interest rate than described above or electing to waive any service charges on IOLTA Accounts.

.1320 Noncompliance

Every lawyer must comply with all of the administrative requirements of this rule, including the certification required in Rule .1318 of this subchapter. A lawyer's failure to comply with the mandatory provisions of this subchapter shall be reported to the Administrative Committee which may initiate proceedings to suspend administratively the lawyer's active membership status and eligibility to practice law pursuant to Rule .0903 of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of January, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

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

This the 28th day of January, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 28th day of January, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

The following amendments to the Rules and Regulations of the North Carolina Board of Law examiners were duly adopted by the North Carolina Board of Law Examiners on October 22, 2009, and approved by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 2010.

BE IT RESOLVED by the North Carolina Board of Law Examiners that the Rules and Regulations of the North Carolina Board of Law Examiners, particularly Rule .0404 and Rule .0502 of the Rules Governing Admission to the Practice of Law in the State of North Carolina, be amended as follows (additions are underlined, deletions are interlined):

Rule .0404 Fees

Every application by an applicant who:

(1) is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of ~~$600.00~~ $700.00.

(2) is or has been a licensed attorney in any other jurisdiction shall be accompanied by a fee of ~~$1200.00~~ $1500.00.

Rule .0502 Requirements for comity applicants.

(2) Pay to the Board with each typewritten application, a fee of ~~$1500.00~~ $2000.00, no part of which may be refunded to the applicant whose application is denied;

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of January, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners as

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

This the 28th day of January, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners be spread upon the minutes of the Supreme Court and that they 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 28th day of January, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

The following amendments to the Rules and Regulations of the North Carolina Board of Law Examiners were duly adopted by the North Carolina Board of Law Examiners on March 27, 2009, and approved by the Council of the North Carolina State Bar at its quarterly meeting on April 24, 2009.

BE IT RESOLVED by the North Carolina Board of Law Examiners that the Rules and Regulations of the North Carolina Board of Law Examiners, particularly Rule .0502 (3) of the Rules Governing Admission to the Practice of Law in the State of North Carolina, be amended as follows (additions are underlined, deletions are interlined):

.0502 REQUIREMENTS FOR COMITY APPLICANTS

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, having comity with North Carolina and, except as otherwise provided in this subsection 3, that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as a corporate counsel; or

(d) Judicial service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States, whether or not such service is in the jurisdiction in which the applicant is duly licensed; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

Employment in North Carolina, when conducted pursuant to a license granted by another jurisdiction, to meet the requirement of this rule is limited to:

(a) Employment as house counsel by a person, firm, association, or corporation engaged in business in this state which business does not include the selling or furnishing of legal advice or services to others; or

(b) Employment as a full time faculty member of a law school approved by the Council of the North Carolina State Bar; or

(c) Employment as a full time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill; or

(d) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States; or

(e) Service as a United States Attorney for a federal judicial district in North Carolina, or as an Assistant United States Attorney in the office of a United States Attorney for a federal judicial district in North Carolina; or

(f) Service in North Carolina as an attorney in a federal public defender's office or a federal community defender's office for a federal judicial district in North Carolina.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on April 24, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of January, 2009.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

This the 28th day of January, 2009.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners be spread upon the minutes of the Supreme Court and that they 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 28th day of January, 2009.

Hudson, J.
For the Court

AMENDMENT TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendment to the Rules of Professional Conduct was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, be amended by adding the following provision (additions are underlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 6.1, Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means;

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; or

(3) individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate

(b) provide any additional services through:

(1) the delivery of legal services described in paragraph (a) at a substantially reduced fee; or

(2) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

COMMENT

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The North Carolina State Bar urges all lawyers to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] The critical need for legal services among persons of limited means is recognized in paragraphs (a)(1) and (2) of the Rule. Legal services to persons of limited means consists of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraph (a). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations described in paragraphs (a)(2) and (3).

[5] Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1), (2), and (3), and (b) (1). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b)(2). Such lawyers and judges are not expected to undertake the reporting outlined in paragraph twelve of this Comment.

[6] Paragraph (a)(3) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(1) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(2) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees; serving on boards of pro bono or legal services programs; taking part in Law Day activities; acting as a continuing legal education instructor, a mediator or an arbitrator; and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[10] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[11] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

[12] Lawyers are encouraged to report pro bono legal services to Legal Aid of North Carolina, the North Carolina Equal Access to Justice Commission, or other similar agency as appropriate in order that such service might be recognized and serve as an inspiration to others.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules of Professional Conduct was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 25th day of January, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules of Professional Conduct 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 28th day of January, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules of Professional Conduct be spread upon the minutes of the Supreme Court and that it 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 28th day of January, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

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 October 23, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Certification of Paralegals, Section .0200 Rules Governing Continuing Paralegal Education

.0202 Accreditation Standards

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(a) . . .

(c) A certified paralegal may receive credit for continuing education activities ~~where~~ in which live instruction ~~is used~~ or ~~mechanically or electronically~~ recorded ~~or reproduced~~ material is used~~,~~ . Recorded material includes ~~including~~ videotaped or satellite transmitted programs, and programs on CD-ROM, DVD, or other similar electronic or digital replay formats. A minimum of three certified paralegals must register to attend the presentation of a replayed prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

(d) A certified paralegal may receive credit for participation in a course ~~on CD-ROM or~~ online. ~~A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer.~~ An online course is an educational seminar available on a provider's website reached via the internet. To be accredited, a computer-based ~~CLE~~ CPE course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

(e) . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

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 October 23, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Certification of Paralegals, Section .0100 The Plan for Certification of Paralegals

.0105 Appointment of Members; When; Removal

(a) Appointment . . .

(b) Procedure for Nomination of Candidates for Paralegal Members.

(1) Composition of Nominating Committee. At least 60 days prior to a meeting of the Council at which one or more paralegal members of the board are subject to Appointment for a full three year term, the board shall appoint a nominating Committee comprised of certified paralegals as follows:

(i) A representative selected by the North Carolina Paralegal Association;

(ii) A representative selected by the North Carolina Bar Association ~~Legal Assistants~~ Paralegal Division

(iii) A representative selected by the North Carolina ~~Academy of Trial Lawyers~~ Advocates for Justice Legal Assistants Division;

(iv) Three representatives from three local or regional paralegal organizations to be slected by the board; and

(v) An independent paralegal (not employed by a law firm, government entity, or legal department) to be selected by the board.

.0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education. The applicant must have earned one of the following:

(A) an associate's, bachelor's, or master's degree from a qualified paralegal studies program; ~~or~~

(B) an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body reconginized by the United States Department of Education and a certificate from a qualified paralegal studies program; or

(C) a juris doctorate degree from a law school accredited by the American Bar Association

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State

Bar be spread upon the minutes of the Supreme Court and that they 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 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL ETHICS

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 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal ethics, as particularly set forth in 27 N.C.A.C. 1D, Section .0100, be amended by adding the following new rule:

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .0100, Procedures for Ruling on Questions of Legal Ethics

.0105 Procedures for Meetings of the Ethics Committee

(a) Consent Agenda. The agenda for a meeting of the committee shall include a consent agenda consisting of those proposed formal ethics opinions, proposed ethics decisions, and ethics advisories (collectively "proposed opinions") published, circulated, or mailed during the preceding quarter that the chairperson, vice-chair, and staff counsel agree do not warrant discussion by the full committee.

(b) Vote on Consent Agenda. The consent agenda shall be considered at the beginning of the meeting of the committee following the consideration of administrative matters. Any committee member may make a non-debatable motion to remove an item from the consent agenda for separate discussion and vote. The motion must receive an affirmative vote of one-third of all of the duly appointed members of the committee in order for an item to be removed from the consent agenda. The items remaining upon the consent agenda shall be considered together upon a non-debatable motion to approve the remaining items on the consent agenda. The motion must pass by a vote of not less than a majority of the duly appointed members of the committee pursuant to Rule .0104(f) of this subchapter. All items on a consent agenda so approved shall be transmitted to the council with a recommendation to adopt.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments

to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ATTORNEY CLIENT ASSISTANCE PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Attorney Client Assistance Program, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Organization of the North Carolina State Bar

Section .0700, Standing Committees of the Council

.0701 Standing Committees and Boards

(a) Standing Committees.

. . .

(1) Executive Committee.

. . .

(3) Grievance Committee. It shall be the duty of the Grievance Committee to exercise the disciplinary and disability functions and responsibilities set forth in Section .0100 of Subchapter 1B of these rules and to make recommendations to the council for such amendments to that section as the committee deems necessary or appropriate. The Grievance Committee shall sit in ~~panels~~ subcommittees as assigned by the president. Each ~~panel~~ subcommittee shall have at least ten members. Two members of each ~~panel~~ subcommittee shall be nonlawyers, one member may be a lawyer who is not a member of the council, and the remaining members of each ~~panel~~ subcommittee shall be councilors of the North Carolina State Bar. A quorum of a ~~panel~~ subcommittee shall be five members serving at a particular time. One subcommittee shall oversee the Attorney Client Assistance Program. It shall be the duty of the Attorney Client Assistance subcommittee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal

representation and to prevent the improper solicitation of victims by lawyers; and to perform such other duties and consider such other matters as the council or the president may designate. Each ~~panel~~ subcommittee shall exercise the powers and discharge the duties of the Grievance Committee with respect to the grievances, fee disputes, and other matters referred to it by the chairperson of the Grievance Committee. Each ~~panel~~ subcommittee member shall be furnished a brief description of all matters referred to other ~~panels~~ subcommittees (and such other available information as he or she may request) and be given a reasonable opportunity to provide comments to such other ~~panels~~ subcommittees. Each ~~panel's~~ subcommittee's decision respecting the grievances, fee disputes, and other matters assigned to it will be deemed final action of the Grievance Committee, unless the full committee at its next meeting, by a majority vote of those present, elects to review a ~~panel~~ subcommittee decision and upon further consideration decides to reverse or modify that decision. There will be no other right of appeal to the committee as a whole or to another ~~panel~~ subcommittee. The president shall designate a vice-chairperson to preside over, and oversee the functions of each ~~panel~~ subcommittee. The vice-chairpersons shall have such other powers as may be delegated to them by the chairperson of the Grievance Committee. The Grievance Committee shall perform such other duties and consider such other matters as the council or the president may designate.

(4) Authorized Practice Committee.

. . .

~~(7) Attorney Client Assistance Committee. It shall be the duty of the Attorney Client Assistance Committee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers; and to perform such other duties and consider such other matters as the council or the president may designate.~~

~~(8)~~ (7) Legal Assistance for Military Personnel (LAMP) Committee.

. . .

[Renumber remaining paragraphs]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

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 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning membership, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D Rules of the Standing Committees of the North Carolina State Bar, Section .0900 Procedures for Administrative Committee

.0904 Compliance After Suspension for Failure to Fulfill Obligations of Membership

(a) Reinstatement Within 30 Days of Service of Suspension Order. A member who receives an Order of Suspension for failure to comply with an obligation of membership may preclude the order from becoming effective by submitting a written request and satisfactory showing within 30 days after service of the suspension order that the member has complied with or fulfilled the obligations of membership set forth in the order, and has paid the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay ~~a $125~~ the reinstatement fee.

(b) Reinstatement More than 30 Days After Service of Suspension Order.

. . .

(c) Contents of Reinstatement Petition

. . .

(d) Procedure for Review of Reinstatement Petition

. . .

(e) Reinstatement by Secretary of the State Bar. At any time after the effective date of a suspension order and prior to the next meeting of the Administrative Committee, a suspended member may petition for reinstatement pursuant to paragraphs (b) and (c) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the

suspended member has complied with or fulfilled the obligations of membership set forth in the order; there are no issues relating to the suspended member's character or fitness; and the suspended member has paid the costs of the suspension and reinstatement procedure including the costs of service and the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f).

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

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 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning obligations of membership, as particularly set forth in 27 N.C.A.C. 1A, Section .0200, and 27 N.C.A.C. 1D, Section .0900 be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Organization of the North Carolina State Bar

Section .0200 Membership—Annual Membership Fees

~~**.0204 Certificate of Insurance Coverage**~~

~~(a) Before July 1 of each year, each active member shall submit a certificate to the secretary of the North Carolina State Bar on a form provided by the secretary stating whether the member is engaged in the private practice of law and, if so, whether the member is covered by a policy of professional liability insurance issued by an insurer legally permitted to provide coverage in North Carolina. The certificate may be submitted in electronic form or in an original document. If, after having most recently submitted a certificate of insurance coverage asserting that the member is covered by a policy of professional liability insurance coverage, a member for any reason ceases to be insured, the member shall immediately advise the North Carolina State Bar of the changed circumstances in writing.~~

~~(b) Any active member who fails to submit the certificate of insurance coverage required above in a timely fashion may be suspended from active membership in the North Carolina State Bar in accordance with the procedures set forth in Rule .0903 of subchapter D.~~

~~(c) Any member failing to submit a certificate of insurance coverage in a timely fashion shall pay a late fee of $30 to defray the administrative cost of enforcing compliance with this rule; provided, however, that no late fee associated with such failure shall be charged if the member is also liable for a late fee in regard to failure to pay the annual membership fee or Client Security Fund assessment for the same year in a timely fashion.~~

~~(d) Notwithstanding the foregoing:~~

~~(1) A person licensed to practice law in North Carolina for the first time by examination shall not be required to file a certificate of insurance coverage during the year in which the person is admitted;~~

~~(2) A person licensed to practice law in North Carolina serving in the armed forces, in a legal or nonlegal capacity, shall not be required to file a certificate of insurance coverage for any year in which the member is on active duty in military service;~~

~~(3) A person licensed to practice law in North Carolina who files a petition for inactive status on or before December 31 of a given year shall not be required to file a certificate of insurance coverage for the following year if the petition is granted. A petition shall be deemed timely if it is postmarked on or before December 31.~~

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .0900, Procedures for Administrative Committee

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedure for Enforcement of Obligations of Membership

. . .

(1) The following are examples of obligations of membership that will be enforced by administrative suspension. This list is illustrative and not exclusive:

(A) . . .

~~(D) Filing of the certificate of insurance coverage as required in Rule .0204 of subchapter 1A of these rules;~~

(D)~~(E)~~ . . .

[Reletter remaining subparagraphs]

(b) . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

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 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2900 Certification Standards for the Elder Law Specialty

.2905, Standards for Certification as a Specialist in Elder Law

Each applicant for certification as a specialist in elder law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in elder law:

(a) Licensure and Practice.

. . .

(c) Substantial Involvement Experience Requirements

(1) . . .

(3) Experience Categories:

(A) . . .

(F) Special Needs Counseling, including the planning, drafting, and administration of special/supplemental needs trusts, housing, employment, education, and related issues.

[Reletter subparagraphs (F) to (I)]

~~(J) Income, Estate, and Gift Tax Advice, including consequences of plans made and advice offered.~~

~~(K) public Benefits Advice, including planning for and assisting in obtaining Medicare, social security, and food stamps.~~

[Reletter remaining subparagraphs]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

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 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1800, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1800 Hearing and Appeal Rules of the Board of Legal Specialization

.1801 Incomplete Applications; Reconsideration of Applications, Failure of Written Examinations Rejected by Specialty Committee; and Appeals Reconsideration Procedure

(a) Applications Incomplete and/or Applicants Not in Compliance with Standards for Certification

(1) Incomplete Applications. The executive director of the North Carolina State Bar Board of Legal Specialization (the board) will review every application to determine if the application is complete. The applicant will be notified in writing of the incompleteness of his or her application if an application is incomplete. The applicant must submit the the information necessary to completed complete the application within 21 days of the date of mailing of the notice. If the applicant fails to provide the required information for the application during the requisite time period, the executive director will refer the application to the specialty committee for review. return the application to the applicant together with a refund of the application fee less a fifty dollar ($50.00) administrative fee. The decision of the executive director to reject an application as incomplete is final unless the applicant shows good cause for an extension of time to provide the required information.

(b) (2) Applicant Not in Compliance Denial of Application by Specialty Committee. The executive director shall refer all complete applications to the specialty committee for review any application which appears complete on its face, but which does not satisfactorily demonstrate for compliance with the standards for certification in the specialty area for which certification is sought.

~~(3) Specialty Committee Action. The specialty committee shall review the incomplete applications and the applications not in compliance with the standards for certification.~~ After reviewing the applications, the specialty committee shall recommend to the board the acceptance or rejection of the applications. The specialty committee shall notify the board of its recommendations in writing and the reason for any negative recommendation must be specified. ~~The specialty committee must complete the above process within 14 days of receiving the applications.~~

(1~~4~~) Notification to Applicant of the Specialty Committee's Action. The executive director shall promptly notify the applicant in writing of the specialty committee's recommendation of rejection of the application and the board's intention to act in accordance with the committee's recommendation. The notification must specify the reason for the recommendation of rejection of the application~~. In addition, the notification~~ and shall inform the applicant of ~~his or her~~ the right to petition pursuant to paragraph (c) of this rule ~~the board~~ for ~~review of the application or request a hearing before the board.~~ reconsideration of the recommendation of the specialty committee.

(c~~5~~) Petition for ~~Review by the Board~~ Reconsideration**.** Within ~~21~~ 14 days of the ~~mailing~~ date of the notice from the executive director that an application has been recommended for rejection by ~~the~~ a specialty committee, the applicant may petition the board for ~~review~~ reconsideration. The petition ~~may be informal (e.g., by letter), but~~ shall be in writing and ~~should~~ shall include the following information: ~~date on which notice of the recommendation of rejection was received~~ the applicant's election between a reconsideration hearing on the written record or in-person; and the reasons for which the applicant believes the specialty committee's recommendation ~~of rejection~~ should not be accepted.

(d~~6~~) ~~Review of Petition by the Board~~ Reconsideration Procedure. Upon receipt of a petition filed pursuant to paragraph (c) of this rule, a~~A~~ three-member panel of the board, to be appointed by the chairperson of the board, shall ~~review and~~ reconsider an application pursuant to the following procedures: ~~take action by a majority of the panel upon the petition :and notify the applicant of the board's decision. The notification shall inform the applicant of his or her right to appeal the decision to the North Carolina State Bar Council (the council) if the board's action is unfavorable to the applicant.~~

~~(7) Request for Hearing. In lieu of a petition for review, an applicant may request a hearing before the board. The applicant shall notify the board through its executive director in writing of such request for a~~

~~hearing within 21 days of the mailing of the notice regarding the specialty committee's recommendation of rejection of the application. The applicant shall set forth the grounds for the hearing before the board. In such a request, the applicant shall list the names of prospective witnesses and identify documentation and other evidence to be introduced at the hearing before the board. The applicant shall be notified of the board's decision, and if the board's decision is unfavorable to the applicant, the applicant will be notified of his or her right to appeal the board's decision to the council.~~

~~(8) Hearing Procedures~~

(1) ~~(A)~~ Notice. ~~Time and Place of Hearing~~ The chairperson of the ~~board~~ panel shall ~~fix~~ set the time and place of the hearing to reconsider the applicant's application as soon as practicable after the applicant's request for ~~hearing~~ reconsideration is received. The applicant shall be notified of the ~~hearing~~ date~~. Such notice shall be given to the applicant~~ at least 10 days prior to the time ~~fixed~~ set for the hearing.

~~(B) Quorum – A panel of three members of the board, as appointed by the chairperson, shall be necessary to conduct the hearing with the majority of those in attendance necessary to decide upon the matter.~~

(2) Reconsideration on the Written Record. ~~(C) Representation by Counsel and Witnesses~~ If the ~~The~~ applicant ~~may~~ elects to have the matter decided on the written record, the applicant will not be present at the hearing and no witnesses will appear before the panel except the executive director of the specialization program, or a staff designee, who shall provide administrative support to the panel. At least 10 days prior to the hearing, the applicant shall provide the panel with copies of any documents that the applicant would like to be considered by the panel.

(3) Reconsideration In-Person. If the applicant elects to be present at the hearing, the applicant may be represented by counsel or represent himself or herself at such hearing. The applicant may offer witnesses and documents and may ~~cross-examine~~ question any witness. At least 10 days prior to the hearing, the applicant shall provide the panel with copies of any documents that the applicant wants considered by the panel and, if the reconsideration is in-person, with the names of prospective witnesses. At least ten days prior to the hearing, the applicant shall be provided with copies of any documents that the executive director will submit to the panel, except confidential peer review forms or information, and with the names of prospective wit-

nesses. Additional documents may be considered at the discretion of the panel.

~~(D) Written Briefs.—The applicant is urged to submit a written brief (in quadruplicate) 10 days prior to the hearing to the executive director for distribution to the panel in support of his or her position. However, written briefs are not required.~~

~~(E) Depositions.—Should the applicant or executive director desire to take a deposition prior to the board hearing of any voluntary witness who cannot attend the board hearing, such intention to take, and request to take, the deposition of a witness may be applied for in writing to the chairperson of the board together with a written consent signed by the potential witness that he or she will give a deposition for one party and a statement to the effect that the witness cannot attend the hearing along with the reason for such unavailability. The party seeking to take the deposition of a witness shall state in detail as to what the witness is expected to testify. If the chairperson is satisfied that such deposition from a possible witness will be relevant to the issue in question before the board, then the chairperson will authorize said taking of the deposition. The chairperson will also designate the executive director or a member of the specialty committee to be present at the deposition. The deposition may be taken orally or by video. Any refusal of the taking of the deposition by the chairperson shall be reviewed by the board at the request of the applicant. The cost connected with taking the deposition shall be borne by the party requesting the deposition.~~

~~(F) Continuances.—Motions for continuance of the hearing should be made to the chairperson of the board and such motions will be granted or denied by the chairperson of the board.~~

(4~~G~~) Burden of Proof. ~~—Preponderance of the Evidence.—~~The applicant must make a clear and convincing showing that the application satisfies the standards for certification in the applicable specialty. ~~The panel of the board shall apply the preponderance of the evidence rule in determining whether or not to accept the application for certification. The burden of proof is upon the applicant.~~

(5) ~~(H)~~ Conduct of ~~Hearings: Rights of Parties.—~~ Reconsideration Hearing.

(A~~i~~) Preservation of Record. ~~Hearings~~ The hearing shall be recorded unless the applicant agrees in writing that the hearing shall not be recorded or, if the applicant wants an official transcript, the applicant ~~reported by a certified court reporter. The applicant shall pay~~ pays the costs associated

with obtaining a court reporter and makes all arrangements for the court reporter's services and for the preparation of the transcript. ~~the court reporter's services for the hearing. The applicant shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The applicant shall be taxed with all other costs of the hearing, but such costs shall not include any compensation to the members of the board before whom the hearing is conducted. The board in its discretion may refund to the applicant all or some portion of the necessary costs incurred as a result of the hearing.~~

~~(ii) The applicant may retain counsel at all stages of the investigation and at all meetinghearings. The applicant and his or her counsel shall have the right to attend all hearings.~~

(B~~iii~~) Procedural Rules. ~~Oral evidence at hearings shall be taken only on oath or affirmation. The applicant shall have the right to testify unless he or she specifically waives such right or fails to appear at the hearing. If the applicant does not testify on his or her behalf, the applicant may be called and examined by the panel of the board, the executive director, and any member of the specialty committee. The applicant's failure to appear at the hearing ordered by the board, after receipt of written notice, shall constitute a waiver of the applicant's right to a hearing before the board.~~

~~(iv) At any hearing, the panel of the board, the executive director, any member of the appropriate specialty committee, and the applicant shall have these rights:~~

~~(a) to call and examine witnesses;~~

~~(b) to offer exhibits;~~

~~(c) to cross examine witnesses on any matter relevant to the issues even thought that matter was not covered in the direct examination; and~~

~~(d) to impeach any witness regardless of who first called such witness to testify and to rebut any evidence.~~

~~(v) Hearings~~ The reconsideration hearing shall ~~need~~ not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted and may be considered by the panel according to its probative value if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of any common

law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(C) Decision of the Panel. ~~(vi) Any hearing may be recessed or adjourned from time to time at the discretion of the panel.~~

The decision of the panel shall be by a majority of the members of the panel and shall be binding upon the board. Written notification of the decision shall be sent to the applicant. If the board's decision is unfavorable, the notification shall set forth the grounds for the decision and shall notify the applicant of the right to appeal the decision to the North Carolina State Bar Council (the council) pursuant to Rule .1804 of this subchapter

(e ~~9~~) Failure of Applicant to Petition the Board for ~~Review or Request a Hearing Before the Board~~ Reconsideration Within the Time Allowed by These Rules. If the applicant does not petition the board for ~~review or request a hearing before the board regarding~~ reconsideration of the specialty committee's recommendation of rejection of the application within the time allowed by these rules, the board shall act on the matter at its next board meeting.

~~(b) Failure of a Written Examination Prepared and Administered by a Certification Committee~~

~~(1) Review of Examination. Within 30 days of the mailing of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant will be given the applicant's scores for each question on the examination. The applicant shall not remove the examination from the board's office.~~

~~(2) Petition for Grade Review. If, after reviewing the examination, the applicant feels an error or errors were made in the grading, the applicant may file with the executive director a petition for grade review. The petition must be filed within 45 days of the mailing of the notice of failure and should set out in detail the examination questions and answers which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed to substantiate the applicant's claim.~~

~~(3) Review Procedure. The applicant's examination and petition shall be submitted to a panel consisting of a minimum of at least three members of the specialty committee (the review committee of the specialty committee). All information will be submitted in blind form, the staff being responsible for deleting any identifying information on the examination or the petition. The review committee of the~~

~~specialty committee shall review the petition of the applicant and determine whether the grade of the examination should remain the same or be changed. The review committee shall make a written report to the board setting forth its recommendation relative to the grade on the applicant's examination and an explanation of its recommendation.~~

~~(4) Decision of the Board. The board shall consider the petition and the report and recommendation of the review committee and shall certify the applicant if it determines that the applicant has satisfied all of the standards for certification.~~

~~(c) Failure of a Written Examination Prepared and Administered by a Testing Organization on Behalf of the Board.~~

~~The applicant shall comply with the review and appeal procedures of any testing organization retained by the board to prepare and administer the certification examination.~~

.1802 Denial, Revocation, or Suspension of Continued Certification as a Specialist

(a) . . .

(c) Notification of Board Action. The executive director shall notify the lawyer of the board's action to grant or deny continued certification as a specialist upon application for continued certification pursuant to Rule .1721(a) of this subchapter, or to revoke or suspend continued certification pursuant to Rule .1723(a) or (b) of this subchapter. If the board's action is unfavorable, the notification shall set forth the grounds for the action and shall notify ~~The~~ the lawyer ~~will also be notified of his or her~~ of the right to a hearing if ~~a hearing is~~ allowed by these rules.

(d) Request for Hearing. Within ~~21~~ 14 days of the ~~mailing~~ date of the ~~of~~ notice from the executive director of the board that the lawyer has been denied continued certification pursuant to Rule .1721(a) of this subchapter or that certification has been revoked or suspended pursuant to Rule .1723(b) of this subchapter, the lawyer must request a hearing before the board in writing. There is no right to a hearing upon automatic revocation pursuant to Rule .1723(a) of this subchapter.

(e) Hearing Procedure. Except as set forth in Rule .1802(f) below, the procedures ~~rules~~ set forth in Rule .1801(~~a~~d)~~(8)~~ of this subchapter shall be followed when a lawyer requests a hearing regarding the denial of continued certification pursuant to Rule .1721(a) of this subchapter or the revocation or suspension of certification under Rule .1723(b) of this subchapter.

(f) Burden of Proof: Preponderance of the Evidence. A three-member panel of the board shall apply the preponderance of the evidence rule in determining whether the lawyer's certification should be continued, revoked, or suspended. ~~In cases of denial of an application for continued certification under Rule .1721(a), the~~ The burden of proof is upon the lawyer. ~~In cases of revocation or suspension under Rule .1723(b), the burden of proof is upon the board.~~

(g) Notification of Board's Decision. After the hearing, the board shall timely notify the lawyer of its decision regarding continued certification as a specialist. If the board's decision is unfavorable, the notification shall set forth the grounds for the decision and the lawyer's appeal rights under Rule .1804 of this subchapter.

.1803 ~~RESERVED~~ Reconsideration of Failed Examination

(a) Review of Examination. Within 30 days of the date of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant will be given the applicant's scores for each question on the examination. The applicant shall not copy, transcribe, or remove the examination from the board's office (or any other location established by the board for the review of the examination) and shall be subject to such other restrictions as the board deems necessary to protect the content of the examination.

(b) Petition for Grade Review. If, after reviewing the examination, the applicant feels an error or errors were made in the grading, the applicant may file with the executive director a petition for grade review. The petition must be filed within 45 days of the date of the notice of failure and should set out in detail the examination questions and answers which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed to substantiate the applicant's claim.

(c) Review Procedure. The applicant's examination and petition shall be submitted to a panel consisting of three members of the specialty committee (the grade review panel). All identifying information shall be redacted from the examination and petition prior to submission to the grade review panel. The grade review panel shall review the petition of the applicant and determine whether the grade of the examination should be changed. The grade review panel shall make a written report to the board setting forth its recommendation relative to the grade on the applicant's examination and an explanation of its recommendation.

(d) Decision of the Board. The board shall consider the petition and the report of the grade review panel and shall certify the applicant if it determines by majority vote that the applicant has satisfied all of the standards for certification.

(e) Failure of Examination Prepared and Administered by a Testing Organization on Behalf of the Board. Notwithstanding paragraphs (a) – (d) of this rule, if the board is utilizing a qualified organization to prepare and administer the certification examination for a specialty pursuant to Rule .1716(10) of this subchapter, an applicant for such specialty shall only be entitled to the review and appeal procedures of the organization.

.1804 Appeal to the Council

(a) Appealable Decisions. An appeal may be taken to the council from a decision of the board which denies an applicant certification (i.e., when an applicant's application has been rejected because ~~it is incomplete and/or~~ it is not in compliance with the standards for certification or when an applicant fails the written specialty examination), denies an applicant continued certification as a specialist, or suspends or revokes a specialist's certification. The rejection of an application because it is incomplete shall not be appealable. (Persons who appeal the board's decision are referred to herein as appellants.)

(b) Filing the Appeal. An appeal from a decision of the board as described in paragraph ~~Rule .1804~~ (a) may be taken by filing with the executive director of the North Carolina State Bar (the State Bar) a written notice of appeal not later than 21 days after the ~~mailing~~ date of the notice of the board's decision to the applicant who is denied certification or continued certification or to a lawyer whose certification is suspended or revoked.

(c) Time and Place of Hearing. The appeal will be scheduled for hearing at a time set by the council. The executive director of the State Bar shall notify the appellant and the board of the time and place of the hearing before the council.

(d) Record on Appeal to the Council.

(1) The record on appeal to the council shall consist of all ~~the evidence~~ documents and oral statements by witnesses offered at ~~the hearing before the board~~ any reconsideration hearing. The executive director of the board shall assemble the record and certify it to the executive director of the State Bar and notify the appellant of such action.

(2) If a court reporter was present at a reconsideration hearing at the election of the appellant, ~~T~~the appellant shall make

prompt arrangement with the court reporter to obtain and have filed with the executive director of the State Bar a complete transcript of the hearing. Failure of the appellant to make such arrangements and pay the costs shall be grounds for dismissal of the appeal.

(e) Parties Appearing Before the Council. The appellant may request to appear, with or without counsel, before the council and make oral argument. The board may appear on its own behalf or by counsel.

(f) Appeal Procedure. The council shall consider the appeal *en banc*. The council shall consider only the record on appeal, briefs, and oral arguments. The decision of the council shall be by a majority of those members voting. All council members present at the ~~meeting~~ hearing may participate in the discussion and deliberation of the appeal. Members of the board who also serve on the council are recused from voting on the appeal.

(g) Scope of Review. Review by the council shall be limited to whether the appellant was provided with procedural rights and whether the board, or the reconsideration panel where applicable, applied the correct procedural standards and State Bar rules in rendering its decision. The appellant shall have the burden of making a clear and convincing showing of arbitrary, capricious, or fraudulent denial of procedural rights or misapplication of the procedural standards or State Bar rules.

(h) Notice of the Council's Decision. The appellant shall receive written notice of the council's decision.

.1806 Additional Rules Pertaining to Hearing and Appeals

(a) Notices. Every notice required by these rules shall be deemed sufficient if ~~mailed~~ sent to the applicant at the address listed on the applicant's last application to the board or the address in the official membership records of the State Bar.

(b) Expenses Related to Hearings and Appeals. In its discretion, the board may direct that the necessary expenses incurred in any investigation, processing, and hearing of any matter to the board or appeal to the council be paid by the board or appeal to the council be paid by the board. However, all expenses related to travel to any hearing or appeal for the applicant, his or her attorney, and witnesses called by the applicant shall be ~~home~~ paid by the applicant ~~and shall not be paid by the board~~.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PROCEDURES FOR FEE DISPUTE RESOLUTION

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 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the procedures for fee dispute resolution, as particularly set forth in 27 N.C.A.C. 1D, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D Rules of the Standing Committees of the North Carolina State Bar, Section .0700 Procedures for Fee Dispute Resolution

.0701 Purpose and Implementation

The purpose of the Fee Dispute Resolution Program ~~shall be to assist lawyers and clients to~~ is to help clients and lawyers settle disputes over fees. In doing so, the Fee Dispute Resolution Program shall assist the lawyers and clients in determining the appropriate fee for legal services rendered. The State Bar shall implement the Fee Dispute Resolution Program under the auspices of ~~the Attorney Client Assistance Committee (the committee)~~ the Grievance Committee (the committee) as part of the Attorney Client Assistance Program (ACAP)~~,~~. It ~~which shall~~ will be offered to clients and their lawyers at no cost. A person other than the client who pays the lawyer's legal fee or expenses may file a fee dispute petition. The person who paid the fees or expenses will not be permitted to participate in the fee dispute resolution process.

.0702 Jurisdiction

~~The committee shall have jurisdiction over all disagreements concerning the fees and expenses charged or incurred for legal services provided by an attorney licensed to practice law in North Carolina arising out of a client lawyer relationship. Jurisdiction shall also extend to any person, other than the client, who pays the fee of such an attorney.~~

~~The committee shall not have jurisdiction over the following:~~

~~1. disputes concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official;~~

~~2. disputes involving services that are the subject of a pending grievance complaint alleging the violation of the Revised Rules of Professional Conduct;~~

~~3. fee disputes that are or were the subject of litigation;~~

~~4. fee disputes between lawyers and service providers, such as court reporters and expert witnesses;~~

~~5. fee disputes between lawyers and individuals with whom the lawyer had no client lawyer relationship, except in those case where the fee has been paid by a person other than the client; and~~

~~6. disputes concerning fees charged for ancillary services provided by the lawyer not involving the practice of law.~~

~~The committee shall encourage mediated settlement of fee disputes falling within its jurisdiction pursuant to Rule .0706 of this subchapter.~~

(a) The committee has jurisdiction over a disagreement arising out of a client-lawyer relationship concerning the fees and expenses charged or incurred for legal services provided by a lawyer licensed to practice law in North Carolina.

(b) The committee does not have jurisdiction over the following:

(1) a dispute concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official;

(2) a dispute involving services that are the subject of a pending grievance complaint alleging violation of the Rules of Professional Conduct;

(3) a dispute over fees or expenses that are or were the subject of litigation unless

(i) a court directs the matter to the State Bar for mediation, or

(ii) both parties to the dispute agree to dismiss the litigation without prejudice and pursue mediation;

(4) a dispute between a lawyer and a service provider, such as a court reporter or an expert witness;

(5) a dispute between a lawyer and a person or entity with whom the lawyer had no client-lawyer relationship, except that the committee has jurisdiction over a dispute between a lawyer and a per-

son other than the lawyer's client who paid fees or expenses to the lawyer for the benefit of the client; and

(6) a dispute concerning a fee charged for services provided by the lawyer that do not constitute the practice of law.

The committee will encourage settlement of fee disputes falling within its jurisdiction pursuant to Rule .0708 of this subchapter.

.0703 Coordinator of Fee Dispute Resolution

The secretary-treasurer of the North Carolina State Bar ~~shall~~ will designate a member of the staff to serve as coordinator of the Fee Dispute Resolution Program. The coordinator ~~shall~~ will develop forms, maintain records, and provide statistics on the Fee Dispute Resolution Program. The coordinator ~~shall~~ will also develop an annual report to the council. The coordinator may also serve as a facilitator.

.0704 ~~Reserved~~ Confidentiality

The existence of and content of any petition for resolution of a disputed fee and of any lawyer's response to a petition for resolution of a disputed fee are confidential.

.0705 Selection of ~~Mediators~~ Facilitators

~~The State Bar will select a pool of qualified mediators. Selected mediators shall be certified by the North Carolina Dispute Resolution Commission or have a minimum of three (3) years experience as a mediator.~~

The secretary-treasurer of the North Carolina State Bar will designate members of the State Bar staff to serve as facilitators.

.0706 ~~Processing Requests for Fee Dispute Resolution~~ Powers and Duties of the Vice-Chairperson

~~(a) Requests for fee dispute resolution shall be timely submitted in writing to the coordinator of fee dispute resolution addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The attorney must allow at least 30 days after the client shall have received written notice of the fee dispute resolution program before filing a lawsuit. An attorney may file a lawsuit prior to expiration of the required 30 day notice period or after the petition is filed by the client if such is necessary to preserve a claim. However, the attorney must not take any further steps to pursue the litigation until he/she complies with the provision of the fee dispute resolution rules. Clients may request fee dispute resolution at any time prior to the filing of a lawsuit. No filing fee shall be required. The request should state with~~

~~clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that, prior to requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement, the matter has not been adjudicated, and the matter is not presently the subject of litigation. All requests for resolution of a disputed fee must be filed before the statute of limitation has run or within three years of the ending of the client/attorney relationship, whichever comes last.~~

~~(b) The coordinator of fee dispute resolution or his/her designee shall investigate the request to determine its suitability for fee dispute resolution. If it is determined that the matter is not suitable for fee dispute resolution, the coordinator shall prepare a brief written report setting forth the facts and a recommendation for dismissal. Grounds for dismissal include, but are not limited to, the following:~~

~~(1) the request is frivolous or moot;~~

~~(2) the absence of jurisdiction; or~~

~~(3) the facts as stated support the conclusion that the fee was earned and is not excessive.~~

~~The report shall be forwarded to the chairperson of the committee. If the chairperson of the Attorney-Client Assistance Committee of the State Bar concurs with the recommendation, the matter shall be dismissed and the parties notified.~~

~~(c) If the chairperson disagrees with the recommendation for dismissal, an attempt to resolve the dispute will be made pursuant to Rule .0707 below or the chair may recommend review by the full committee.~~

The vice-chairperson of the Grievance Subcommittee overseeing ACAP, or his/her designee, who must be a councilor, will:

(a) approve or disapprove any recommendation that a petition for resolution of a disputed fee be dismissed;

(b) call and preside over meetings of the committee; and

(c) refer to the Grievance Committee all cases in which it appears to the vice chairperson that (i) a lawyer might have charged, contracted to receive or received an illegal or clearly excessive fee or a clearly excessive amount for expenses or (ii) a lawyer might have failed to refund an unearned portion of a fee in violation of Rule 1.5 the Rules of Professional Conduct, or (iii) a lawyer might have violated one or more Rules of Professional Conduct other than or in addition to Rule 1.5.

.0707 ~~Mediation Proceedings~~ Processing Requests for Fee Dispute Resolution

~~(a) The coordinator shall assign the case to a mediator who shall conduct a mediated settlement conference. The mediator shall be responsible for reserving a place and making arrangements for the conference at a time and place convenient to all parties.~~

~~(b) The attorney against whom a request for fee dispute resolution is filed must attend the mediated settlement conference in person and may not send another representative of his or her law firm. If a party fails to attend a mediated settlement conference without good cause, the mediator may either reschedule the conference or recommend dismissal.~~

~~(c) The mediator shall at all times be in control of the conference and the procedures to be followed. The mediator may communicate privately with any participant prior to and during the conference. Any private communication with a participant shall be disclosed to all other participants at the beginning of the conference. The mediator shall define and describe the following at the beginning of the conference:~~

~~(1) the process of mediation;~~

~~(2) the differences between mediation and other forms of conflict resolution;~~

~~(3) that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;~~

~~(4) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;~~

~~(5) Whether and under what conditions communications with the mediator will be held in confidence during the conference;~~

~~(6) The duties and responsibilities of the mediator and the participants; and~~

~~(7) That any agreement reached will be reached by mutual consent, reduced to writing and signed by all parties.~~

~~The mediator has a duty to be impartial and advise all participants of any circumstance bearing on possible bias, prejudice, or partiality. It is the duty of the mediator timely to determine and declare that an impasse exists and that the conference should end.~~

(a) Requests for resolution of a disputed fee must be submitted in writing to the coordinator of the Fee Dispute Resolution Program addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. A lawyer is required by Rule 1.5 of the Rules of Professional Conduct to notify in writing a client with whom the lawyer has a dispute over a fee of the existence of the Fee Dispute Resolution Program and to wait at least 30 days after the client receives such notification before filing a lawsuit to collect a disputed fee. A lawyer may file a lawsuit prior to expiration of the required 30-day notice period or after the petition is filed by the client only if such filing is necessary to preserve a claim. If a lawyer does file a lawsuit pursuant to the preceding sentence, the lawyer must not take steps to pursue the litigation until the fee dispute resolution process is completed. A client may request fee dispute resolution at any time before either party files a lawsuit. The petition for resolution of a disputed fee must contain:

(1) the names and addresses of the parties to the dispute;

(2) a clear and brief statement of the facts giving rise to the dispute;

(3) a statement that, prior to requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement;

(4) a statement that the subject matter of the dispute has not been adjudicated and is not presently the subject of litigation.

(b) All petitions for resolution of a disputed fee must be filed (i) before the expiration of the statute of limitation applicable in the General Court of Justice for collection of the funds in issue or (ii) within three years of the termination of the client-lawyer relationship, whichever is later.

(c) The coordinator of the Fee Dispute Resolution Program or a facilitator will investigate the petition to determine its suitability for fee dispute resolution. If it is determined that the dispute is not suitable for fee dispute resolution, the coordinator and/or the facilitator will prepare a dismissal letter setting forth the facts and a recommendation for dismissal. The coordinator and/or the facilitator will forward the dismissal letter to the vice-chairperson. If the vice chairperson agrees with the recommendation, the petition will be dismissed. The coordinator and/or facilitator will notify the parties in writing of the dismissal. Grounds for dismissal include, but are not limited to, the following:

(1) the petition is frivolous or moot;

(2) the committee lacks jurisdiction over one or more of the parties or over the subject matter of the dispute;

(3) the fee has been earned; or

(4) the expenses were properly incurred.

(d) If the vice-chairperson disagrees with the recommendation for dismissal, the coordinator will schedule a settlement conference.

.0708 ~~Finalizing the Agreement~~ Settlement Conference Proceedings

~~If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel, if any, prior to leaving the conference.~~

(a) The coordinator will assign the case to a facilitator.

(b) The facilitator will send a Letter of Notice to the lawyer by certified mail. The Letter of Notice will include a copy of the petition and any documents the petitioner included with the petition.

(c) Within 15 days after the Letter of Notice is served upon the lawyer, the lawyer must provide a written response to the petition. The facilitator is authorized to grant requests for extensions of time to respond. The lawyer's response must be a full and fair disclosure of all the facts and circumstances pertaining to the dispute. The facilitator will provide a copy of the lawyer's response to the client unless the lawyer objects in writing.

(d) The facilitator will conduct an investigation.

(e) The facilitator will conduct a telephone settlement conference between the parties. The facilitator is authorized to carry out the settlement conference by separate telephone calls with each of the parties or by conference calls, depending upon which method the facilitator believes has the greater likelihood of success.

(f) The facilitator will define and describe the following to the parties:

(1) the procedure that will be followed;

(2) the differences between a facilitated settlement conference and other forms of conflict resolution;

(3) that the settlement conference is not a trial;

(4) that the facilitator is not a judge;

(5) that participation in the settlement conference does not deprive the parties of any right they would otherwise have to pursue resolution of the dispute through the court system if they do not reach a settlement;

(6) the circumstances under which the facilitator may communicate privately with any of the parties or with any other person;

(7) whether and under what conditions private communications with the facilitator will be shared with the other party or held in confidence during the conference; and

(8) that any agreement reached will be reached by mutual consent.

(g) The facilitator has a duty to be impartial and to advise all participants of any circumstance that might cause either party to conclude that the facilitator has a possible bias, prejudice, or partiality.

(h) It is the duty of the facilitator to timely determine when the dispute cannot be resolved by settlement and to declare that an impasse exists and that the settlement conference should end.

(i) Upon completion of the settlement conference, the facilitator will prepare a disposition letter to be sent to the parties detailing:

(1) that the settlement conference resulted in a settlement and the terms of settlement; or

(2) that the settlement conference resulted in an impasse.

.0709 Record Keeping

The coordinator of fee dispute resolution ~~shall~~ will keep a record of each request for fee dispute resolution. The record must contain the following information:

(1) the client's name;

(2) ~~date of the request;~~ the date the petition was received;

(3) the lawyer's name;

(4) the district in which the lawyer resides or maintains a place of business;

(5) ~~how the dispute was resolved (dismissed for non-merit, mediated agreement, arbitration, etc.);~~ what action was taken on the petition and, if applicable, how the dispute was resolved; and

(6) ~~the time necessary to resolve the dispute.~~ the date the file was closed.

.0710 District Bar Fee Dispute Resolution

~~For the purpose of resolving disputes involving attorneys residing or doing business in the district, any district bar may adopt a fee dispute resolution program, subject to the approval of the council, which shall operate in lieu of the program described herein. Although such programs may be tailored to accommodate local conditions, they must be offered without cost, comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter, and be consistent with the provisions of Rules .0706 and .0707.~~ Subject to the approval of the council, any judicial district bar may adopt a fee dispute resolution program for the purpose of resolving disputes involving lawyers residing or doing business in the district. The State Bar does not offer arbitration as a form of dispute resolution. The judicial district bar may offer arbitration to resolve a disputed fee. A judicial district bar fee dispute resolution program shall have jurisdiction over disputes that would otherwise be addressed by the State Bar's ACAP department. Such programs may be tailored to accommodate local conditions but they must be offered without cost and must comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter.

.0711 District Bar Settlement Conference Proceedings

(a) The chairperson of the judicial district bar fee dispute committee will assign the case to a facilitator who will conduct a settlement conference. The facilitator is responsible for arranging the settlement conference at a time and place convenient to all parties.

(b) The lawyer who is named in the petition must attend the settlement conference in person and may not send a representative in his or her place. If a party fails to attend a settlement conference without good cause, the facilitator may either reschedule the settlement conference or recommend dismissal of the petition.

(c) The facilitator must at all times be in control of the settlement conference and the procedures to be followed. The facilitator may communicate privately with any participant prior to and during the settlement conference. Any private communication with a participant will be disclosed to all other participants at the beginning of the settlement conference or, if the private communication occurs during the settlement conference, immediately after the private communication occurs. The facilitator will explain the following at the beginning of the settlement conference:

(1) the procedure that will be followed;

(2) the differences between a facilitated settlement conference and other forms of conflict resolution;

(3) that the settlement conference is not a trial;

(4) that the facilitator is not a judge;

(5) that participation in the settlement conference does not deprive the parties of any right they would otherwise have to pursue resolution of the dispute through the court system if they do not reach a settlement;

(6) the circumstances under which the facilitator may meet and communicate privately with any of the parties or with any other person;

(7) whether and under what conditions communications with the facilitator will be held in confidence during the settlement conference;

(8) that any agreement reached will be reached by mutual consent; and

(9) that, if the parties reach an agreement, that agreement will be reduced to writing and signed by the parties and their counsel, if any, before the parties leave the settlement conference.

(d) The facilitator has a duty to be impartial and to advise all participants of any circumstance that might cause either party to conclude that the facilitator has a possible bias, prejudice, or partiality.

(e) It is the duty of the facilitator to timely determine when the dispute cannot be resolved by settlement and to declare that an impasse exists and that the settlement conference should end.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

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

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

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 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1518 Continuing Legal Education Program

(a) Annual Requirement. Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

~~(b)~~ Of the 12 hours:

(1) at least 2 hours shall be devoted to the areas of professional responsibility or professionalism or any combination thereof; and

(2) effective January 1, 2002, at least once every three calendar years, each member shall complete an hour of continuing legal education instruction on substance abuse and debilitating mental conditions as defined in Rule .1602 ~~(c)~~ (a). This hour shall be credited to the annual 12-hour requirement ~~set forth in Rule .1518 (a) above~~ but shall be in addition to the annual professional responsibility/professionalism requirement ~~of Rule .1518 (b)(1) above~~. To satisfy ~~this~~ the requirement, a member must attend an accredited program on substance abuse and debilitating mental conditions that is at least one hour long.

~~(c)~~ (b) Carryover. Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by ~~Rule .1518(b)~~ paragraph (a)(1) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year

any approved CLE hours earned after that member's graduation from law school.

(c) Professionalism Requirement for New Members. Except as provided in paragraph (d)(1), each active member admitted to the North Carolina State Bar after January 1, 2011, must complete the North Carolina State Bar New Admittee Professionalism Program (New Admittee Program) in the year the member is first required to meet the continuing legal education requirements as set forth in Rule .1526(b) and (c) of this subchapter. CLE credit for the New Admittee Program shall be applied to the annual mandatory continuing legal education requirements set forth in paragraph (a) above.

(1) Content and Accreditation. The State Bar New Admittee Program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish the required content on or before January 1 of each year. To be approved as a New Admittee Program CLE activity, a sponsor must satisfy the annual content requirements. At least 45 days prior to the presentation of a New Admittee Program, a sponsor must submit a detailed description of the program to the board for approval. Accredited sponsors shall not be exempt from the prior submission requirement and may not advertise a New Admittee Program until approved by the board. New Admittee Programs shall be specially designated by the board and no course that is not so designated shall satisfy the New Admittee Program requirement for new members.

(2) Evaluation. To receive CLE credit for attending a New Admittee Program, the participant must complete a written evaluation of the program which shall contain questions specified by the State Bar. Sponsors shall collate the information on the completed evaluation forms and shall send a report showing the collated information, together with the original forms, to the State Bar when reporting attendance pursuant to Rule .1601(e)(1) of this subchapter.

(3) Format and Partial Credit. The New Admittee Program shall be presented in two six-hour blocks (with appropriate breaks) over two days. The six-hour blocks do not have to be attended on consecutive days or taken from the same provider; however, no partial credit shall be awarded for attending less than an entire six-hour block unless a special circumstances exemption is

granted by the board. No part of the program may be taken online (via the Internet).

(d) Exemptions from Professionalism Requirement for New Members.

(1) Licensed in Another Jurisdiction. A member who is licensed by a United States jurisdiction other than North Carolina for five or more years prior to admission to practice in North Carolina is exempt from the New Admittee Program requirement and must notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter.

(2) Inactive Status. A newly admitted member who is transferred to inactive status in the year of admission to the State Bar is exempt from the New Admittee Program requirement but, upon the entry of an order transferring the member back to active status, must complete the New Admittee Program in the year that the member is subject to the requirements set forth in paragraph (a) above unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

(3) Exemptions Under Rule .1517. A newly admitted active member who qualifies for an exemption under Rule .1517 of this subchapter shall be exempt from the New Admittee Program requirement during the period of the Rule .1517 exemption. The member shall notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter. The member must complete the New Admittee Program in the year the member no longer qualifies for the Rule .1517 exemption or the next calendar year unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

.1519 Accreditation Standards

The board shall approve continuing legal education activities which meet the following standards and provisions.

(a) . . .

(d) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience. Credit shall not be given for any continuing legal education activity taught or presented by a disbarred lawyer except a course on professional responsibility (including a course or program on the effects of substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities) taught by a disbarred lawyer whose disbarment date is at

least five years (60 months) prior to the date of the activity. The advertising for the activity shall disclose the lawyer's disbarment.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

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

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they 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 11th day of March, 2010.

Hudson, J.
For the Court

Order Adopting Amendments To The Rules Implementing Statewide Mediated Settlement Conferences And Other Settlement Procedures In Superior Court Civil Actions

WHEREAS, section 7A-38.1 of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in superior court judicial districts in order to facilitate the resolution of civil actions within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of March, 2010.

Adopted by the Court in conference the 17th day of February, 2010. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Timmons-Goodson, J.
For the Court

REVISED RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

TABLE OF CONTENTS

RULE 1. INITIATING SETTLEMENT EVENTS

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a superior Court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

(1) **Order by Senior Resident Superior Court Judge.** The Senior Resident Superior Court Judge of any judicial district shall, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.C.6 only for good cause shown.

(2) **Motion to authorize the use of other settlement procedures.** The parties may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in G.S. 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on an AOC form, and shall include:

(a) the type of other settlement procedure requested;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected;

(e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the Senior Resident Superior Court Judge shall deny the motion and the parties shall attend the mediated settlement conference as originally ordered by the Court. Otherwise, the Court may order the use of any agreed upon settlement procedures authorized by Rules 10-12 herein or by local rules of the Superior Court in the county or district where the action is pending.

(3) **Timing of the order.** The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.C.(4) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(4) **Content of order.** The Court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the Court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the Court. The order shall be on an AOC form.

(5) **Motion for Court ordered mediated settlement conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(6) **Motion to dispense with mediated settlement conference.** A party may move the Senior Resident Superior Court Judge to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

D. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE.

(1) **Order by local rule.** In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts shall, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.D.6. only for good cause shown.

(2) **Scheduling orders or notices.** In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the Court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the Court.

(3) **Scheduling conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the Court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the Court.

(4) **Application of Rule 1.C.** The provisions of Rule 1.C.(2), (5) and (6) shall apply to Rule 1.D. except for the time limitations set out therein.

(5) **Deadline for completion.** The provisions of Rule 3.B. determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) **Selection of mediator.** The parties may select and nominate, or the Senior Resident Superior Court Judge may

appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.D.

(7) **Use of other settlement procedures.** The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C.(2) and Rule 10. However, the time limits and method of moving the Court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

RULE 2. ~~SELECTION~~ DESIGNATION OF MEDIATOR

A. ~~SELECTION~~ DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may ~~select~~ designate a mediator certified pursuant to these Rules by agreement within 21 days of the Court's order. The plaintiff's attorney shall file with the Court a ~~Notice of Selection~~ Designation of Mediator by Agreement within 21 days of the Court's order, however, any party may file the ~~notice~~ Designation. The party filing the Designation shall serve a copy on all parties and the mediator designated to conduct the settlement conference. Such ~~notice~~ Designation shall state the name, address and telephone number of the mediator ~~selected~~ designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the ~~selection~~ designation and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an AOC form.

B. APPROVAL OF PARTY NOMINEE ELIMINATED. As of January 1, 2006, the former Rule 2.B.rule allowing the approval of a non-certified mediator is rescinded. Beginning on that date, the Senior Resident Superior Court Judge shall appoint mediators certified by the Dispute Resolution Commission, pursuant to Rule 2.C. which follows.

C. APPOINTMENT OF MEDIATOR BY THE COURT. If the parties cannot agree upon the ~~selection~~ designation of a mediator, the plaintiff or plaintiff's attorney shall so notify the Court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the Court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the ~~selection~~ designation of a mediator and have

been unable to agree ~~upon a mediator~~. The motion shall be on a form approved by the Administrative Office of the Courts.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a ~~Notice of Selection~~ Designation of Mediator with the Court within 21 days of the Court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the Judge's district.

In making such appointments, the Senior Resident Superior Court Judge shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned. The Senior Resident Superior Court Judge shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

The Dispute Resolution Commission shall furnish to the Senior Resident Superior Court Judge of each judicial district a list of those certified ~~s~~Superior Court mediators requesting appointments in that district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided both in writing and electronically through the Commission's website. The Commission shall promptly notify the Senior Resident Superior Judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

D. MEDIATOR INFORMATION DIRECTORY. To assist the parties in ~~selecting~~ designating a mediator, the Dispute Resolution Commission shall assemble, maintain and post on its web site at a list of certified Superior Court mediators. The list shall supply contact information for mediators and identify Court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information including information about an individual mediator's education, professional experience and mediation training and experience.

E. DISQUALIFICATION OF MEDIATOR. Any party may move the Senior Resident Superior Court Judge of the district where

the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be ~~selected~~ designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the Courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The Court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the Court's order. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for the completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the Court.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) **Parties.**

(i) All individual parties;

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action or who has been authorized to negotiate on behalf of such party and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, if a specific procedure is required by law (*e.g.*, a statutory preaudit certificate) or the party's governing documents (*e.g.*, articles of incorporation, bylaws, partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to nego-

tiate on behalf of the party and to make a recommendation to that board.

(b) **Insurance company representatives.** A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

(3) **Scheduling.** Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another Court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District

Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically recorded. If an agreement is upon all issues, a consent judgment or one or more voluntary dismissals shall be filed with the Court by such persons as the parties shall designate.

(2) If the agreement is upon all issues at the conference, the person(s) responsible for filing closing documents with the Court shall also sign the mediator's report to the Court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the Court within thirty (30) days or within ninety days (90) days if the State or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the Court thirty (30) days or within ninety (90) days if the State or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four

business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when*.

D. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

E. RELATED CASES. Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order.

DRC COMMENTS TO RULE 4

DRC Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement upon all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the Court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the Court.

DRC Comment to Rule 4.E.

Rule 4.E. was adopted to clarify a Senior Resident Superior Court Judge's authority in those situations where there may be a case related to a Superior Court case pending in a different forum. For example, it is

common for there to be claims asserted against a third-party tortfeasor in a Superior Court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party, or insurance carrier representative in the Superior Court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E. specifically authorizes a Senior Resident Superior Court Judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related Superior Court Case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES~~.~~ OR PAY MEDIATOR'S FEE. ~~If a party or other person required to attend a mediated settlement conference fails to attend without good cause, a resident or presiding Superior Court Judge, may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.~~ Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with G.S. 7A-38.1 and the rules promulgated by the Supreme Court to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact ~~supported by substantial evidence~~ and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. (See also Rule 7.G. and the Comment to Rule 7.G.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private consultation.** The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) **Scheduling the conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1;

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) **Declaring impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting results of conference.**

(a) The mediator shall report to the Court on an AOC form within 10 days of the conference whether or not an agreement was reached by the parties. The mediator's report shall include the names of those persons attending the mediated settlement conference. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the Court.

(b) If an agreement upon all issues is reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s), when it shall be filed with the Court, and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the Court as required by Rule 4.C.(1). If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the Court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the Court and sanctions.

(5) **Scheduling and holding the conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to sched-

ule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(6) **Distribution of mediator evaluation form.** At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY COURT ORDER. When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of ~~$125~~ $150 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of ~~$125~~ $150 that is due upon appointment.

C. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A., the parties may select a certified mediator to conduct their mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the Court has appointed a mediator, shall obtain Court approval for the substitution. The Court may approve the substitution only upon proof of payment to the Court's original appointee the ~~$125~~ $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B. and any postponement fee due and owing pursuant to Rule 7.E.

D. INDIGENT CASES. No party found to be indigent by the Court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the Court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The Court shall enter an order granting or denying the party's request.

E. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in Court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least fourteen (14) calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of ~~$125~~ $150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven (7) calendar days of the scheduled date for mediation, the fee shall be ~~$250~~ $300. The postponement fee shall be paid by the party

requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the named parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of Court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a Court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one time, per case administrative fee when two or more cases are mediated together and set his/her fee according to the amount of time s/he spent in an effort to schedule the matter for mediation. The mediator may charge a flat fee of ~~$125.00~~ $150 if scheduling was relatively easy or multiples of that amount if more effort was required.

DRC Comment to Rule 7.E.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program

designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.G.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and Court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the Court express authority to enforce payment of fees owed both Court-appointed and party-selected mediators. In instances where the mediator is party-selected, the Court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Superior Court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a trial Court mediation training program certified by the Dispute Resolution Commission, or have completed a 16 hour supplemental trial Court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) a member similarly in good standing of the Bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North Carolina Court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience after date of licensure as a judge, practicing attorney, law professor and/or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B.(1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a six hour training on North Carolina Court organization, legal terminology, civil Court procedure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators

certified prior to January 1, 2005 and have four years of professional, management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of professional, management or administrative experience in a professional, business, or governmental entity and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator;

(1) at least one of which must be Court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein in cases pending in the North Carolina Court of Appeals, North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, the North Carolina Superior Court or the United States District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the

application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanctions(s) imposed by a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within thirty (30) days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license(s), other disciplinary complaint(s) filed with, or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission;

H. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the Court pursuant to Rule 7; and,

I. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.)

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking only certification as Superior Court mediators shall consist of a minimum

of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial Court mediation;

(3) Communication and information gathering skills;

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;

(5) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(6) Demonstrations of mediated settlement conferences;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A. and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Senior Resident Superior Court Judge may order the use of the procedure requested under these rules or under local rules unless the Court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C.(2)); or that for good cause, the selected procedure is not appropriate for the case or the parties.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES. In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation (Rule 11).** Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party,

(2) **Arbitration (Rule 12).** Non-Binding Arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and Binding Arbitration, in which a neutral renders a binding decision following presentations by the parties.

(3) **Summary Trials (Jury or Non-Jury) (Rule 13).** Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When proceeding is conducted.** Other settlement procedures ordered by the Court pursuant to these rules shall be conducted no later than the date of completion set out in the Court's original mediated settlement conference order unless extended by the Senior Resident Superior Court Judge.

(2) Authority and duties of neutrals.

(a) Authority of neutrals.

(i) Control of proceeding. The neutral evaluator, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the proceeding. The neutral evaluator, arbitrator, or presiding officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s). In the absence of agreement, such neutral shall select the date for the proceeding.

(b) Duties of neutrals.

(i) The neutral evaluator, arbitrator, or presiding officer shall define and describe the following at the beginning of the proceeding.

(a) he process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G. S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral(s) and the participants.

(ii) Disclosure. Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.

(iii) Reporting results of the proceeding. The neutral evaluator, arbitrator, or presiding officer shall report the result of the proceeding to the Court on an AOC form. The Administrative Office of the Courts may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.

(iv) Scheduling and holding the proceeding. It is the duty of the neutral evaluator, arbitrator, or

presiding officer to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator, or presiding officer unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(3) **Extensions of time.** A party or a neutral may request the Senior Resident Superior Court Judge to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the Court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) **Where procedure is conducted.** The neutral evaluator, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) **No delay of other proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

(6) **Inadmissibility of settlement proceedings.** Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(7) **No record made.** There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.

(8) **Ex parte communication prohibited.** Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(9) Duties of the parties.

(a) Attendance. All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is nonbinding in nature, authorized by these rules, and ordered by the Court except those persons to whom the parties agree and the Senior Resident Superior Court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the Court shall be those persons to whom the parties agree.

Notice of such agreement shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference. The notice shall be on an AOC form.

(b) Finalizing agreement.

(i) If an agreement is reached on all issues at the neutral evaluation, arbitration, or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the Court by such persons as the parties shall designate within fourteen (14) days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is longer. The person(s) responsible for filing closing documents with the Court shall also sign the report to the Court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the neutral evaluator, arbitrator, or presiding officer and all parties at the proceeding.

(ii) If an agreement is reached upon all issues prior to the evaluation, arbitration, or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all

issues with the Court within fourteen (14) days or before the expiration of the deadline for completion of the proceeding whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when*.

(c) **Payment of neutral's fee.** The parties shall pay the neutral's fee as provided by Rule 10.C.(12).

(10) **Selection of neutrals in other settlement procedures.** The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference.

The notice shall be on an AOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) **Disqualification.** Any party may move a Resident or Presiding Superior Court Judge of the district in which an action is pending for an order disqualifying the neutral; and for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) **Compensation of the neutral.** A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the Court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented

by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) Sanctions for failure to attend other settlement procedures or pay neutral's fee. ~~If a~~A person required to attend a settlement procedure or to pay a neutral's fee in compliance with G.S. 7A-38.1 and the rules promulgated by the Supreme Court to implement that section, who fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a Resident or Presiding Superior Court Judge. ~~may impose upon the person any appropriate monetary sanction including but not limited to, the payment of fines, reimbursement of a party's attorney fees, expenses, and share of the neutral's fee and loss of earnings incurred by persons attending the conference.~~ Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses and loss of earnings incurred by persons attending the procedure. A party seeking sanctions against a person, or a Resident or Presiding Judge upon his/her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall not be more than five (5) pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three (3) pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) **Evaluator's opening statement.** At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the Parties.

(2) **Oral report to parties by evaluator.** In addition to the written report to the Court required under these rules at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing, and shall not inform the Court thereof.

(3) **Report of evaluator to Court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form. The evaluator's report shall inform the Court when and where the evaluation was held, the names of those who attended, and the names of any party, attorney, or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the Court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the Court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the Court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

RULE 12. RULES FOR ARBITRATION

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the Senior Resident Superior Court Judge as a judgment, or the parties agree that the decision shall be binding.

A. ARBITRATORS.

(1) **Arbitrator's Canon of Ethics.** Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by

the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

(1) **Pre-hearing exchange of information.** At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:

(a) Lists of witnesses they expect to testify.

(b) Copies of documents or exhibits they expect to offer into evidence.

(c) A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the Court or included in the case file.

(2) **Exchanged documents considered authenticated.** Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) **Copies of exhibits admissible.** Copies of exchanged documents or exhibits are admissible in arbitration hearings, in lieu of the originals.

C. ARBITRATION HEARINGS.

(1) **Witnesses.** Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) **Subpoenas.** Rule 45 of the North Carolina Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(3) **Motions.** Designation of an action for arbitration does not affect a party's right to file any motion with the Court.

(a) The Court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B.(1).

(b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the Court so orders.

(4) **Law of evidence used as guide.** The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) **Authority of arbitrator to govern hearings.** Arbitrators shall have the authority of a trial Judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the Senior Resident Superior Court Judge.

(6) **Conduct of hearing.** The arbitrator and the parties shall review the list of witnesses, exhibits and written statements concerning issues previously exchanged by the parties pursuant to Rule 12.B.(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.

(7) **No Record of hearing made.** No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(8) **Parties must be present at hearings; Representation.** Subject to the provisions of Rule 10.C.(9), all parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties

may be represented by counsel. Parties may appear *pro se* as permitted by law.

(9) **Hearing concluded.** The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

(1) **Filing the award.** The arbitrator shall file a written award signed by the arbitrator and filed with the Clerk of Superior Court in the County where the action is pending, with a copy to the Senior Resident Superior Court Judge within twenty (20) days after the hearing is concluded or the receipt of post-hearing briefs whichever is later. The award shall inform the Court of the absence of any party, attorney, or insurance company representative known to the arbitrator to have been absent from the arbitration without permission. An award form, which shall be an AOC form, shall be used by the arbitrator as the report to the Court and may be used to record its award. The report shall also inform the Court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the Court. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the Court.

(2) **Findings; Conclusions; Opinions.** No findings of fact and conclusions of law or opinions supporting an award are required.

(3) **Scope of award.** The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(4) **Costs.** The arbitrator may include in an award Court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) **Copies of award to parties.** The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. TRIAL DE NOVO.

(1) **Trial de *novo* as of right.** Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for trial *de novo* with the Court, and service of the demand on all parties, on an AOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section shall include all claims in the action.

(2) **No reference to arbitration in presence of jury.** A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the Court's approval.

F. JUDGMENT ON THE ARBITRATION DECISION.

(1) **Termination of action before judgment.** Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(2) **Judgment entered on award.** If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial *de novo* within 30 days after the award is served, the Senior Resident Superior Court Judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. AGREEMENT FOR BINDING ARBITRATION.

(1) **Written agreement.** The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel, and shall be filed with the Clerk of Superior Court and the Senior Resident Superior Court Judge prior to the filing of the arbitrator's decision.

(2) **Entry of judgment on a binding decision.** The arbitrator shall file the decision with the Clerk of Superior Court

and it shall become a judgment in the same manner as set out in G.S. 1-567.1 ff.

H. MODIFICATION PROCEDURE.

Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for Court ordered arbitration.

RULE 13. RULES FOR SUMMARY TRIALS

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provide for summary jury trials. While parties may request of the Court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. PRE-SUMMARY TRIAL CONFERENCE.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C.(10). That presiding officer shall issue an order which shall:

(1) Confirm the completion of discovery or set a date for the completion;

(2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses;

(3) Schedule all outstanding motions for hearing;

(4) Set dates by which the parties exchange:

(a) A list of parties' respective issues and contentions for trial;

(b) A preview of the party's presentation, including notations as to the document (e.g. deposition, affidavit, letter, contract) which supports that evidentiary statement;

(c) All documents or other evidence upon which each party will rely in making its presentation; and

(d) All exhibits to be presented at the summary trial.

(5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day);

(6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to be held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;

(7) Set a date for the summary jury trial; and

(8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. PRESIDING OFFICER TO ISSUE ORDER IF PARTIES UN-ABLE TO AGREE. If the parties are unable to agree upon the dates and procedures set out in Section A. of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. STIPULATION TO A BINDING SUMMARY TRIAL. At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. EVIDENTIARY MOTIONS. Counsel shall exchange and file motion in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. JURY SELECTION. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties.

Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. **PRESENTATION OF EVIDENCE AND ARGUMENTS OF COUNSEL.** Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks, or other visual means are encouraged, but shall be stipulated by both parties or approved by the presiding officer.

G. **JURY CHARGE.** In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. DELIBERATION AND VERDICT. In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly, and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than ten days after the close of the hearing or filing of briefs whichever is longer.

I. JURY QUESTIONNING. In a summary jury trial the presiding officer may allow a brief conference with the jurors in open Court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

J. SETTLEMENT DISCUSSIONS. Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

K. MODIFICATION OF PROCEDURE. Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

L. REPORT OF PRESIDING OFFICER. The presiding officer shall file a written report no later than ten (10) days after the verdict. The report shall be signed by the presiding officer and filed with the Clerk of the Superior Court in the County where the action is pending, with a copy to the Senior Resident Court Judge. The presiding officer's report shall inform the Court of the absence of any party, attorney, or insurance company representative known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. The report shall also inform the Court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the Court. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

RULE 14. LOCAL RULE MAKING.

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.1, implementing mediated settlement conferences in that district.

RULE 15. DEFINITIONS.

A. The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 16. TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

Order Adopting Amendments to the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission to provide for the certification and qualification of mediators, other neutrals, and mediation and other neutral training programs, the regulation of mediators, other neutrals, and trainers and managers affiliated with certified or qualified programs, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to implement section 7A-38.2 by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Supreme Court's Rules for the Dispute Resolution Commission are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of March, 2010.

Adopted by the Court in conference the 17th day of February, 2010. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Supreme Court's Rules for the Dispute Resolution Commission amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Timmons-Goodson, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

I. OFFICERS OF THE COMMISSION.

A. Officers. The Commission shall establish the offices of Chair~~,~~ and Vice-Chair~~, and Secretary/Treasurer~~.

B. Appointment; Elections.

1. The Chair shall be appointed for a two year term and shall serve at the pleasure of the Chief Justice of the North Carolina Supreme Court.

2. The Vice-Chair ~~and Secretary/Treasurer~~ shall be elected by vote of the full Commission for a two year term ~~and shall serve two year terms~~ and shall serve in the absence of the Chair.

C. Committees.

1. The Chair may appoint such standing and *ad hoc* committees as are needed and designate Commission members to serve as committee chairs.

2. The Chair may, with approval of the full Commission, appoint ex-officio members to serve on either standing or *ad hoc* committees. Ex-officio members may vote upon issues before committees but not upon issues before the Commission.

II. COMMISSION OFFICE; STAFF.

A. Office. The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to establish and maintain an office for the conduct of Commission business.

B. Staff. The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to appoint an Executive Secretary and to: (1) fix his or her terms of employment, salary, and benefits; (2) determine the scope of his or her authority and duties and (3) delegate to the Executive Secretary the authority to employ necessary secretarial and staff assistants, with the approval of the Director of the Administrative Office of the Courts.

III. COMMISSION MEMBERSHIP.

A. Vacancies. Upon the death, resignation or permanent incapacitation of a member of the Commission, the Chair shall

notify the appointing authority and request that the vacancy created by the death, resignation or permanent incapacitation be filled. The appointment of a successor shall be for the former member's unexpired term.

B. Disqualifications. If, for any reason, a Commission member becomes disqualified to serve, that member's appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, the appointment of a successor shall be for the former member's unexpired term.

C. Conflicts of Interest and Recusals. All members and ex-officio members of the Commission must:

1. Disclose any present or prior interest or involvement in any matter pending before the Commission or its committees for decision upon which the member or ex-officio member is entitled to vote.

2. Recuse himself or herself from voting on any such matter if his or her impartiality might reasonably be questioned; and

3. Continue to inform themselves and to make disclosures of subsequent facts and circumstances requiring recusal.

D. Compensation. Pursuant to N. C. Gen. Stat. § 138-5, ex-officio members of the Commission shall receive no compensation for their services but may be reimbursed for their out-of-pocket expenses necessarily incurred on behalf of the Commission and for their mileage, subsistence and other travel expenses at the per diem rate established by statutes and regulations applicable to state boards and commissions.

IV. MEETINGS OF THE COMMISSION.

A. Meeting Schedule. The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the Chair or other officer acting for the Chair.

B. Quorum. A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to dismiss complaints or impose sanctions pursuant to Rule VIII of these Rules or to deny certification or certification renewal

or to revoke certification pursuant to Rule IX of these Rules shall require an affirmative vote consistent with those Rules.

C. Public Meetings. All meetings of the Commission for the general conduct of business and minutes of such meetings shall be open and available to the public except that meetings, portions of meetings or hearings conducted pursuant to Rules VIII and IX of these Rules may be closed to the public in accordance with those Rules.

D. Matters Requiring Immediate Action. If, in the opinion of the Chair, any matter requires a decision or other action before the next regular meeting of the Commission and does not warrant the call of a special meeting, it may be considered and a vote or other action taken by correspondence, telephone, facsimile, or other practicable method; provided, all formal Commission decisions taken are reported to the Executive Secretary and included in the minutes of Commission proceedings.

V. COMMISSION'S BUDGET.

The Commission, in consultation with the Director of the Administrative Office of the Courts, shall prepare an annual budget. The budget and supporting financial information shall be public records.

VI. POWERS AND DUTIES OF THE COMMISSION.

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster growth of dispute resolution services in this State and to ensure the availability of high quality mediation training programs and the competence of mediators. Specifically, the Commission is authorized and directed to do the following:

A. Review and approve or disapprove applications of (1) persons seeking to have training programs certified; (2) persons seeking certification as qualified to provide mediation training; (3) attorneys and non-attorneys seeking certification as qualified to conduct mediated settlement conferences and mediations; and (4) persons or organizations seeking reinstatement following a prior suspension or decertification.

B. Review applications as against criteria for certification set forth in ~~the *Rules Implementing Mediated Settlement Conferences* (*Rules*)~~ rules adopted by the Supreme Court for mediated settlement conference/mediation programs oper-

ating under the Commission's jurisdiction and as against such other requirements of ~~the North Carolina Supreme Court Dispute Resolution Commission or~~ the Commission which amplify and clarify those ~~*Rules*~~ rules. The Commission may adopt application forms and require their completion for approval.

C. Compile and maintain lists of certified trainers and training programs along with the names of contact persons, addresses, and telephone numbers and make those lists available on-line or upon request.

D. Institute periodic review of training programs and trainer qualifications and re-certify trainers and training programs that continue to meet criteria for certification. Trainers and training programs that are not re-certified, shall be removed from the lists of certified trainers and certified training programs.

E. Compile, ~~and~~ keep current, and make available on-line ~~a~~ lists of certified mediators, which specify~~ies~~ the judicial districts in which each mediator wishes to practice. ~~Periodically disseminate copies of that list to each judicial district with a mediated settlement conferences program, and make the list available upon request to any attorney, organization, or member of the public seeking it.~~

F. Prepare, ~~and~~ keep current and make available on-line biographical information ~~on certified mediators~~ submitted to the Commission by certified mediators in order to make such information accessible to court staff, lawyers, and the wider public. ~~who wish to appear in the Mediator Information Directory contemplated in the *Rules*. Periodically disseminate updated biographical information to Senior Resident Superior Court Judges, in districts in which mediators wish to serve, and~~

G. Make reasonable efforts on a continuing basis to ensure that the judiciary~~,~~; clerks of court~~,~~; court administration personnel; attorneys; and to the extent feasible, parties to mediation~~,~~; are aware of the Commission and its office and the Commission's duty to receive and hear complaints against mediators and mediation trainers and training programs.

VII. MEDIATOR CONDUCT.

The conduct of all mediators, mediation trainers and managers of mediation training programs must conform to the Standards of

Professional Conduct for Mediators adopted by the Supreme Court and enforceable by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Standards. A certified mediator shall inform the Commission of any criminal convictions, disbarments or other revocations or suspensions of a professional license, ~~any~~ complaints filed against the mediator or disciplinary actions imposed upon the mediator by any ~~other~~ professional organization, ~~or any~~ judicial sanctions~~.~~, civil judgments, tax liens or filings for bankruptcy. Failure to do so is a violation of these Rules. Violations of the Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the Commission.

VIII. INVESTIGATION AND REVIEW OF MATTERS OF ETHICAL CONDUCT, CHARACTER, AND FITNESS TO PRACTICE; CONDUCT OF HEARINGS; SANCTIONS

~~**A. Establishment of the Standing Committee on Standards, Discipline, and Advisory Opinions.**~~

~~**1. Establishment of Committee.** The Chair of the Commission shall appoint a standing Committee on Standards, Discipline, and Advisory Opinions (Committee) to review the matters set forth in Section 2 below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.~~

~~**2. Matters to Be Considered by Committee.** The Committee shall review and consider the following matters:~~

~~**a.** appeals of staff decisions to deny an application filed by a person seeking certification as a mediator or filed by a person seeking recertification as a mediator based upon the person's conduct, character, or fitness to practice;~~

~~**b.** appeals of staff decisions to deny an application filed by a person or entity seeking certification or recertification as a mediator training program based upon the person's conduct, character, or fitness to practice or that of a trainer or program manager of the mediator training program;~~

c. complaints which are filed by a member of the Commission, its staff, or any member of the public about a mediator, an applicant for mediator certification or renewal of certification, a mediation trainer, or a mediator training program manager (affected person) based upon the affected person's conduct, character, or fitness to practice; and

d. the drafting of advisory opinions pursuant to the Commission's Advisory Opinion Policy.

3. The Investigation of Violations of the Standards of Conduct.

a. Information obtained during the process of certification or renewal. Commission staff shall review all pending grievances, disciplinary matters, judicial sanctions, and convictions reported by certified mediators, by applicants for mediator certification or certification renewal and by trainers or managers affiliated with mediator training programs applying for certification or certification renewal. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant, mediator, or training program's eligibility for certification or certification renewal. Staff shall forward all such matters of eligibility to the Committee for review except those matters expressly exempted from review by the *Guidelines for Reviewing Pending Grievances/Complaints*, *Disciplinary Actions Taken and Convictions* (Guidelines) adopted by the Committee and approved by the Commission.

b. Complaints of mediator misconduct filed with the Commission. The staff of the Commission shall forward written complaints about the conduct of an applicant, mediator, trainer, or training program manager filed by any member of the general public, the Commission, or its staff to the committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit, the

~~Executive Director shall refer the matter to the committee's chair rather than to the committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have thirty (30) days from the date of notification to appeal the chair's determination to the full Committee on Standards, Discipline, and Advisory Opinions.~~

~~**c. Investigation by the Standing Committee.** The Committee shall investigate all matters brought before it by staff pursuant to the provisions of subsection a. or b. and may contact the following persons and entities for information concerning such application or complaint: the affected person or applicant, State Bar officials, officials of other professional licensing bodies to whom the affected person is subject, parties or other individuals who brought complaints against the mediator or applicant, court officials, and any other person or entity who may have additional information about the matters reported or facts alleged. The Chair or his/her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to any such investigation.~~

~~All information in Commission files pertaining to the initial certification of a mediator or mediation training program or renewals of such certifications, to requests for informal or formal guidance from the Commission pursuant to the Advisory Opinion Policy, and to pending complaints shall be confidential.~~

~~**d. Probable Cause Determination.** The Committee on Standards, Discipline, and Advisory Opinions shall deliberate to determine whether probable cause exists to believe that the conduct of the affected person or applicant:~~

~~**i)** is inconsistent with good moral character (MSC Rule 8.E., FFS Rule 8.F. and Rule VII above);~~

~~**ii)** is a violation of the Supreme Court's Standards of Professional Conduct for Mediators or any~~

~~other standards of professional conduct that are not in conflict with nor inconsistent with the Supreme Court's Standards and to which the mediator, applicant, trainer, or manager is subject (Rule VII above);~~

~~**iii)** is a violation of the rules for the Mediated Settlement Conference, Family Financial Settlement, or Pre-litigation Farm Nuisance Mediation Programs;~~

~~**iv)** is a violation of MSC Rule 9 or FFS Rule 9 or guidelines and other policies adopted by the Commission that amplify those rules;~~

~~**v)** reflects a lack of fitness to conduct mediations or to serve as a trainer or training program manager (Rule VII above); or~~

~~**vi)** discredits the Commission, the courts, or the mediation process (Rule VII above).~~

~~If there is a finding of probable cause, that the affected person or applicant shall be sanctioned pursuant to these rules.~~

~~**4. Authority of Committee to Dismiss Complaints or Propose Sanctions.**~~

~~**a.** If a majority of Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d. above, Commission staff shall certify or recertify the affected person or applicant without conditions or, if the investigation were initiated by the filing of a written complaint, shall dismiss the complaint and notify the complaining party and the affected person by certified U.S. mail, return receipt requested, that no further action will be taken and that the matter is dismissed. There shall be no right of appeal from the Committee's decision to dismiss a complaint or certify an affected person or applicant.~~

~~**b.** If a majority of Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Committee shall propose sanctions on the affected person or applicant as set forth in Section B.10. of these rules, except that if the Committee determines that the violation of the Standards or rules is technical or minor in nature, that the com-~~

plaining party was not significantly harmed and that the Commission, courts or programs were not discredited, the Committee may elect to caution the affected person or applicant rather than imposing sanctions. The Committee's findings, conclusions, and proposed sanctions or any letter of caution shall be in writing and forwarded to the affected person or applicant by U.S. mail, return receipt requested.

c. If sanctions are proposed, the affected person or applicant may appeal the findings and/or proposed sanctions to the Commission within thirty (30) days from the date of the letter transmitting the Committee's findings and its proposed sanctions. Notification of appeal must be in writing. If no appeal is filed within thirty (30) days, the affected person or applicant shall be deemed to have accepted the Committee's findings and proposed sanctions and said sanctions shall commence.

5. Disputes Between Mediators and Complainants. Commission staff may attempt to resolve any disputes between a complaining party and an affected person in which the conduct of the affected person does not constitute a violation of the grounds set out in Section A.3.d. above.

B. Appeal to the Commission.

1. The Commission Shall Meet to Consider Appeals. An appeal of the Committee's determination pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination that is on appeal shall be recused and shall not participate in the Commission's deliberations. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

2. Conduct of the Hearing.

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all parties, special counsel to the Commission, and

members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.

b. Hearings conducted by the Commission pursuant to this rule shall be a *de novo* review of the Committee's decision.

c. Complainants, applicants, and affected persons may appear at the hearing with or without counsel.

d. All hearings will be open to the public except that for good cause shown the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of an applicant or affected person.

e. In the event that the complainant, affected person, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

f. Proceedings before the Commission shall be conducted informally but with decorum.

g. The Commission, through its counsel, and the applicant or affected person may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or affected person may cross-examine any witness called to testify by the other. Commission members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

h. The Commission's chair or designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for

~~the attendance of witnesses and the production of books, papers, or other documentary evidence.~~

~~**3. Date of Hearing.** An appeal of any sanction proposed by the Committee shall be heard by the Commission within ninety (90) days of the date the sanction is imposed.~~

~~**4. Notice of Hearing.** The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.~~

~~**5. *Ex Parte* Communications.** No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.~~

~~**6. Attendance.** All parties, including complaining parties, applicants and parties against whom sanctions are proposed, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.~~

~~**7. Witnesses.** The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least ten (10) days prior to the hearing the names of all witnesses who will be called to testify.~~

~~**8. Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his/her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter~~

retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. Commission Decision. After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the imposition of sanctions and, therefore, dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program, or (ii) find that there is clear and convincing evidence that grounds exist to impose sanctions and impose sanctions. The Commission shall set forth its findings, conclusions, and sanctions, or other action, in writing and serve its decision on the parties within sixty (60) days of the date of the hearing.

10. Sanctions. The sanctions that may be proposed by the Committee or imposed by the Commission include, but are not limited to, the following:

a. Private, written admonishment;

b. Public, written admonishment;

c. Completion of additional training;

d. Restriction on types of cases to be mediated in the future;

e. Reimbursement of fees paid to the mediator or training program;

f. Suspension for a specified term;

g. Probation for a specified term;

h. Certification or renewal of certification upon conditions;

i. Denial of certification or certification renewal;

j. Decertification; and/or

k. Prohibition on participation as a trainer or manager of a certified mediator training program either indefinitely or for a period of time.

11. Publication of Committee/Commission Decisions.

a. Names of mediators who are reprimanded privately or applicants who have never been certified and

have been denied certification shall not be published in the Commission's newsletter and on its web site.

b. Names of mediators who are sanctioned under any other provision of Section B.10. above and who have been denied reinstatement under Section B.13. below shall be published in the Commission's newsletter and on its web site along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Commission may waive this requirement.

c. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any sanction imposed upon a mediator except those named in Subsection a. above.

d. If the Commission imposes sanctions as a result of a complaint filed by a third party, the Commission's office shall, on request, release copies of the complaint, response, counter response, and Commission/Committee decision.

12. Appeal. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions imposing sanctions or denying applications for mediator or mediator training program certification. An order imposing sanctions or denying applications for mediator or mediator training program certification shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

13. Reinstatement. A mediator, trainer, or manager who has been sanctioned under this rule may be reinstated as a certified mediator or as an active trainer or manager pursuant to Section B.13.g. below. Except as otherwise provided by the Standing Committee or

~~Commission, no application for reinstatement may be tendered within two years of the date of the sanction or denial.~~

~~**a**. A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.~~

~~**b.** The petition for reinstatement shall contain:~~

~~**i)** the name and address of the petitioner;~~

~~**ii)** the offense or misconduct upon which the suspension or decertification or the bar to training or program management was based; and~~

~~**iii)** a concise statement of facts claimed to justify reinstatement as a certified mediator or a trainer or program manager.~~

~~**c.** The petition for reinstatement may also contain a request for a hearing on the matter to consider any additional evidence which the petitioner wishes to put forth, including any third party testimony regarding his or her character, competency, or fitness to practice as a mediator, trainer, or manager.~~

~~**d.** The Commission's staff shall refer the petition to the Commission for review.~~

~~**e.** If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B above. At the hearing, the petitioner may:~~

~~**i)** appear personally and be heard;~~

~~**ii)** be represented by counsel;~~

~~**iii)** call and examine witnesses;~~

~~**iv)** offer exhibits; and~~

~~**v)** cross-examine witnesses.~~

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

g. The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

i) that the petitioner has rehabilitated his/her character, addressed and resolved any conditions which led to his/her suspension or decertification, completed additional training in mediation theory and practice to ensure his/her competency as a mediator, trainer, or manager, and/or taken steps to address and resolve any other matter(s) which led to the petitioner's suspension, decertification, or prohibition from serving as a trainer or manager; and

ii) the petitioner's certification will not be detrimental to the Mediated Settlement Conference and/or Family Financial Settlement Programs, the Commission, the courts, or the public interest; and

iii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

h. If the petitioner is found to have rehabilitated him or herself and is fit to serve as a mediator, trainer, or manager, the Commission shall reinstate the petitioner as a certified mediator or as an active trainer or manager. However, if the suspension or decertification or the bar to training or management has continued for more than two years, the reinstatement may be conditioned upon the completion of additional training and observations as needed to refresh skills and awareness of program rules and requirements.

i. The Commission shall set forth its decision to reinstate a petitioner or to deny reinstatement in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. mail, return receipt requested, within thirty (30) days of the date of the hearing.

~~j. If a petition for reinstatement is denied, the petitioner may not apply again pursuant to this section until two years have lapsed from the date the denial was issued.~~

~~**k.** The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.~~

VIII. INVESTIGATION AND REVIEW OF MATTERS OF ETHICAL CONDUCT, CHARACTER, AND FITNESS TO PRACTICE; CONDUCT OF HEARINGS; SANCTIONS

A. Establishment of the Committee on Standards, Discipline, and Advisory Opinions.

The Chair of the Commission shall appoint a standing Committee on Standards, Discipline, and Advisory Opinions (Committee) to review the matters set forth in Section B. below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest. The Commission's Executive Secretary shall serve as staff to the Committee.

B. Matters to Be Considered by Committee. The Committee shall review and consider the following matters:

1. Matters relating to the moral character of an applicant for mediator certification or certification renewal or of a certified mediator and appeals of staff decisions to deny an application for mediator certification or certification renewal on the basis of the applicant's character;

2. Matters relating to the moral character of any trainer or manager affiliated with a certified mediator trainining program or one that is an applicant for certification or certification renewal and appeals of staff decisions to deny an application for mediator training program certification or certification renewal on the basis of the character of any trainer or manager affiliated with the program;

3. Complaints by a member of the Commission, its staff, a judge, court staff or any member of the public regarding the charac-

ter, conduct or fitness to practice of a mediator or a trainer or manager affiliated with a certified mediator training program or that allege a violation of the program rules or the Standards of Professional Conduct of Mediators; and

4. The drafting of advisory opinions pursuant to the Commission's Advisory Opinion Policy.

C. Initial Staff Review and Determination.

1. Review and Referral Of Matters Relating to Moral Character. The Executive Secretary shall review information relating to the moral character of applicants for mediator or mediator training program certification or certification renewal, mediators, and mediator training program managers and administrators (applicants) including matters which applicants are required to report under program rules.

The Executive Secretary may contact applicants to discuss matters reported and conduct background checks on applicants. Any third party with knowledge of the above matters or any other information relating to the moral character of an applicant may notify the Commission. Commission staff shall seek to verify any such third party reports and may disregard those that cannot be verified. Commission staff may contact any agency where complaints about an applicant have been filed or any agency or judge that has imposed discipline.

All such reported matters or any other information gathed by Commission staff and bearing on moral character shall be forwarded directly to the Committee for its review, except those matters expressly exempted from review by the *Guidelines for Reviewing Pending Grievances/Complaints, Disciplinary Actions Taken and Convictions* (*Guidelines*). Matters that are exempted by the *Guidelines* may be processed by Commission staff and will not act as a bar to certification or certification renewal.

The Executive Secretary or the Committee may elect to take any matter relating to an applicant's moral character, including matters reported by third parties or revealed by background check, and process it as a complaint pursuant to Rule VIII.C.3.below. The Executive Secretary may consult with the Chair prior to making such election.

2. Director Review of Oral or Written Complaints. The Executive Secretary shall review oral and written complaints made to the Commission regarding the conduct, character or

fitness to practice of a mediator or a trainer or manager affiliated with a certified mediator training program (respondent), except that the Executive Secretary shall not act on anonymous complaints unless staff can independently verify the allegations made.

a. **Oral complaints.** If after reviewing an oral complaint, the Executive Secretary determines it is necessary to contact third party witnesses about the matter or to refer it to the Committee, the Executive Secretary shall first make a summary of the complaint and forward it to the complaining party who shall be asked to sign the summary along with a release and to return it to the Commission's office, except that complaints initiated by a member of the Commission, Committee or Commission staff or by judges, other court officials, or court staff need not be in writing and, upon request, the identity of the complaining party may be withheld from the respondent. The Executive Secretary shall not contact any third parties in the course of investigating a matter until such time as the signed summary and release have been returned to the Commission.

b. **Written complaints:** Commission staff shall acknowledge all written complaints within twenty (20) days of receipt. Written complaints may be made by letter or email or filed on the Commission's approved complaint form. If a complaint is not made on the approved form, Commission staff shall require the complaining party to sign a release before contacting any third parties in the course of an investigation.

c. If a complaining party refuses to sign a complaint summary prepared by the Executive Secretary or to sign a release or otherwise seeks to withdraw a complaint after filing it with the Commission, the Executive Secretary or a Committee member may pursue the complaint. In determining whether to pursue a complaint independently, the Executive Secretary or a Committee member shall consider why the complaining party is unwilling to pursue the matter further, whether the complaining party is willing to testify if a hearing is necessary, whether the complaining party has specifically asked to withdraw the complaint, the seriousness of the allegations made in the complaint, whether the circumstances complained of may be independently verified without the complaining party's partici-

pation and whether there have been previous complaints filed regarding the respondent's conduct.

d. There shall be no statute of limitations on the filing of complaints.

3. Initial Determination on Oral and Written Complaints.

After reviewing a Rule VIII.B.3. complaint and any additional information gathered, including information supplied by the respondent and any witnesses contacted, the Executive Secretary shall determine whether to:

a. Recommend Dismissal. The Executive Secretary shall make a recommendation to dismiss a complaint if s/he concludes that the complaint does not warrant further action. Such recommendation shall be made to the Chair of the Committee. If after giving the complaint due consideration, the Chair agrees with the Executive Secretary, the complaint shall be dismissed with notification to the complaining party, the respondent, and any witnesses contacted. The Executive Secretary shall note for the file why a determination was made to dismiss the complaint. Dismissed complaints shall remain on file with the Commission for at least five years and the Comittee may take such complaints into consideration if additional complaints are later made against the same respondent.

The complaining party shall have thirty (30) days from the date of notification to appeal the Chair's determination to the full Committee on Standards, Discipline, and Advisory Opinions. If after giving the complaint due consideration, the Chair disagrees with the Executive Secretary's recommendation to dismiss, s/he may direct staff to refer the matter for conciliation or to the full Committee for review.

b. Refer to Conciliation. If the Executive Secretary determines that the complaint appears to be largely the result of a misunderstanding between the respondent and complainant or raises a best practices concern(s) or technical or relatively minor rule violation(s) resulting in minimal harm to the complainant, the matter may be referred for conciliation after speaking with the parties and concluding that they are willing to discuss the matter and explore the complainant's concerns. Once a matter is referred for conciliation, the Executive Secretary may serve as a resource to the parties, but shall not act as their mediator.

Prior to or at the time a matter is referred for conciliation, Commission staff shall provide written information to the complainant explaining the conciliation process and advising him/her that the complaint will be deemed to be resolved and the file closed if the complainant does not notify the Commission within ninety (90) days of the referral that conciliation either failed to occur or did not resolve the matter. If either the complaining party or the respondent refuses conciliation or the complaining party notifies Commission staff that conciliation failed, the Executive Secretary may refer the matter to the Committee for review or to the Chair with a recommendation for dismissal.

c. **Refer to Committee.** Following initial investigation, including contacting the respondent and any witnesses, if necessary, the Executive Secretary shall refer all Rule VIII.B.3. matters to the full Committee when such matters raise concerns about possible significant program rule or Standards violations or raise a significant question about a respondent's character, conduct, or fitness to practice. No matter shall be referred to the Committee until the respondent has been forwarded a copy of the complaint and a copy of these Rules and allowed a thirty (30) day period in which to respond. Upon request, the respondent may be afforded ten (10) additional days to respond.

The response shall not be forwarded to the complainant, except as provided for in G.S. 7A-38.2(h) and there shall be no opportunity for rebuttal. The response, shall be included in the materials forwarded to the Committee. In addition, if any witnesses were contacted, any written responses or any notes from conversations with those witnesses shall also be included in the materials forwarded to the Committee.

4. **Confidentiality.** Commission staff will create and maintain files for all matters considered pursuant to Rule VIII.B. Those files shall contain information submitted by or about applicants and respondents including any notes taken by the Executive Secretary or Commission staff relative to reports regarding moral character of applicants or complaints about mediators, trainers or managers. All information in those files shall remain confidential until such time as the Committee completes its preliminary investigation and finds probable cause following deliberation pursuant to Rule VIII.D.2.

The Executive Secretary shall reveal the names of respondents to the Committee and the Committee shall keep the names of respondents and other identifying information confidential except as provided for in G.S. 7A-38.2(h).

D. Committee Review and Determination on Matters Referred by Staff.

1. Committee Review of Applicant Moral Character Issues and Complaints.

The Committee shall review all matters brought before it by the Executive Secretary pursuant to the provisions of Rule VIII.B. above and may contact any other persons or entities for additional information. The Chair or his/her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to the Committee's investigation and review of the matter.

2. Committee Deliberation.

The Committee shall deliberate to determine whether probable cause exists to believe that an applicant or respondent's conduct:

a. is a violation of the Standards of Professional Conduct for Mediators or any other standards of professional conduct that are not in conflict with nor inconsistent with the Supreme Court's Standards and to which the mediator, trainer, or manager is subject;

b. is a violation of Supreme Court program rules for mediated settlement conference/mediation programs;

c. is inconsistent with good moral character (Mediated Settlement Conference Program Rule 8.E., Family Financial Settlement Conference Rule 8.F. and District Criminal Court Rule 7. E.);

d. reflects a lack of fitness to conduct mediated settlement conferences/mediations or to serve as a trainer or training program manager (Rule VII above); and/or

e. discredits the Commission, the courts, or the mediation process (Rule VII above).

3. Committee Determination.

Following deliberation, the Committee shall determine to dismiss a matter, or to make a referral, or to impose sanctions.

a. To Dismiss. If a majority of Committee members reviewing an issue of moral character or a complaint finds no probable cause, the Committee shall dismiss the matter and instruct the Executive Secretary:

(i) to certify or recertify the applicant, if an application is pending, or to notify the mediator, trainer or manager by certified U.S. mail, return receipt requested that no further action will be taken in the matter; or

(ii) to notify the complaining party and the respondent by certified U.S. mail, return receipt requested, that no further action will be taken and that the matter is dismissed. The complaining party shall have no right of appeal from the Committee's decision to dismiss the complaint.

b. To Refer. If a majority of Committee members determines that:

(i) any violation of the program rules or Standards that occurred was technical or relatively minor in nature, caused minimal harm to a complainant, and did not discredit the program, courts, or Commission, the Committee may:

1) dismiss the complaint with a letter to the respondent citing the violation and advising him or her to avoid such conduct in the future, or

2) refer the respondent to one or more members of the Committee to discuss the matter and explore ways that the respondent may avoid similar complaints in the future.

(ii) the applicant or respondent's conduct has raised best practices or professionalism concerns, the Committee may:

1) direct staff to dismiss the complaint with a letter to the respondent advising him/her of the Committee's concerns and providing guidance, or

2) direct the respondent to meet with one or more members of the Committee who will informally discuss the Committee's concerns and provide counsel, or

3) refer the respondent to the Chief Justice's Commission on Professionalism for counseling and guidance; or

(iii) the applicant or respondent's conduct raises significant concerns about his/her mental stability, mental health, lack of mental acuity, or possible dementia, or concerns about possible alcohol or substance abuse, the Committee may, in lieu of or in addition to imposing sanctions refer the applicant or respondent to the North Carolina State Bar's Lawyer Assistance Program (LAP) for evaluation or, if the applicant or respondent is not a lawyer, to a physician or other licensed mental health professional or to a substance abuse counselor or organization.

Neither letters nor referrals are viewed as sanctions under Rule VIII, E.10. below. Rather, both are intended as opportunities to address concerns and to help applicants or respondents perform more effectively as mediators. There may, however, be instances that are more serious in nature where the Committee may both make a referral and impose sanctions under Rule VIII. E.10.

In the event that an applicant or respondent is referred to one or more members of the Committee for counsel, to LAP or some other professional or entity and fails to cooperate regarding the referral; refuses to sign releases or to provide any resulting evaluations to the Committee; or any resulting discussions or evaluation(s) suggest that the applicant or respondent is not currently capable of serving as a mediator, trainer or manager, the Committee reserves the right to make further determinations in the matter, including decertification. During a referral under (iii) above, the Committee may require the applicant or respondent to cease practicing as a mediator, trainer or manager during the referral period and until such time as the Committee has authorized his/her return to active practice. The Committee may condition a certification or renewal of recertification on the applicant's successful completion of the referral process.

Any costs associated with a referral, *e.g.*, costs of evaluation or treatment, shall be borne entirely by the applicant or respondent.

c. To Propose Sanctions. If a majority of Committee members find probable cause pursuant to Rule VIII.D.2. above, the Committee shall propose sanctions on the applicant or respondent, except as provided for in Rule VIII.D.3.(b)(i).

Within the 30 day period set forth in Rule VIII.D.3.(d) below, an applicant or respondent may contact the Committee and object to any referral made or sanction imposed on the applicant or respondent, including objecting to any public posting of a sanction, and seek to negotiate some other outcome with the Committee. The Committee shall have the authority to engage in such negotiations with the applicant or respondent. During the negotiation period, the respondent may request an extension of the time in which to request an appeal under Rule VIII.E. below. The Executive Secretary, in consultation with the Committee Chair, may extend the appeal period an additional thirty days in order to allow more time to complete negotiations.

4. Right of Appeal. If a referral is made or sanctions are imposed, the applicant or respondent shall have thirty (30) days from the date of the letter transmitting the Committee's findings and action to appeal. Notification of appeal must be made to the Commission's office in writing. If no appeal is received within thirty (30) days, the complainant, applicant or respondent shall be deemed to have accepted the Committee's findings and proposed sanctions.

E. Appeal to the Commission.

1. The Commission Shall Meet to Consider Appeals. An appeal of the Committee's determination pursuant to Rule VIII.E. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination on appeal shall be recused and shall not participate in the Commission's deliberations. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's Chair.

2. Conduct of the Hearing.

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all

parties, special counsel to the Commission, and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.

b. Hearings conducted by the Commission pursuant to this rule shall be *de novo*.

c. Applicants, complainants, respondents and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.

d. All hearings will be open to the public except that for good cause shown the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of an applicant or respondent.

e. In the event that the applicant, complainant, or respondent fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

f. Proceedings before the Commission shall be conducted informally but with decorum.

g. The Commission, through its counsel, and the applicant or respondent may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or respondent may cross-examine any witness called to testify by the other. Commission members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

h. The Commission's Chair or designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of

witnesses and the production of books, papers, or other documentary evidence.

3. **Date of Hearing.** An appeal of any sanction proposed by the Committee shall be heard by the Commission within ninety (90) days of the date the sanction is proposed.

4. **Notice of Hearing.** The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.

5. ***Ex Parte* Communications.** No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

6. **Attendance.** All parties, including applicants, complainants and responents, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

7. **Witnesses.** The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office and to all other parties at least ten (10) days prior to the hearing, the names of all witnesses who will be called to testify.

8. **Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his/her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. **Commission Decision.** After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the imposition of sanctions and, therefore, dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program, or (ii) find that there is clear and convincing evidence that grounds exist to impose sanctions and impose sanctions. The Commission may impose the same or different sanctions than imposed by the Committee. The Commission shall set forth its findings, conclusions, and sanctions, or other action, in writing and serve its decision on the parties within sixty (60) days of the date of the hearing.

10. **Sanctions.** The sanctions that may be proposed by the Committee or imposed by the Commission include, but are not limited to, the following:

    a. Private, written admonishment;

    b. Public, written admonishment;

    c. Completion of additional training;

    d. Restriction on types of cases to be mediated in the future;

    e. Reimbursement of fees paid to the mediator or training program;

    f. Suspension for a specified term;

    g. Probation for a specified term;

    h. Certification or renewal of certification upon conditions;

    i. Denial of certification or certification renewal;

    j. Decertification;

    k. Prohibition on participation as a trainer or manager of a certified mediator training program either indefinitely or for a period of time, and

    l. Any other sanction deemed appropriate by the Commission.

11. **Publication of Committee/Commission Decisions.**

    a. Names of respondents who have been reprimanded privately or applicants who have never been certified and have been denied certification shall not be published in the Commission's newsletter and on its web site.

b. Names of respondents or applicants who are sanctioned under any other provision of Section B.10. above and who have been denied reinstatement under Section B.13. below shall be published in the Commission's newsletter and on its web site along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Commission may waive this requirement.

c. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which a mediator serves, the NC State Bar and any other professional licensing/certification bodies to which a mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any sanction imposed upon a mediator except those named in Subsection a. above.

d. If the Commission imposes sanctions as a result of a complaint filed by a third party, the Commission's office shall, on request, release copies of the complaint, response, counter response, and Commission/Committee decision.

12. Appeal. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions imposing sanctions or denying applications for mediator or mediator training program certification. An order imposing sanctions or denying applications for mediator or mediator training program certification shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

13. Reinstatement. An applicant, mediator, trainer, or manager who has been sanctioned under this rule may be reinstated as a certified mediator or as an active trainer or manager pursuant to Section B.13.g. below. Except as otherwise provided by the Standing Committee or Commission, no application for reinstatement may be tendered within two years of the date of the sanction or denial.

a. A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.

b. The petition for reinstatement shall contain:

(i) the name and address of the petitioner;

(ii) the offense or misconduct upon which the suspension or decertification or the bar to training or program management was based; and

(iii) a concise statement of facts claimed to justify reinstatement as a certified mediator or a trainer or program manager.

c. The petition for reinstatement may also contain a request for a hearing on the matter to consider any additional evidence which the petitioner wishes to put forth, including any third party testimony regarding his or her character, competency, or fitness to practice as a mediator, trainer, or manager.

d. The Commission's staff shall refer the petition to the Commission for review.

e. If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B above. At the hearing, the petitioner may:

(i) appear personally and be heard;

(ii) be represented by counsel;

(iii) call and examine witnesses;

(iv) offer exhibits; and

(v) cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

g. The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

(i) the petitioner has rehabilitated his/her character, addressed and resolved any conditions which led to his/her suspension or decertification, completed additional training in mediation theory and practice to ensure his/her competency as a mediator, trainer, or manager, and/or taken steps to address and resolve any other matter(s) which led to the peti-

tioner's suspension, decertification, or prohibition from serving as a trainer or manager; and

(ii) the petitioner's certification will not be detrimental to the Mediated Settlement Conference, Family Financial Settlement, Clerk Mediation or District Criminal Court Mediation Programs, the Commission, the courts, or the public interest;

(iii) and that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

h. If the petitioner is found to have rehabilitated him or herself and is fit to serve as a mediator, trainer, or manager, the Commission shall reinstate the petitioner as a certified mediator or as an active trainer or manager. However, if the suspension or decertification or the bar to training or management has continued for more than two years, the reinstatement may be conditioned upon the completion of additional training and observations as needed to refresh skills and awareness of program rules and requirements.

i. The Commission shall set forth its decision to reinstate a petitioner or to deny reinstatement in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. mail, return receipt requested, within thirty (30) days of the date of the hearing.

j. If a petition for reinstatement is denied, the petitioner may not apply again pursuant to this section until two years have lapsed from the date the denial was issued.

k. The General Court of Justice, Superior Court Division in Wake County, shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

IX. INVESTIGATION AND REVIEW OF APPLICATIONS FOR CERTIFICATION DENIED OR REVOKED FOR REASONS OTHER THAN THOSE PERTAINING TO ETHICS AND CONDUCT.

A. Establishment of the Standing Committee on Certification of Mediators and Mediator Training Programs.

1. **Establishment of Committee.** The Chair of the Commission shall appoint a standing Committee on Certification of Mediators and Mediator Training Programs (Committee) to review the matters set forth in Section 2 below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.

2. **Matters to Be Considered by Committee.** The Committee shall review and consider the following matters:

   a. Appeals of staff decisions to deny an application filed by a person seeking mediator certification or recertification or by a mediator training program seeking certification or recertification, because of deficiencies that do not relate to conduct or ethics. The latter deficiencies shall be considered pursuant to Rule ~~8.~~ VIII.

   b. Complaints which are filed by a member of the Commission, its staff, or any member of the public about a certified mediator or certified mediator training program or an applicant for certification or certification renewal; except that, complaints relating to applicant, mediator, trainer or manager conduct or ethics shall be considered only pursuant to Rule ~~8.~~ VIII.

3. **The Investigation of Qualifications.**

   a. Information obtained during the process of certification or renewal. Commission staff shall review all pending applications for certification and recertification to determine whether the applicant meets the non-ethics related qualifications set out in ~~the MSC Rules 8 and 9 and FFS Rules 8 and 9~~ program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission and any guidelines or other policies adopted by the Commission amplifying those rules. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant's eligibility for certification or certification renewal.

   b. Complaints about mediator or mediator training program qualifications filed with the Commission. The staff of the Commission shall forward written complaints about the qualifications of a certified mediator or certified mediator training program or any trainer or manager affil-

iated with such program (affected person/program) that do not pertain to ethics or conduct filed by any member of the general public, the Commission, or its staff to the Committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit, the Executive ~~Director~~ Secretary shall refer the matter to the Committee's chair rather than to the Committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have thirty (30) days from the date of notification to appeal the chair's determination to the full Committee on Certification of Mediators and Mediator Training Programs. The appeal shall be in writing and directed to the Commission's office.

c. Investigation by the Standing Committee. The Committee shall investigate all matters brought before it by staff pursuant to the provisions of Sections a. or b. The Chair or designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to any such investigation. The Chair or designee may contact the following persons and entities for information concerning such application or complaint:

i) all references, employers, colleges, and other individuals and entities cited in applications for mediator certification, including any and all other professional licensing or certification bodies to which the applicant is subject.

ii) all proposed trainers cited in training program applications and in the case of applications for certification renewal, participants who have completed the training program.

iii) all parties bringing complaints about a mediator or a mediator training program's qualifications for certification or certification renewal and any other person or entity with information about the subject of the complaint.

All information in Commission files pertaining to the initial certification of a mediator or mediation training program or to renewals of such certifications shall be confidential.

d. Probable Cause Determination. The Committee on Certification of Mediators and Mediator Training Programs shall deliberate to determine whether probable cause exists to believe that the affected person/program or the applicant:

i) does not meet the qualifications for mediator certification set out in ~~MSC Rule 8 and/or FFS Rule 8~~ program adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted by the Commission that amplify those rules; or

ii) does not meet the qualifications for mediator training program certification as set out in ~~MSC rule 9 and/or FFS Rule 9~~ program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted by the Commission that amplify those rules.

If probable cause is found, that the application for certification or re-certification should be denied or the affected person/program's certification should be revoked.

4. Authority of Committee to Deny Certification or Certification Renewal or to Revoke Certification.

a. If a majority of Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d. above, Commission staff shall certify or recertify the affected person/program or applicant. If the investigation were initiated by the filing of a written complaint, the Committee shall dismiss the complaint and notify the complaining party and the affected person/program or applicant in writing by certified U.S. mail, return receipt requested, that the complaint has been dismissed and that the affected person/program or applicant will be certified or re-certified. There shall be no right of appeal from the Committee's decision to dismiss a complaint or to certify or re-certify an affected person/program or applicant.

b. If a majority of Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Committee shall deny certification or re-certification or revoke certification. The Committee's findings, conclusions, and denial shall be in writing and forwarded to the affected person/program or applicant by U.S. mail, return receipt requested.

c. If the Committee denies certification or re-certification or revokes certification, the affected person/program or applicant may appeal the denial or revocation to the Commission within thirty (30) days from the date of the letter transmitting the Committee's findings, conclusions, and denial. Notification of appeal must be in writing and directed to the Commission's office. If no appeal is filed within thirty (30) days, the affected person/program or applicant shall be deemed to have accepted the committee's findings and denial or revocation.

B. Appeal of the Denial to the Commission.

1. The Commission Shall Meet. An appeal of a denial or revocation by the Committee pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination that is on appeal shall recuse themselves from participating. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

2. Conduct of the Hearing.

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all parties; special counsel to the Commission, if appointed; and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.

b. Hearings conducted by the Commission will be a *de novo* review of the Committee's decision.

c. The Commission's chair or his/her designee shall serve as the presiding officer. The presiding officer shall have such

jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

d. Special counsel supplied either by the Attorney General at the request of the Commission or employed by the Commission may present the evidence in support of the denial or revocation of certification. Commission members may question any witnesses called to testify at the hearing.

e. The Commission, through its counsel, and the applicant or affected person/program may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or affected person/program, may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

f. All hearings shall be conducted in private, unless the applicant or affected person/program requests a public hearing.

g. In the event that the complainant, affected person/program, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

h. Proceedings before the Commission shall be conducted informally but with decorum.

3. Date of Hearing. An appeal of any denial by the Committee shall be heard by the Commission within ninety (90) days of the date of the letter transmitting the Committee's findings, conclusions, and denial or revocation.

4. Notice of Hearing. The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.

5. *Ex Parte* Communications. No person shall have any *ex parte* communication with members of the Commission con-

cerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

6. **Attendance.** All parties, including complaining parties and applicants, or their representatives in the case of a training program, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

7. **Witnesses.** The presiding officer shall exercise his/her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least ten (10) days prior to the hearing the names of all witness who will testify for them.

8. **Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. **Commission Decision.** After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the denial or revocation and, therefore dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program; or (ii) find that there is clear and convincing evidence to affirm the committee's findings and denial or revocation. The Commission shall set forth its findings, conclusions, and denial in writing and serve it on the parties within sixty (60) days of the date of the hearing.

10. Publication of Committee/Commission Decisions.

a. Names of applicants for mediator certification or names of mediator training programs that are denied certification or recertification or who have had their certification revoked pursuant to this rule shall not be published in the Commission's newsletter or on its web site and the fact of that denial or revocation shall not be generally publicized.

b. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any denial or revocation of certification.

11. Appeals. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions denying an application or revoking a certification. An order denying or revoking certification pursuant to this rule shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

12. Reinstatement of Certification. A mediator or training program whose certification renewal has been denied or whose certification has been revoked under this rule may be re-certified or reinstated as a certified mediator or mediation training program pursuant to Section B.12.g. below. An application for reinstatement may be tendered at any time the applicant believes that he/she/it is qualified to be reinstated.

a. A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.

b. The petition for reinstatement shall contain:

i) the name and address of the petitioner;

ii) the qualification upon which the denial or revocation was based; and

iii) a concise statement of facts claimed to justify certification or recertification as a certified mediator or mediator training program.

c. The petition for reinstatement or certification may also contain a request for a hearing on the matter to consider any additional evidence that the petitioner wishes to put forth.

d. The Commission's staff shall refer the petition to the Commission for review.

e. If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B above. At the hearing, the petitioner may:

i) appear personally and be heard;

ii) be represented by counsel;

iii) call and examine witnesses;

iv) offer exhibits; and

v) cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

g. The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

i) that the petitioner has satisfied the qualifications that led to the denial or revocation; and

ii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

h. If the petitioner is found to have met the qualifications and is entitled to be certified as a mediator or mediator training program, the Commission shall so certify.

i. If a petition for reinstatement is denied, the petitioner may apply again pursuant to this section at any time after the qualifications are met.

j. The Commission shall set forth its decision to certify a mediator or mediator training program or to deny certification in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. mail, return receipt requested, within ~~thirty (30)~~ sixty (60) days of the date of the hearing.

k. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of review shall be filed with the Superior Court in Wake County within thirty (30) days of the date of the Commission's decision.

X. INTERNAL OPERATING PROCEDURES.

A. The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

B. The Commission's procedures and policies may be changed as needed on the basis of experience.

Order Adopting Amendments to the Standards of Professional Conduct for Mediators

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the proceedings conducted pursuant to N.C.G.S. § 7A-38.1, 7A-38.3, 7A-38.4A, 7A-38.3B, and 7A-38.3C.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Standards of Professional Conduct for Mediators are hereby amended to read as in the following pages. These amended Standards shall be effective on the 1st of March, 2010.

Adopted by the Court in conference the 17th day of February, 2010. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Standards of Professional Conduct for Mediators amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Timmons-Goodson, J.
For the Court

STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

PREAMBLE

These standards shall apply ~~are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct~~ to all mediators who are certified by the North Carolina Dispute Resolution Commission or who are not certified, but are conducting court-ordered mediations in the context of a program or process that is governed by statutes, as amended from time-to-time, which provide for the Commission to regulate the conduct of mediators participating in the program or process. Provided, however, that if there is a specific statutory provision that conflicts with these standards, then the statute shall control. ~~As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators participating in mediated settlement conferences in the State of North Carolina pursuant to NCGS 7A-38.1, NCGS 7A-38.3, NCGS 7A-38.4A, NCGS 7A-38.3B, NCGS 7A-38.3C or who are certified by the NC Dispute Resolution Commission. These Standards shall not apply in instances where a mediator is participating in a mediation program or process which is governed by other statutes, program rules, and/or Standards of Conduct and there is a conflict between these Standards and the statutes, rules, or Standards governing the other program. In such instance, the mediator's conduct shall be governed by the conflicting statutory provision, rule, or Standard applicable to the program or process in which the mediator is participating.~~

These standards are intended to instill and promote public confidence in the mediation process and to provide minimum standards for mediator conduct. As with other forms of dispute resolution, mediation must be built upon public understanding and confidence. Persons serving as mediators are responsible to the parties, the public and the courts to conduct themselves in a manner that will merit that confidence. (See Rule VII of the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission.)

~~Mediation is a process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.~~

~~The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in~~

~~deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.~~

It is the mediator's role to facilitate communication and understanding among the parties and to assist them in reaching an agreement. The mediator should aid the parties in identifying and discussing issues and in exploring options for settlement. The mediator should not, however, render a decision on the issues in dispute. In mediation, the ultimate decision whether and on what terms to resolve the dispute belongs to the parties and the parties alone.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his/her judgment as to whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his/her serving on grounds of lack of impartiality, and after discussion, the party continues to object; or

(2) the mediator determines he/she cannot serve impartially.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

A. A mediator shall not disclose, directly or indirectly, to any non-participant, any information communicated to the mediator by a participant within the mediation process. A mediator's tendering a copy of an agreement reached in mediation pursuant to a statute that mandates such a tender shall not be considered to be a violation of this paragraph.

B. A mediator shall not disclose, directly or indirectly, to any ~~non-~~ participant, information communicated to the mediator in confidence by any other participant in the mediation process, unless that participant gives permission to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.

C. The confidentiality provisions set forth in A. and B. above notwithstanding, a mediator has discretion to report otherwise confidential conduct or statements made in preparation for, during, or as a follow-up to mediation to a participant, non-participant, law enforcement personnel, or other officials or to give an affidavit, or to testify about such conduct or statements in the following circumstances:

(1) A statute requires or permits a mediator to testify, or to give an affidavit, or to tender a copy of any agreement reached in mediation to the official designated by the statute.

(2) Where public safety is an issue:

(i) a party to the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(ii) a party to the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(iii) a party's conduct during the mediation results in direct bodily injury or death to a person.

D. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

E. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during, or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. ~~A mediator shall also inform the parties of the following:~~

~~(1) that mediation is private;~~

~~(2) that mediation is informal;~~

~~(3) that mediation is confidential to the extent provided by law;~~

~~(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;~~

~~(5) the mediator's role; and~~

~~(6) what fees, if any, will be charged by the mediator for his/her services.~~

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nev-

ertheless, a mediator ~~may and~~ shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

~~C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.~~

C. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator shall explore the circumstances and potential accommodations, modifications or adjustments that would facilitate the party's capacity to comprehend, participate and exercise self-determination. If the mediator then determines that the party cannot meaningfully participate in the mediation, the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstance of the mediation, including subject matter of the dispute, availability of support persons for the party and whether the party is represented by counsel.

~~D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the process, issues or options for settlement, the mediator shall discontinue the mediation.~~

~~E.~~D In appropriate circumstances, a mediator shall ~~encourage~~ inform the parties ~~to seek~~ of the importance of seeking legal, financial, tax or other professional advice before, during or after the mediation process. ~~A mediator shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.~~

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He/She may assist them in making informed and thoughtful decisions, but shall not impose his/her judgment or opinions for those of the parties concerning any aspect of the mediation.

B. A mediator may raise questions for the participants to consider regarding their perceptions of the dispute as well as the accept-

ability of proposed options for settlement and their impact on third parties. Furthermore, a mediator may suggest for consideration options for settlement in addition to those conceived of by the parties themselves.

C. A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

This section prohibits imposing one's opinions, advice and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

D. Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

E. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, inequality of bargaining power or ability, unfairness resulting from non-disclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties of the mediator's concern. Consistent with the confidentiality required in Standard III, the mediator may discuss with the parties the source of the concern. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may~~,~~ provide information that the mediator ~~in areas where he/she~~ is qualified by training ~~and~~ or experience to provide, ~~raise questions regarding the~~ only if the mediator can do so consistent with these Standards. ~~information presented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice.~~ Mediators may respond to a

party's request for an opinion on the merits of the case or suitability of settlement proposals only in accordance with Section V.C. above.

OFFICIAL COMMENT

Although mediators shall not provide legal or other professional advice, mediators may respond to a party's request for an opinion on the merits of the case or the suitability of settlement proposals only in accordance with Section V.C. above, and mediators may provide information that they are qualified by training or experience to provide only if it can be done consistent with these Standards.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his/her own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer, therapist or other professional and the mediator's professional partners or co-shareholders shall not advise, counsel or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute, or an out growth of the dispute when the mediator or his/her staff has engaged in substantive conversations with any party to the dispute. Substantive conversations are those that go beyond discussion of the general issues in dispute, the identity of parties or participants and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential pursuant to Standard III is a substantive conversation.

A mediator who is a lawyer, therapist or other professional may not mediate the dispute when the mediator or the mediator's professional partners or co-shareholders has advised, counseled or represented any of the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute or an out growth of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained or relationships formed during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral or expectation of referral of clients for mediation services.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. ~~When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, (and subject to Standard V. D. above) nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality~~. If a mediator believes that the actions of a participant, including those of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

Order Adopting Amendments to the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases

WHEREAS, section 7A-38.4A of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in district court judicial districts in order to facilitate the resolution of equitable distribution and other family financial matters within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.4A(o) provides for this Court to implement section 7A-38.4A by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4A(o), Rules Implementing Settlement Procedures in Equitable Distribution and other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of March, 2010.

Adopted by the Court in conference the 17th day of February, 2010. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Timmons-Goodson, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

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RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a district Court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action, or

claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52 B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) Equitable Distribution Scheduling Conference. At the scheduling conference mandated by G.S. 50-21(d) in all equitable distribution actions in all judicial districts, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2). The Court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case.

Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that all parties consent to the motion.

(4) Content of Order. The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases. Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the

reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) Motion to Dispense With Settlement Procedures. A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as nonbinding arbitration or early neutral evaluation prior to the Court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. ~~SELECTION~~ DESIGNATION OF MEDIATOR

A. ~~SELECTION~~ DESIGNATION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may ~~select~~ designate a certified family financial mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such ~~d~~Designation shall: state the name, address and telephone number of the mediator ~~selected~~ designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the ~~selection~~ designation and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to ~~select~~ designate a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified

Family Financial Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the ~~selection~~ nomination and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the ~~selection~~ designation of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the ~~selection~~ designation of a mediator and have been unable to agree on a mediator. The motion shall be on a form approved by the Administrative Office of the Courts.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a ~~Notice of Selection~~ Designation of Mediator with the Court, the Court shall appoint a family financial mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the Court's district.

In making such appointments, the Court shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned. The District Court Judges shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

The Dispute Resolution Commission shall furnish to the District Court Judges of each judicial district a list of those certified family financial mediators requesting appointments in that district. That list shall contain the mediators' names, addresses and telephone numbers and shall be provided both in writing and electronically through the Commission's website. The Commission shall promptly notify the District Court Judges of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

C. **MEDIATOR INFORMATION.** To assist the parties in ~~selecting~~ designating a mediator, the Dispute Resolution Commission shall assemble, maintain and post on its web site at www.ncdrc.org a list of certified family financial mediators. The list shall supply contact information for mediators and identify Court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information including information about an individual mediator's education, professional experience and mediation training and experience.

D. **DISQUALIFICATION OF MEDIATOR.** Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **WHERE CONFERENCE IS TO BE HELD.** The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion of the conference which shall be

not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any,

declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

(3) Scheduling. Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another Court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, the parties shall reduce to writing the essential terms of the agreement.

a. If the parties conclude the conference with a written document containing all the terms of their agreement, signed by all parties and formally acknowledged as required by NCGS 50-20(d) for property distribution, the mediator shall report to the Court that the matter has been settled and include in the report the name and signature of the person responsible for filing closing documents with the Court.

b. If the parties are able to reach an agreement at the conference, but are unable to have it written or have it signed and acknowledged as required by NCGS 50-20(d) for property distribution agreements, then the parties shall summarize their understanding in written form and shall use it as a memorandum and

guide to writing such agreements and orders as may be required to give legal effect to its terms. In that event, the mediator shall facilitate the writing of the summary memorandum and shall either:

(i) report to the Court that the matter has been settled and include in the report the name and signature of the person responsible for filing closing documents with the Court; or, in the mediator's discretion,

(ii) declare a recess of the conference. If a recess is declared, the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) If the agreement is reached at the conference, the person(s) responsible for filing closing documents with the Court shall sign the mediator's report to the Court. The parties shall file their consent judgment or voluntary dismissal with the Court within thirty (30) days or before expiration of the mediation deadline, whichever is longer.

(3) If an agreement is reached prior to the conference or finalized while the conference is in recess, the parties shall notify the mediator and file the consent judgment or voluntary dismissal(s) with the Court within thirty (30) days or before the expiration of the mediation deadline, whichever is longer. The mediator shall report to the Court that the matter has been settled and who reported the settlement.

(4) No settlement agreement resolving issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing, signed by the parties, and acknowledged as required by NCGS 50-20(d).

C. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

DRC Comments to Rule 4.

DRC Comment to Rule 4.B.

N.C.G.S. § 7A-38.4A(j) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the

parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement on all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the Court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the Court.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES~~S~~ OR PAY MEDIATOR'S FEE

~~If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.~~

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with G.S. 7A-38.4A and the rules promulgated by the Supreme Court to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the Court and monetary sanctions imposed by a judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

~~A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.F. and the Comment to Rule 7.F.)~~

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief

sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making finding of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. (See also Rule 7.F. and the Comment to Rule 7.F.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) Private Consultation. The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.4A(j);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of Conference.

(a) The mediator shall report to the Court on an A.O.C. form within 10 days of the conference whether or not an agreement was reached by the parties.

The mediator's report shall include the names of those persons attending the mediated settlement conference. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the Court.

(b) If an agreement upon all issues was reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s), when it shall be filed with the Court, and the name, address and telephone number of the per-

son(s) designated by the parties to file such consent judgment or dismissal(s) with the Court as required by Rule 4.B.2. If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the Court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the Court and sanctions.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) Informational Brochure. Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.

(7) Evaluation Forms. At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purpose of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY COURT ORDER. When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of ~~$125~~ $150 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of ~~$125~~ $150, which accrues upon appointment.

C. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A., the parties may select a certified mediator or nominate a non-certified mediator to conduct their mediated settlement conference. Parties who fail to select a mediator and then desire a substitution after the Court has appointed a mediator, shall obtain Court approval for the substitution. The Court may approve the substitution only upon proof of payment to the Court's original appointee the ~~$125~~ $150 one time, per case administrative fee, and any other amount due and owing for mediation services pursuant to Rule 7.B. and any postponement fee due and owing pursuant to Rule 7.E.

D. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fees shall be paid in equal shares by the named parties. Payment shall be due and payable upon completion of the conference.

E. INABILITY TO PAY. No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7.B. and C. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

F. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all par-

ties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in Court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least fourteen (14) calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of ~~$125~~ $150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven (7) calendar days of the scheduled date for mediation, the fee shall be ~~$250~~ $300. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status or the inability to pay his or her full share of the fee to promptly move the Court for a determina-

tion of indigency or the inability to pay a full share, shall constitute contempt of Court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by the Court.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a Court-ordered mediation.

DRC Comment to Rule 7.D.

If a party is found by the Court to have failed to attend a family financial settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.F.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.G.

If the Family Financial Settlement Program is to be successful, it is essential that mediators, both party-selected and Court-appointed, be compensated for their services. FFS Rule 7.G. is intended to give the Court express authority to enforce payment of fees owned both Court-appointed and party-selected mediators. In instances where the mediator is party-selected, the Court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.F (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as family financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience. Each applicant for certification under this provision shall have completed the North Carolina Bar Association's two-day basic family law CLE course or equivalent course work in North Carolina law relating to separation and divorce, alimony and post separation support, equitable distribution, child custody and support and domestic violence and in addition, shall:

(1) Be an Advanced Practitioner member of the Association for Conflict Resolution and have earned an undergraduate degree from an accredited four-year college or university, or

(2) Have completed a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9, or, if already a certified Superior Court mediator, have completed the 16 hour family mediation supplemental course pursuant to Rule 9, and have additional experience as follows:

(a) as a Licensed Attorney and/or Judge of the General Court of Justice of the State of North Carolina or other state for at least five years; or

(b) as a Licensed Physician certified in psychiatry pursuant to NCGS 90-9 et seq., for at least five years; or

(c) as a person licensed to practice psychology in North Carolina pursuant to NCGS 90-270.1 et seq., for at least five years; or

(d) as a Licensed Marriage and Family Therapist pursuant to NCGS 90-270.45 et seq., for at least five years; or

(e) as a Licensed Clinical Social Worker pursuant to NCGS 90B-7 et seq., for at least five years; or

(f) as a Licensed Professional Counselor pursuant to NCGS 90-329 et seq., for at least five years; or

(g) as a Certified Public Accountant certified in North Carolina for at least five years.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, Court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission. Attorneys licensed to practice law in states other than North

Carolina shall complete this requirement through a course of self-study as directed by the Commission's Executive Secretary.

C. Be a member in good standing of the State Bar of one of the United States. or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience as required by Rule 8.A.

D. Have observed as a neutral observer with the permission of the parties two mediations involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, or who is an Advanced Practitioner Member of the Association for Conflict Resolution or who is an A.O.C. mediator, and, if the applicant is not an attorney licensed to practice law in one of the United States, have observed three additional Court ordered mediations in cases that are pending in State or Federal Courts in North Carolina having rules for mandatory mediation similar to these.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanction(s) imposed by a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within thirty (30) days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license, other disciplinary complaints filed with, or actions taken by, a professional licensing or regulatory body; any judi-

cial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Courts ~~in consultation with~~ upon the recommendation of the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

J. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. No application for recertification shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under Rules which were promulgated after the date of his/her original certification.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to Rule 8.A.2.(c) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) Communication and information gathering skills.

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and post separation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing family financial settlement procedures in North Carolina.

B. Certified training programs for mediators certified pursuant to Rule 8.A.2.(d) shall consist of a minimum of sixteen hours of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the

Association for Conflict Resolution (ACR) with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an ACR approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8). either in the ACR approved training or in some other acceptable course.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of those procedures listed in Rule 10.B. unless the Court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) Neutral Evaluation (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) Judicial Settlement Conference (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) Other Settlement Procedures described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) which shall constitute good cause for the Court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) When Proceeding is Conducted. The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) Extensions of Time. A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) Where Procedure is Conducted. Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) No Delay of Other Proceedings. Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) Inadmissibility of Settlement Proceedings. Evidence of statements made and conduct occurring in a

mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or others neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) Finalizing Agreement.

i. If agreement is reached on all issues at the neutral evaluation, judicial settlement conference, or other settlement procedure, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within thirty (30) days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

ii. If an agreement is reached upon all issues prior to the neutral evaluation, judicial settlement conference, or other settlement procedure or finalized while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel, shall comply in all respects with the requirements of Chapter 50 of the General Statutes, and shall file a con-

sent judgment or voluntary dismissals(s) disposing of all issues with the Court within thirty (30) days, or before the expiration of the deadline for completion of the proceeding, whichever is longer.

iii. When a case is settled upon all issues, all attorneys of record must notify the Court within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when*.

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedures or Pay Neutral's Fee. ~~If a~~Any person required to attend a settlement ~~proceeding~~ procedure or pay a neutral's fee in compliance with G.S. 7A-38.4A and the rules promulgated by the Supreme Court to implement that section who, fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the Court and monetary sanctions imposed by the Court. ~~may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.~~ Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses and loss of earnings incurred by persons attending the procedure. A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the

settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the Court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the Court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The admissibility of conduct and statements as provided by G.S. 7A-38.1 (1) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting Results of the Proceeding. The neutral evaluator, settlement judge, or other neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11 and 12 herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) Scheduling and Holding the Proceeding. It is the duty of the neutral to schedule the proceeding and conduct it prior to the com-

pletion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) Report of Evaluator to Court. Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the evaluator to have been absent

from the neutral evaluation without permission. The report shall also inform the Court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the evaluation conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the Court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the Court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. SETTLEMENT JUDGE. A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge. Unless specifically approved by the Chief District Court Judge, the District Court Judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. CONDUCTING THE CONFERENCE. The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. CONFIDENTIAL NATURE OF THE CONFERENCE. Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. REPORT OF JUDGE. Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the Court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the Court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the Court.

E. REPORT OF JUDGE. Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the Court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the Court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the Court.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

A. The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial Court

administrator, case management assistant, judicial assistant, and trial Court coordinator.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

C. The term, Family Financial Case, shall refer to any civil action in district Court in which a claim for equitable distribution, child support, alimony, or post separation support is made, or in which there are claims arising out of contracts between the parties under GS 50-20(d), 52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

Order Adopting Amendments to the Rules Implementing Mediation in Matters Before the Clerk of Superior Court

WHEREAS, section 7A-38.3B of the North Carolina General Statutes establishes a statewide system of mediations to facilitate the resolution of matters pending before Clerks of Superior Court, and

WHEREAS, N.C.G.S. § 7A-38.3B(b) enables this Court to implement section 7A-38.3B by adopting rules and amendments to rules concerning said mediations.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3B(b), the Rules Implementing Mediation In Matters Before The Clerk Of Superior Court are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st of March, 2010.

Adopted by the Court in conference the 17th day of February, 2010. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Mediation In Matters Before The Clerk Of Superior Court amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Timmons-Goodson, J.
For the Court

RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

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RULE 1. INITIATING MEDIATION IN MATTERS BEFORE THE CLERK.

A. PURPOSE OF MANDATORY MEDIATION.

These Rules are promulgated pursuant to G.S. 7A-38.3B to implement mediation in certain cases within the Clerk's jurisdiction. The procedures set out here are designed to focus the parties' attention on settlement and resolution rather than on preparation for contested hearings and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily either prior to or after the filing of a matter with the Clerk.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent a party to a matter before the Clerk, shall discuss the means available to the parties through mediation and other settlement procedures to resolve their disputes without resort to a contested hearing. Counsel shall also discuss with each other what settlement procedure and which neutral third party would best suit their clients and the matter in controversy.

C. INITIATING THE MEDIATION BY ORDER OF THE CLERK.

(1) **Order by The Clerk of Superior Court.** The Clerk of Superior Court of any county may, by written order, require all persons and entities identified in Rule 4 to attend a mediation in any matter in which the Clerk has original or exclusive jurisdiction, except those matters under NCGS Chapters 45 and 48 and those matters in which the jurisdiction of the Clerk is ancillary.

(2) **Content of Order.** The order shall be on an AOC form and shall:

(a) require that a mediation be held in the case;

(b) establish deadlines for the selection of a mediator and completion of the mediation;

(c) state the names of the persons and entities who shall attend the mediation;

(d) state clearly that the persons ordered to attend have the right to select their own mediator as provided by Rule 2;

(e) state the rate of compensation of the Court appointed mediator in the event that those persons do not exercise their right to select a mediator pursuant to Rule 2; and

(f) state that those persons shall be required to pay the mediator's fee in shares determined by the Clerk.

(3) **Motion for Court Ordered Mediation.** In matters not ordered to mediation, any party, interested persons, or fiduciary may file a written motion with the Clerk requesting that mediation be ordered. Such motion shall state the reasons why the order should be allowed and shall be served in accordance with Rule 5 of the N.C.R.C.P. on non-moving parties, interested persons, and fiduciaries designated by the Clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within 5 days after the date of the service of the motion. Thereafter, the Clerk shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(4) **Informational Brochure.** The Clerk shall serve a brochure prepared by the Dispute Resolution Commis-

sion explaining the mediation process and the operations of the Commission along with the order required by Rule 1.C.(1) and 1.C.(3).

(5) Motion to Dispense With Mediation. A named party, interested person, or fiduciary may move the Clerk of Superior Court to dispense with a mediation ordered by the Clerk. Such motion shall state the reasons the relief is sought and shall be served on all persons ordered to attend and the mediator. For good cause shown, the Clerk may grant the motion.

(6) Dismissal of Petition For the Adjudication of Incompetence. The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after mediation is ordered.

RULE 2. ~~SELECTION~~ DESIGNATION OF MEDIATOR

A. ~~SELECTION~~ DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may ~~select~~ designate a mediator certified by the Dispute Resolution Commission by agreement within a period of time as set out in the Clerk's order. However, the parties may only ~~select~~ designate mediators certified for estate and guardianship matters pursuant to these Rules for estate or guardianship matters.

The petitioner shall file with the Clerk a ~~Notice of Selection of~~ Designation of Mediator ~~by Agreement~~ within the period set out in the Clerk's order; however, any party may file the ~~notice~~ Designation. The party filing the Designation shall serve a copy on all parties and the mediator designated to conduct the mediation. Such ~~notice~~ Designation shall state the name, address and telephone number of the mediator ~~selected~~ designated; state the rate of compensation of the mediator; state that the mediator and persons ordered to attend have agreed upon the ~~selection~~ designation and rate of compensation; and state under what Rules the mediator is certified. The notice shall be on an AOC form.

B. APPOINTMENT OF MEDIATOR BY THE CLERK. In the event a ~~notice of selection~~ Designation of Mediator is not filed with the Clerk within the time for filing stated in the Clerk's order, the Clerk shall appoint a mediator certified by the Dispute Resolution Commission. The Clerk shall appoint only

those mediators certified pursuant to these Rules for estate and guardianship matters to those matters. The Clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the Clerk.

Except for good cause, mediators shall be appointed by the Clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the Clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether they are an attorney.

C. MEDIATOR INFORMATION DIRECTORY. The Dispute Resolution Commission shall maintain for the consideration of the Clerks of Superior Court and those ~~selecting~~ designating mediators for matters within the Clerk's jurisdiction a directory of certified mediators who request appointments in those matters and a directory of those mediators who are certified pursuant to these Rules. Said directory shall be maintained on the Commission's web site.

D. DISQUALIFICATION OF MEDIATOR. Any person ordered to attend a mediation pursuant to these Rules may move the Clerk of Superior Court of the county in which the matter is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be ~~selected~~ designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. CONDUCTING THE MEDIATION

A. WHERE MEDIATION IS TO BE HELD. The mediation may be held in any location to which all the persons ordered to attend and the mediator agree. In the absence of such an agreement, the mediation shall be held in the Courthouse or other public or community building in the county where the matter is pending. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the time and location of the mediation to all persons ordered to attend.

B. WHEN MEDIATION IS TO BE HELD. The Clerk's order issued pursuant to Rule 1.C.(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation pursuant to Rule 6.B.(5) and shall conduct the mediation before that date unless the date is extended by the Clerk.

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. The mediator or any person ordered to attend the mediation may request the Clerk of Superior Court to extend the deadline for completion of the mediation. Such request shall state the reasons the extension is sought and shall be delivered to all persons ordered to attend and the mediator. The Clerk may grant the request without hearing by setting a new deadline for the completion of the mediation, which date may be set at any time prior to the hearing. Notice of the Clerk's decision shall be delivered to all persons ordered to attend and the mediator by the person who sought the extension and shall be filed with the Court.

D. RECESSES. The mediator may recess the mediation at any time and may set times for reconvening which are prior to the deadline for completion. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation.

E. THE MEDIATION IS NOT TO DELAY OTHER PROCEEDINGS. The mediation shall not be cause for the delay of other proceedings in the matter, including the completion of discovery, the filing or hearing of motions, or the hearing of the matter, except by order of the Clerk of Superior Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATIONS

A. ATTENDANCE.

(1) Persons ordered by the Clerk to attend a mediation conducted pursuant to these Rules shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.B. or an impasse has been declared. Any such person may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference:

(a) By agreement of all persons ordered to attend and the mediator; or

(b) By order of the Clerk of Superior Court, upon motion of a person ordered to attend and notice of the motion to all other persons ordered to attend and the mediator.

(2) Any person ordered to attend a mediation conducted pursuant to these Rules that is not a natural person or a

governmental entity shall be represented at the mediation by an officer, employee or agent who is not such person's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the matter.

(3) Any person ordered to attend a mediation conducted pursuant to these Rules that is a governmental entity shall be represented at the mediation by an employee or agent who is not such entity's outside counsel and who has authority to decide on behalf of such entity whether and on what terms to settle the matter; provided, however, if under law proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation pursuant to these Rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in the mediation at the discretion of the mediator.

(6) Persons ordered to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for mediation sessions before the completion deadline and shall keep the mediator informed as to such problems as may arise before an anticipated session is scheduled by the mediator.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. The parties shall designate a person who will file a consent judgment or one or more voluntary dismissals with the Clerk and that person shall sign the mediator's report. If agreement is reached in such matters prior to the mediation or during a recess, the parties shall inform the mediator and the Clerk that the matter has been settled and, within 10 calendar days of

the agreement being reached, file a consent judgment or voluntary dismissal(s).

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at mediation, the persons ordered to attend shall reduce its terms to writing and sign it along with their counsel, if any. Such agreements are not binding upon the Clerk but they may be offered into evidence at the hearing of the matter and may be considered by the Clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible pursuant to NCGS 7A-38. 3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent place in the document:

"This agreement is not binding on the Clerk but will be presented to the Clerk as an aid to reaching a just resolution of the matter."

C. PAYMENT OF MEDIATOR'S FEE. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATION OR PAY MEDIATOR'S FEE. ~~If a~~ Any person ordered to attend a mediation pursuant to these Rules who fails without good cause to attend ~~without good cause,~~ or to pay a portion of the mediator's fee in compliance with G.S. 7A-38.3B and the rules promulgated by the Supreme Court to implement that section, shall be subject to contempt powers of the Clerk and the Clerk may impose ~~upon the person any appropriate~~ monetary sanctions. ~~including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.~~ Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.

A person seeking sanctions against another person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all persons ordered to attend. The Clerk may initiate sanction proceedings upon ~~its~~ his/her own motion by the entry of a show cause order. If the Clerk imposes sanctions, the Clerk shall do so, after notice and a hearing, in a writ-

ten order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38.1(g).

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of the Mediation.** The mediator shall at all times be in control of the mediation and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court that shall contain a provision prohibiting mediators from prolonging a mediation unduly.

(2) **Private Consultation.** The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The costs of the mediation and the circumstances in which participants will not be taxed with the costs of mediation;

(c) That the mediation is not a trial, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(f) The inadmissibility of conduct and statements as provided by G.S. 7A-38.3B;

(g) The duties and responsibilities of the mediator and the participants; and

(h) That any agreement reached will be reached by mutual consent and reported to the Clerk as provided by rule.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of Mediation.**

(a) The mediator shall report to the Court on an AOC form within 5 days of completion of the mediation whether or not the mediation resulted in a settlement or impasse. If settlement occurred prior to or during a recess of a mediation, the mediator shall file the report of settlement within 5 days of learning of the settlement and, in addition to the other information required, report who informed the mediator of the settlement.

(b) The mediator's report shall identify those persons attending the mediation, the time spent in and fees charged for mediation, and the names and contact information for those persons designated by the parties to file such consent judgment or dismissal(s) with the Clerk as required by Rule 4.B. Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Dispute Resolution Commission or the Administrative Office of the Courts. Mediators shall not be required to send agreements reached in mediation to the Clerk, except in Estate and Guardianship matters and other matters which may be resolved only by order of the Clerk.

(c) Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the Court and sanctions.

(5) **Scheduling and holding the mediation.** It is the duty of the mediator to schedule the mediation and conduct it prior to the mediation completion deadline set out in

the Clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. Deadlines for completion of the mediation shall be strictly observed by the mediator unless said time limit is changed by a written order of the Clerk of Superior Court.

(6) **Distribution of mediator evaluation form.** At the mediation, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per person with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY ORDER OF THE CLERK. When the mediator is appointed by the Clerk, the parties shall compensate the mediator for mediation services at the rate of ~~$125~~ $150 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of ~~$125~~ $150 that is due upon appointment.

C. PAYMENT OF COMPENSATION. In matters within the Clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement**,** the mediator's fee shall be paid in equal shares by the parties unless otherwise agreed to by the parties. Payment shall be due upon completion of the mediation.

In all other matters before the Clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares as determined by the Clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or a guardianship or against a fiduciary or interested person upon the entry of a written order making specific written findings of fact justifying the taxing of costs.

D. CHANGE OF APPOINTED MEDIATOR. Parties who fail to select a certified mediator within the time set out in the

Clerk's order and then desire a substitution after the Clerk has appointed a certified mediator, shall obtain the approval of the Clerk for the substitution. The Clerk may approve the substitution only upon proof of payment to the Clerk's original appointee the ~~$125~~ $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B., and any postponement fee due and owing pursuant to Rule 7.F., unless the Clerk determines that payment of the fees would be unnecessary or inequitable.

E. INDIGENT CASES. No person ordered to attend a mediation found to be indigent by the Clerk for the purposes of these rules shall be required to pay a share of the mediator's fee. Any person ordered by the Clerk of Superior Court to attend may move the Clerk for a finding of indigence and to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation or, if the parties do not settle their matter, subsequent to its conclusion. In ruling upon such motions, the Clerk shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the matter and whether a decision was rendered in the movant's favor. The Clerk shall enter an order granting or denying the person's request. Any mediator conducting a mediation pursuant to these rules shall waive the payment of fees from persons found by the Court to be indigent.

F. POSTPONEMENTS.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with mediation once the mediator has scheduled a date for a session of the mediation. After mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

(2) A mediation session may be postponed by the mediator for good cause beyond the control of the movant only after notice by the movant to all persons of the reasons for the postponement and a finding of good cause by the mediator. A postponement fee shall not be charged in such circumstance.

(3) Without a finding of good cause, a mediator may also postpone a scheduled mediation session with the consent of all parties. A fee of ~~$125~~ $150 shall be paid to the mediator if the postponement is allowed or if the

request is within two (2) business days of the scheduled date the fee shall be ~~$250~~ $300. The person responsible for it shall pay the postponement fee. If it is not possible to determine who is responsible, the Clerk shall assess responsibility. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B. A mediator shall not charge a postponement fee when the mediator is responsible for the postponement.

(4) If all persons ordered to attend select the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Clerk of Superior Court for a finding of indigency, shall constitute contempt of Court and may result, following notice and a hearing, in the imposition of any and all lawful sanctions by the Superior Court pursuant to G.S. 5A.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Clerk of Court mediators.

A. For appointment by the Clerk as mediator in all cases within the Clerk's jurisdiction except guardianship and estate matters, a person shall be certified by the Dispute Resolution Commission for either the superior or district Court mediation programs;

B. For appointment by the Clerk as mediator in guardianship and estate matters within the Clerk's jurisdiction, a person shall be certified as a mediator by the Dispute Resolution Commission for either the superior or district Court programs and complete a course, at least 10 hours in length, approved by the Dispute Resolution Commission pursuant to Rule 9 concerning estate and guardianship matters within the Clerk's jurisdiction;

C. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

D. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission; and

E. Agree to accept, as payment in full of a party's share of the mediator's fee, the fee ordered by the Clerk pursuant to Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any county in which he or she has served as a mediator or the Standards of Conduct. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking certification pursuant to these Rules for estate and guardianship matters within the jurisdiction of the Clerk of Superior Court shall consist of a minimum of 10 hours instruction. The curriculum of such programs shall include:

(1) Factors distinguishing estate and guardianship mediation from other types of mediations;

(2) The aging process and societal attitudes toward the elderly, mentally ill, and disabled;

(3) Ensuring full participation of Respondents and identifying interested persons and nonparty participants;

(4) Medical concerns of the elderly, mentally ill and disabled;

(5) Financial and accounting concerns in the administration of estates and of the elderly, mentally ill and disabled;

(6) Family dynamics relative to the elderly, mentally ill, and disabled and to the families of deceased persons;

(7) Assessing physical and mental capacity;

(8) Availability of community resources for the elderly, mentally ill and disabled;

(9) Principles of guardianship law and procedure;

(10) Principles of estate law and procedure;

(11) Statute, Rules, and forms applicable to mediation conducted under these Rules; and

(12) Ethical and conduct issues in mediations conducted under these Rules.

The Commission may adopt Guidelines for trainers amplifying the above topics and set out minimum time frames and materials that trainers shall allocate to each topic. Any such Guidelines shall be available at the Commission's office and posted on its web site.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.B. Certification need not be given in advance of attendance. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. PROCEDURAL DETAILS. The Clerk of Superior Court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with these Rules.

RULE 11. DEFINITIONS.

A. The term, Clerk of Superior Court, as used throughout these rules, shall refer both to said Clerk or Assistant Clerk.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 12. TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

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Instructions—elements of crime omitted—harmless error review—The trial court's omission of elements of a crime in its recitation of jury instructions

CRIMINAL LAW—Continued

CRIMINAL LAW—Continued

Prosecutor's argument—personal belief—credibility—The trial court did not err in a double first-degree murder case by failing to intervene *ex mero motu* when the prosecutor allegedly expressed personal opinions during closing arguments in the guilt-innocence phase of defendant's trial by vouching for the credibility of two witnesses, or by arguing his personal belief in defendant's guilt under the theory of acting in concert, because: (1) as to the first witness, the prosecutor did not personally vouch for her veracity but instead provided jurors reason to believe the witness by arguing that her testimony was truthful because it was corroborated; (2) while the prosecutor's passing comment that he believed defendant's girlfriend was telling the truth violated section 15A-1230(a), the comment was made while admitting weaknesses in her testimony; and (3) as to the prosecutor's argument that defendant and a coparticipant were equally culpable for the murders of the two victims, our Supreme Court already concluded that the prosecutor correctly explained the legal theory of acting in concert. **State v. Wilkerson, 382.**

Prosecutor's argument—reasonable inference drawn from evidence—acting in concert—The prosecutor's argument in a double first-degree murder case that the reason a man advised defendant's girlfriend that defendant and a coparticipant had shot someone was that defendant had given the man this information in a telephone call following the shooting was a reasonable inference from the evidence presented at trial, and the prosecutor's argument that defendant and a coparticipant would be equally guilty was an accurate statement of law applicable to the State's theory of the case that the two acted in concert. **State v. Wilkerson, 382.**

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Request for substitute counsel—defendant's letter not sufficient—A first-degree murder defendant's letter to the trial court did not clearly constitute a request for substitute counsel and the trial court was not required to conduct a hearing as argued by defendant. Even if a hearing should have been held, there was not a conflict sufficient to remove the attorney from the case. **State v. Williams, 689.**

Self-defense—defense of family—instruction denied—error—The trial court erred by not instructing on self-defense and defense of a family member in a voluntary manslaughter prosecution where the evidence, viewed in the light most favorable to defendant, showed that the 64-year-old defendant was operating a produce stand with his wife and his grandson; the victim approached the stand and attempted to wrestle the cash box from defendant's wife, who feared for her safety; defendant ordered the victim to "back off" and he did so; the victim then put his hand in his pocket and approached the family, pulling his hand from his pocket; and defendant shot the victim one time. **State v. Moore, 793.**

DAMAGES AND REMEDIES

Punitive—judgment notwithstanding the verdict—standard for appellate review—In reviewing a trial court's ruling on a motion for judgment notwithstanding the verdict on punitive damages, appellate courts must determine whether the nonmovant produced clear and convincing evidence from which a jury could reasonably find one or more of the statutory aggravating factors required by N.C.G.S. § 1D-15(a) and that the aggravating factor was related to the injury for which compensatory damages were awarded. Evidence that is only more than a scintilla cannot satisfy the nonmoving party's threshold statutory burden of clear and convincing evidence. **Scarborough v. Dillard's, Inc., 715.**

DECLARATORY JUDGMENTS

Court's statement—not an erroneous statement of fact—The trial court did not erroneously decide a question of fact in a declaratory judgment action concerning physician participation in executions by a statement regarding the historical practice. The court's order does not demonstrate that its decision was based on this statement, the statement was not designated as a finding or conclusion and can be considered surplusage, and the decision rested solely upon conclusions of law and stated no findings. **N.C. Dep't of Corr. v. N.C. Med. Bd., 189.**

Physician participation in executions—ripeness—A declaratory judgment action involving defendant N.C. Medical Board's position statement on physicians and executions was ripe for decision. The existence of pending litigation about an ancillary matter does not render the issue presented here nonjusticiable, nor does the fact that defendant has not yet disciplined a medical doctor for participating in an execution. The determinative point is that plaintiffs are hindered in their ability to perform their statutory duties because they are unable to find a physician willing to subject himself or herself to discipline for participating in an execution. **N.C. Dep't of Corr. v. N.C. Med. Bd., 189.**

Standing—justiciable controversy—Plaintiffs had standing in a declaratory judgment action involving defendant's position statement on physicians and executions. The actions of two governmental entities, both seeking to fulfill their statutory duties, were in irreconcilable conflict. **N.C. Dep't of Corr. v. N.C. Med. Bd., 189.**

DEEDS

Restrictive covenants—amendments—service charges—enforceability—Amendments to restrictive covenants to impose service charges were enforceable as written where residents of the community received a list of policies and procedures that explained how property values were determined for the purpose of assessing service charges, and regulations contained an itemized description of the purposes for the assessments, which were limited to common expenses. Limiting provisions for certain properties in the community established that the declaration did not bind property owners outside that section of the development, but did not limit the portion of the development (the Assembly) that could reap the benefits of the covenants. **Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 590.**

Restrictive covenants—amendments—service charges—reasonableness—Restrictive covenant amendments that instituted service charges were reason-

EMINENT DOMAIN—Continued

been considered in the context of the purpose and use of the taking as well as generally considered in determining whether the taking rendered [the owner's] property less valuable" is disavowed. **Department of Transp. v. Blevins, 649.**

ESTATES

Bneficiary's action against executor—acts as attorney-in-fact—standing—claim for conversion—The decision of the Court of Appeals in an action by plaintiff estate beneficiary for alleged conversion by defendant, the executor of decedent's estate, based upon acts as decedent's attorney-in-fact prior to decedent's death is reversed for the reasons stated in the dissenting opinion that (1) plaintiff had standing to bring the action without making a demand upon defendant executor or petitioning the clerk of court for the executor's removal; and (2) plaintiff established a claim for conversion where defendant closed two bank accounts he and decedent had individually opened with decedent's funds and owned as joint tenants with right of survivorship and individually opened two new joint owner accounts with funds from the closed accounts by signing on the signature cards his name as owner and decedent's name as her attorney-in-fact. **Horry v. Woodbury, 7.**

EVIDENCE

Cross-examination—defendant was ringleader—plain error analysis—The trial court did not commit plain error in a double first-degree murder case by permitting an eyewitness to testify during cross-examination that he knew in his heart who shot the two victims and that defendant was the ringleader where defense counsel effectively established that the witness was unable to see the face of either assailant and impeached the witness by confronting him with a prior inconsistent statement to police in which the witness failed to name defendant as a possible perpetrator of the crimes, thus, diminishing the force of the witness's nonresponsive statements. **State v. Wilkerson, 382.**

Defendant's purchase of drugs and guns on day of murders—The trial court did not err in a double first-degree murder case by permitting a witness to testify that defendant purchased drugs and guns from her husband on the day of the murders because: (1) although the evidence supporting the witness's assumption that her husband sold drugs to defendant was not based upon personal knowledge or perception and her inference that a drug deal occurred was a supposition based largely on guesswork and speculation, in light of the other evidence against defendant and the relative insignificance of this evidence of one purported drug sale, the error was not prejudicial; and (2) in regard to the witness's testimony that her husband sold one or more firearms to defendant, although she did not witness a complete transaction in that she did not see money change hands, N.C.G.S. § 8C-1, Rule 701 permits a lay witness to testify to an inference that is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue, and her natural inference that a sale took place was supported by her perceptions. **State v. Wilkerson, 382.**

Extrajudical witness statements—corroboration—The trial court did not err or commit plain error in a capital first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case

EVIDENCE—Continued

by admitting into evidence extrajudicial statements from three State witnesses because the trial court informed the jurors at length that they could consider statements made during the interviews only for corroboration purposes when they weighed the credibility of the witnesses' trial testimony. **State v. Garcell, 10.**

Hearsay—cell phone number—failure to show prejudice—The trial court did not err in a double first-degree murder case by admitting the police report created at the time of the arrest of the man who sold defendant weapons for the purpose of establishing the man's cellular telephone number which was provided by the man upon his arrest and was the same number defendant dialed while hiding under a tractor-trailer immediately after the pertinent shooting. **State v. Wilkerson, 382.**

Hearsay—excited utterance exception—defendant threatened to kill victim—The trial court did not err in a double first-degree murder case by permitting a victim's brother to testify over defendant's objection, under the excited utterance exception to the hearsay rule, that the victim told him defendant had threatened them both in a telephone call. **State v. Wilkerson, 382.**

Lay opinion testimony—substance was cocaine—The decision of the Court of Appeals finding no error in defendant's trial and conviction of trafficking in cocaine by possession of 28 grams or more but less than 200 grams is reversed for the reason stated in the dissenting opinion that the trial court erred by allowing two detectives to express lay opinions that a white powder substance found in an apartment leased by defendant was cocaine. **State v. Llamas-Hernandez, 8.**

Letter from jail—relevancy—The trial court did not abuse its discretion in a capital first-degree murder case by admitting into evidence under N.C.G.S. § 8C-1, Rule 401 the letter defendant wrote to his mother from jail, and concluding it was not unduly prejudicial under N.C.G.S. § 8C-1, Rule 403, because the letter constituted defendant's admission to the crime in his own words and thus was relevant to defendant's involvement in the crime and his deliberation of the murder. **State v. Garcell, 10.**

Letter received by inmate—not authenticated—admissibility to show credibility—An unauthenticated letter in which defendant purportedly asked an incarcerated witness to change her story was otherwise irrelevant but admissible on redirect examination in response to defendant's attack on the inmate's credibility. **State v. Locklear, 438.**

Marital privilege—spouse visiting prisoner—An inmate had no reasonable expectation of privacy in conversations with his wife in the public visiting areas of Department of Correction facilities, and the conversations were not protected by the marital communications privilege set forth in N.C.G.S. § 8-57(c). **State v. Rollins, 232.**

911 call—plain error analysis—The trial court did not err or commit plain error in a double first-degree murder case by admitting the entire tape recording of the call to 911 by the victim's brother just before the shooting requesting police officers to come to his house, including the statement that "more than likely they'll rob us." **State v. Wilkerson, 382.**

EVIDENCE—Continued

EVIDENCE—Continued

dence and then making findings based on the material the court considers trustworthy. **Blankenship v. Bartlett, 518.**

Testimony by officers—statements made by others—admissible as corroboration—The trial court did not err in a first-degree murder prosecution by admitting certain testimony for corroborative purposes. The testimony of one officer tracked the testimony of the fiancée of a victim about a telephone call received by the victim, and testimony from a detective about defendant's statements to his cellmate generally tracked the testimony given by the cellmate. Any prejudicial effect from the language of the statements was mitigated by the admission of other testimony, and the jury was instructed on corroborative purposes. **State v. Williams, 689.**

Victim's convictions excluded—no prejudicial error—The trial court did not err in a first-degree murder prosecution by excluding certified copies of the victim's prior convictions where those convictions would corroborate defendant's testimony that the victim was a violent person who had been incarcerated. There is no reasonable possibility of a different result in light of other evidence. **State v. Jacobs, 815.**

Victim's reputation for peacefulness—harmless error—The trial court committed harmless error in a double first-degree murder case by admitting over defendant's objection a witness's testimony as to the reputation of one of the victims for peacefulness. **State v. Wilkerson, 382.**

Victim's reputation for violence—evidence excluded—no abuse of discretion—The trial court did not abuse its discretion in a first-degree felony murder prosecution arising from an alleged robbery by precluding defendant from testifying about his knowledge of specific instances of violent behavior by the victim. The exclusion of evidence under the N.C.G.S. § 8C-1, Rule 403 balancing test lies within the trial court's sound discretion and will only be disturbed where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. **State v. Jacobs, 815.**

Violent acts and fear of defendant after crimes committed—plain error analysis—The trial court did not commit plain error in a capital first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by admitting the testimony of two witnesses concerning defendant's violent acts and their fear of defendant after the crimes occurred. **State v. Garcell, 10.**

FIREARMS AND OTHER WEAPONS

Possession by convicted felon—N.C.G.S. § 14-415.1 as amended in 2004—unreasonable regulation as applied to plaintiff—The Court of Appeals erred to the extent that it determined N.C.G.S. § 14-415.1 as amended in 2004, that makes it "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm," can be constitutionally applied to plaintiff whose right to possess firearms was restored in 1987 by operation of law after he completed his sentence for possession with intent to sell and deliver a controlled substance without incident in 1982. **Britt v. State, 546.**

HOMICIDE

Felony murder—first-degree burglary—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charges of felony murder and first-degree burglary, even though defendant contends that the State failed to present sufficient evidence that he possessed the felonious intent that is an essential element of first-degree burglary when he broke and entered into the pertinent residence, where the evidence was sufficient to support a finding by the jury that defendant broke and entered into the victims' residence with the intent to commit the felony of larceny therein. **State v. Wilkerson, 382.**

Felony murder—instructions—omissions—harmless error—Any error in the instructions for felony murder was harmless where the trial court did not give an explicit instruction requiring the jury to find beyond a reasonable doubt that defendant was the killer or that defendant's acts proximately caused the victim's death, but, in the context of the entire charge, the trial court informed jurors of the two elements of felony murder and instructed on the underlying felonies of burglary and robbery with a dangerous weapon, and the evidence was overwhelming that defendant caused the victim's death. **State v. Bunch, 841.**

Felony murder—merger with assault—further felony of arson—The trial court did not err by submitting felony murder to the jury where defendant argued that the killing should have merged with the underlying assault, but there was also the underlying felony of arson. **State v. Locklear, 438.**

First-degree murder—evidence sufficient—viewed in light most favorable to State—The evidence of first-degree murder was sufficient for a reasonable person to find defendant guilty beyond a reasonable doubt and sufficient for the jury to finding the aggravating circumstance of course of conduct. Defendant on appeal attempted to interpret the evidence in the light most favorable to him, detailing other plausible explanations for the evidence; however, contradictions or conflicts are resolved in favor of the State on a motion to dismiss for insufficient evidence. Evidence not favorable to the State is not considered. **State v. Williams, 689.**

Second-degree murder—lesser included offense—instruction denied—The trial court did not err in a first-degree murder prosecution by not giving the requested instruction on second-degree murder as a lesser included offense where there was clear evidence supporting each element of first-degree murder, and defendant did not show that rage rendered him incapable of deliberate thought and the ability to reason. **State v. Locklear, 438.**

IMMUNITY

Negligence and constitutional claims against school board—summary judgment—Summary judgment for defendant board of education was correctly denied on direct colorable constitutional claims which arose from an assault in a school where there was also a negligence claim, the facts alleged and the damages sought were the same for both claims, and the defendant raised governmental immunity. Sovereign immunity entirely precludes plaintiff's common law claim, so that plaintiff does not have an adequate state law remedy, and allowing sovereign immunity to defeat plaintiff's colorable constitutional claims would defeat the purpose of *Corum v. University of North Carolina*, 330 N.C. 761. **Craig v. New Hanover Cty. Bd. of Educ., 334.**

JURISDICTION

Nonresident defendant—telephone and e-mail communications—long-arm statute—Plaintiff's complaint alleged sufficient facts to authorize the exercise of personal jurisdiction over the nonresident defendant pursuant to N.C.G.S. § 1-75.4(4)(a) in an action for alienation of affection and criminal conversation, although the complaint did not specifically state that plaintiff's wife was physically located in North Carolina at the time she received telephonic and e-mail communications from defendant, where plaintiff alleged that he resided in Guilford County with his wife and daughter; defendant initiated frequent and inappropriate telephone and e-mail conversations with plaintiff's wife on an almost daily basis; defendant and plaintiff's wife discussed their sexual and romantic relationship in the presence of plaintiff and his minor child; and defendant's alienation of his wife's affections occurred within the jurisdiction of North Carolina. **Brown v. Ellis, 360.**

Personal jurisdiction—corporate officer and shareholder—minimum contacts with this state—The decision of the Court of Appeals that a nonresident corporate officer and principal shareholder had insufficient minimum contacts with this state to permit the exercise of personal jurisdiction over him in an action for breach of contract and unjust enrichment based upon unpaid purchase order for goods delivered to two corporations is reversed for the reasons stated in dissenting opinion that the corporate actions of a defendant who is also an officer and principal shareholder of a corporation may be imputed to him for the purpose of deciding the issue of personal jurisdiction, and defendant had sufficient minimum contacts with this state so that the exercise of personal jurisdiction over him did not violate due process. **Saft Am., Inc. v. Plainview Batteries, Inc., 5.**

Subject matter—42 U.S.C. § 1983—pleading defect—Defendant's argument that the superior court lacked subject matter jurisdiction to hear plaintiff's 42 U.S.C. § 1983 action because defendant's disciplinary prosecution of plaintiff was still pending identifies a pleading defect in plaintiff's procedural due process claim rather than implicating a defect in the trial court's jurisdiction. **Gilbert v. N.C. State Bar, 70.**

JURY

Capital selection—excusal for cause—death penalty views—The trial court did not abuse its discretion in a capital first-degree murder case by excusing three prospective jurors for cause based on their answers to questions concerning the death penalty because the answers from all three prospective jurors ultimately revealed an unequivocal denial of their personal ability to consider the death penalty in the instant case. **State v. Garcell, 10.**

Capital selection—peremptory challenges—*Batson* challenge—gender challenge—Defendant's constitutional right to a jury selected without regard to race or to gender was not violated when the trial court overruled his objections to the State's use of peremptory challenges against five prospective jurors who were either female, African-American, or both in a prosecution for capital first-degree murder and other crimes. **State v. Maness, 261.**

Capital selection—voir dire—stake out questions—repetitive questions—The trial court did not abuse its discretion in a capital first-degree mur-

JURY—Continued

der case by not allowing defense counsel to question prospective jurors about their ability to surrender their honest convictions for the purpose of returning a sentencing recommendation, and to recommend a life sentence even if other jurors disagreed, because: (1) in regard to the voir dire of one prospective juror, the hypothetical question was an impermissible "stake out" question; and (2) in regard to the voir dire of a second prospective juror, the questions asked this prospective juror were redundant. **State v. Maness, 261.**

Capital trial—right to be present—jury pool selection—A first-degree murder defendant's right to be present at all of the proceedings of his capital trial was not violated when the deputy clerk selected forty-eight prospective jurors from the pool in the jury assembly room, outside of defendant's presence. The random segregation of the entire jury pool so that it could be split among defendant's proceeding and other matters being handled at the courthouse was a preliminary administrative matter at which defendant did not have a right to be present. **State v. Williams, 689.**

Jury request to review exhibits—abuse of discretion standard—The trial court did not commit prejudicial error or abuse its discretion in a prosecution for capital first-degree murder and other crimes when it denied a jury request to review certain exhibits because: (1) the trial court noted numerous times that it was denying the jury's request in its discretion, and thus it correctly understood that it was permitted to exercise its discretion pursuant to N.C.G.S. § 15A-1233; and (2) the trial court's ruling was amply supported by the record since the exhibits were admitted solely for the purpose of illustrating an expert's testimony, the jury already had seen the exhibits in their entirety, and the transcript of the discussion between the trial court and the parties when the exhibits were initially admitted indicated that these exhibits did contain some inadmissible material. **State v. Maness, 261.**

Preservation of issues—challenge for cause of prospective juror—failure to follow statutory requirements—Although defendant contends the trial court abused its discretion in a capital first-degree murder case by denying defendant's challenge for cause to the twelfth juror seated based on her personal knowledge of the victim, the victim's son, and defendant's ex-girlfriend, defendant failed to properly preserve this issue because: (1) although defendant met two of the three requirements of N.C.G.S. § 15A-1214(h) when he exhausted all of his peremptory challenges and had his renewal motion denied, he failed to satisfy the remaining requirement to renew his challenge as provided in N.C.G.S. § 15A-1214(i); and (2) the statutory procedure is mandatory and must be followed precisely. **State v. Garcell, 10.**

Voir dire—life sentence without parole—The trial court did not abuse its discretion in a capital first-degree murder case by sustaining the State's objections to voir dire questions concerning the prospective juror's views of a sentence of life without parole and whether the juror felt that the death penalty is more or less harsh than life in prison without parole. **State v. Garcell, 10.**

JUVENILES

Juvenile delinquency—custody—participation of resource officer during questioning—The presence of a school resource officer did not render the questioning of respondent juvenile by school officials a custodial interrogation requiring Miranda warnings and the protections of N.C.G.S. § 7B-2101, and the juve-

MEDICAL MALPRACTICE—Continued

tute a majority of the Court in favor of reversing and remanding a decision of the Court of Appeals that affirmed the trial court's entry of summary judgment in favor of defendants in a medical malpractice wrongful death action on the ground that plaintiffs' only expert witness was incompetent to testify because he failed to demonstrate in his deposition and affidavit that he was sufficiently familiar with the relevant "same or similar community" standard of care. N.C.G.S. § 90-21.12. **Crocker v. Roethling, 140.**

PATERNITY

Motion for paternity test—prior order establishing paternity—absence of appeal or Rule 60(b) motion—A decision of the Court of Appeals that the mother of a child born out of wedlock was entitled to a paternity test after custody was changed from the mother to the purported biological father was reversed for the reasons stated in the dissenting Court of Appeals opinion that the father's paternity was established in a prior court order and the mother failed to appeal that order in a timely manner and failed to seek relief from that order pursuant to Rule of Civil Procedure 60(b). **Helms v. Landry, 738.**

PROCESS AND SERVICE

Failure to issue summons on juveniles—subject matter jurisdiction—personal jurisdiction—The Court of Appeals erred in a termination of parental rights (TPR) case by determining ex mero motu that failure to name a juvenile as respondent or to serve a summons upon the juvenile in accordance with N.C.G.S. § 7B-1106(a) precludes the trial court from exercising subject matter jurisdiction over the action because these summons-related deficiencies implicate personal jurisdiction rather than subject matter jurisdiction; the requirements of N.C.G.S. § 7B-1101 were satisfied and thus the trial court's subject matter jurisdiction attached upon issuance of a summons to respondent parents; the full participation of the juveniles' guardian ad litem and the attorney advocate throughout the TPR proceedings, without objection to the trial court's exercise of personal jurisdiction over the juveniles, constituted a general appearance and served to waive any such objections that might have been made; and it was inconsequential to the trial court's subject matter jurisdiction that no summons named any of the three juveniles as respondent and that no summons was ever served on the juveniles or their GAL. **In re J.T. (I), J.T. (II), A.J., 1.**

PUBLIC OFFICERS AND EMPLOYEES

Industrial Commissioner—new appointment—oath not yet taken—authority of prior Commissioner—The authority of an Industrial Commissioner holding over after his term expired because no replacement had been appointed continued through the period between a successor's appointment and the successor taking the oath of office, and the Industrial Commission correctly denied defendant's motion to vacate a workers' compensation opinion and award made during the holdover period by a panel on which the holdover Commissioner was a member of the two-to-one majority. **Baxter v. Nicholson, 829.**

Whistleblower action—protected activity—sufficiency—The decision of the Court of Appeals affirming the dismissal of the complaint of a former state university employee for retaliatory discharge under the Whistleblower Act is

PUBLIC OFFICERS AND EMPLOYEES—Continued

reversed for the reasons stated in the Court of Appeals dissenting opinion that plaintiff's allegations were sufficient to support her claim that she was engaged in a protected activity where she alleged that she was asked to resign because she refused the university chancellor's request to issue a check from the university endowment fund for an option to purchase realty that she knew the university had insufficient funds to exercise and because she reported her objection to the transaction to a university attorney. **Helm v. Appalachian State Univ., 366.**

ROBBERY

Dangerous weapon—motion to dismiss—sufficiency of evidence—weapon stolen from victim—continuous transaction—The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon even though defendant contends he was not armed until he took the victim police officer's firearm and the object taken in the robbery was the officer's firearm because: (1) an armed robbery can be a continuous transaction, and where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial; (2) there is no reason why the use of a weapon stolen from the victim cannot also be a part of the continuing transaction of the armed robbery; and (3) the evidence presented was sufficient for the jury to find that defendant's use of the gun was inseparable from the taking of it and defendant's efforts to flee. **State v. Maness, 261.**

RULES OF CIVIL PROCEDURE

Summary judgment—private investigator's affidavit—passive voice—personal knowledge requirement—An affidavit from a private detective in an alimony case that was phrased in the passive voice ("Michael Scott Cooper was observed . . .") satisfied the personal knowledge requirement of Rule 56(e) where the affidavit began with the statement that the investigator had been retained for the investigation, raising the reasonable inference that everything in her affidavit was based on her personal knowledge. There was no record or mention of any other individual performing the investigation, and the trial court's duty to treat indulgently the Rule 56 materials of the party opposing the motion reasonably encompassed the passive voice averments in this affidavit. **Bird v. Bird, 774.**

SCHOOLS AND EDUCATION

Funding—dispute with county—resolution by court—constitutional—N.C.G.S. § 115C-431 (which provides an eventual judicial resolution of disputes between school boards and county commissioners over the amounted needed to operate the school system) does not impermissibly delegate legislative authority and is constitutional. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 500.**

Funding—judicial determination of minimum—county authority not infringed—N.C.G.S. § 115C-431 does not deprive the county commissioners of funding discretion granted by the State Constitution. The requirement that the commissioners provide the minimum level of funding required by state law does not abrogate their discretionary authority to contribute more. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 500.**

SCHOOLS AND EDUCATION—Continued

Funding—judicial dispute—denial of continuance—not a denial of due process—A county claiming a due process violation in a school funding case for the denial of a continuance had ample opportunity to communicate with the board of education and to request information, and the trial court did not by denying the motion for a continuance. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 500.**

Funding—judicial resolution of disputed amount—jury instruction—The Supreme Court exercised its general supervisory authority to promptly resolve a novel issue of great import, despite the lack of an objection or assignment of error, in a case involving the amount needed to operate a county school system. The instruction given to the jury on the word "needed" was too expansive, and was remanded for application of the more restrictive definition articulated herein. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 500.**

Funding—responsibility for operating expenses—The statutes concerning school funding explicitly contemplate the funding of current school expenses by county commissioners when state funding is insufficient rather than local governments having responsibility for capital expenses only. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 500.**

Mandatory year-round schools—statutory authority—The Wake County Board of Education is statutorily authorized to compel attendance at year-round calendar schools. The General Assembly has conferred broad, specific, and sole authority upon local school boards to determine school calendars, and year-round schools are explicitly recognized as acceptable school calendars by N.C.G.S. § 115C-84.2. Parental consent is no more a factor in assignment to year-round schools than it is to traditional schools. **Wake Cares, Inc. v. Wake Cty. Bd. of Educ., 165.**

SEARCH AND SEIZURE

Frisk of defendant for weapons—reasonable suspicion—The decision of the Court of Appeals that the trial court erred by denying defendant's motion to suppress scales and cocaine seized during a search of defendant's person is reversed for the reason stated in the Court of Appeals dissenting opinion that, under the totality of the circumstances, officers had reasonable suspicion to frisk defendant for a weapon based upon a confidential informant's tip that defendant was involved in a recent drive-by shooting, the fact defendant was wearing gang colors, and information received from other informants and anonymous tipsters that defendant was selling drugs in the area. **State v. Morton, 737.**

Motion to suppress—results of search of cellular telephone—The trial court did not err in a double first-degree murder case by denying defendant's motion to suppress the results of the search of his cellular telephone because the seizure was pursuant to defendant's lawful arrest. **State v. Wilkerson, 382.**

Search of pocketbook—not consensual—The trial court erred by denying defendant's motion to suppress evidence seized pursuant to a search of her purse because the search of defendant's purse occurred after she was illegally seized where an officer in a high crime area approached defendant and a companion who were parked in a pick-up truck, requested identification and asked other questions, called for back-up, and ultimately found drug related items in defendant's purse after she handed it to him when asked. **State v. Icard, 303.**

SENTENCING

SENTENCING—Continued

SENTENCING—Continued

New counsel needed to be appointed with time for the new counsel to prepare; defendant is not prejudiced by error resulting from his own conduct. **State v. Williams, 689.**

Death penalty—proportionality—The trial court did not err by sentencing defendant to death in a first-degree murder case because: (1) the jury found three aggravating circumstances including under N.C.G.S. § 15A-2000(e)(3) that defendant had been previously convicted of a felony involving the use or threat of violence to the person; under N.C.G.S. § 15A-2000(e)(5) that the murder was committed while defendant was engaged in the commission of a robbery; and under N.C.G.S. § 15A-2000(e)(9) that the murder was especially heinous, atrocious, or cruel; (2) defendant manhandled, brutally choked, and strangled his victim, a seventy-one year old woman, to death within the perceived sanctuary of her own residence; and (3) defendant was convicted of first-degree murder on the basis of malice, premeditation and deliberation and felony murder. **State v. Garcell, 10.**

Death penalty—proportionality—Sentences of death imposed in a double first-degree murder case were not disproportionate where: (1) the jury found the aggravating circumstances under N.C.G.S. § 15A-2000(e)(5) that each murder was committed while defendant was engaged in the commission of first-degree burglary and under N.C.G.S. § 15A-2000(e)(11) that each murder was part of a course of conduct in which defendant engaged and that included the commission by defendant of other crimes of violence against other persons; (2) the murders occurred inside the home of one of the victims; (3) defendant was convicted of first-degree murders both under the felony murder rule and on the basis of malice, premeditation, and deliberation; and (4) these murders involved the use of at least two semiautomatic assault rifles and a pistol against young, unarmed victims, resulting in multiple close range gunshot wounds to each victim's head or neck. **State v. Wilkerson, 382.**

Death penalty—proportionality—A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate because: (1) defendant was convicted of first-degree murder on the basis of malice, premeditation, and deliberation, and under the felony murder rule; (2) the trial court found the four aggravating circumstances that the murder was committed for the purpose of avoiding or preventing a lawful arrest, the murder was committed while defendant was engaged in the commission of robbery with a dangerous weapon, the murder was committed against a law enforcement officer while engaged in the performance of his official duties, and the murder was part of a course of conduct in which defendant engaged that included the commission by defendant of other crimes of violence against other persons; (3) nothing in the record indicated that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (4) our Supreme Court has never found a death sentence to be disproportionate when the jury found more than two aggravating circumstances to exist, and has found the N.C.G.S. § 15A-2000(e)(11) violent course of conduct circumstance, standing alone, sufficient to support a death sentence. **State v. Maness, 261.**

Death penalty—proportionality—A death penalty was proportionate where defendant murdered two people, was convicted on the basis of premeditation and deliberation, and the killings appeared to be motivated by revenge for failure

SENTENCING—Continued

SENTENCING—Continued

indicator that the jury has been improperly exposed to an external influence nor a de facto indicator of prejudice against defendant. **State v. Garcell, 10.**

Prosecutor's argument—community standard—personalized jurors to the crime—The trial court did not abuse its discretion in a capital sentencing proceeding by failing to intervene *ex mero motu* when the prosecutor allegedly urged the jury to deter crime in general and allegedly personalized the crime to the jurors during closing arguments because: (1) regarding the prosecutor's reference to a community standard, it is not improper for the State to remind the jurors that they are the voice and conscience of the community, and jurors may also be urged to appreciate the circumstances of the crime; (2) regarding comments that allegedly personalized the jurors to the crime, it is permissible for the prosecution to ask the jury to imagine the emotions and fear of a victim, and the prosecutor asked the jury to appreciate the circumstances of the crime and permissibly made arguments related to the nature of defendant's crime; (3) particularly when a prosecutor is arguing that the murder was especially heinous, atrocious, and cruel, it is permissible to ask jurors to imagine the situation based on the evidence and to facilitate a thorough and meticulous contemplation of the crime; and (4) the prosecutor never descended to degrading comments or conclusory "name-calling." **State v. Garcell, 10.**

Prosecutor's argument—references to defendant's constitutional rights—The trial court did not abuse its discretion in a capital sentencing proceeding by failing to intervene *ex mero motu* to halt the prosecutor's references to defendant's constitutional rights during the closing argument. **State v. Garcell, 10.**

Prosecutor's argument—sentencing grid and aggravating factor—relevant but inaccurate—The trial court erred during a sentencing proceeding for involuntary manslaughter and other offenses arising from drunken driving by allowing the prosecutor's argument concerning the sentencing grid, the effect of an aggravating factor, and merger. A jury's understanding that its determination of aggravating factors may have an effect on the sentence is relevant to its role in a sentencing proceeding, but the prosecutor's argument here was inaccurate and misleading. However, there was no likelihood of a different result without the argument and no prejudice. **State v. Lopez, 535.**

Statutory mitigating circumstances—defendant's age—instruction—effective assistance of counsel—The trial court did not commit plain error in a capital first-degree murder case by its instruction on the N.C.G.S. § 15A-2000(f)(7) mitigating circumstance regarding defendant's age at the time of the crime because the State did not stipulate to defendant's age as constituting a mitigating circumstance, and thus, a mandatory peremptory instruction was not required; although a forensic psychiatrist testified about defendant's "immaturity" and stated that defendant's emotional age was more of a 10 to 12 year old child who had not grown up, cross-examination drew out potential indicators of maturity in defendant's behavior including that defendant's prison record reflected calculated acts of violence committed against other inmates, and defendant was seen as a leader by some of his friends; and in regard to defendant's alleged ineffective assistance of counsel claim pertaining to this issue, defendant can establish neither deficient performance by counsel nor prejudice when the jury instruction mirrored the pattern instruction and complied with the

SENTENCING—Continued

precedent of the Court of Appeals, defense counsel vigorously argued to the jury that defendant's age had mitigating value, and counsel submitted nonstatutory mitigators based on his client's age and immaturity for the jury's consideration. **State v. Garcell, 10.**

SEXUAL OFFENSES

Sex offenders—registration—temporary move—The State presented sufficient evidence that a convicted sex offender changed her address so as to trigger reporting requirements where defendant was living with her father at another address in the county when a social worker attempted to locate her, but she had maintained connections with the registered address and stated that she thought of the registered address as home and intended to return. Provisions of the registration program demonstrate the legislature's clear intent that even a temporary "home address" must be registered so that law enforcement authorities and the general public know the whereabouts of sex offenders. **State v. Abshire, 322.**

TAXATION

Summons from Secretary of Revenue for information—enforcement—Rules of Civil Procedure not applicable—The Rules of Civil Procedure do not apply to summons enforcement proceedings under N.C.G.S. § 105-258(a) because that statute prescribes a civil proceeding with its own specialized procedure that supplants the Rules. **In re Summons of Ernst & Young, 612.**

TERMINATION OF PARENTAL RIGHTS

Failure to issue summons on juveniles—subject matter jurisdiction—personal jurisdiction—The Court of Appeals erred in a termination of parental rights (TPR) case by determining ex mero motu that failure to name a juvenile as respondent or to serve a summons upon the juvenile in accordance with N.C.G.S. § 7B-1106(a) precludes the trial court from exercising subject matter jurisdiction over the action because these summons-related deficiencies implicate personal jurisdiction rather than subject matter jurisdiction; the requirements of N.C.G.S. § 7B-1101 were satisfied and thus the trial court's subject matter jurisdiction attached upon issuance of a summons to respondent parents; the full participation of the juveniles' guardian ad litem and the attorney advocate throughout the TPR proceedings, without objection to the trial court's exercise of personal jurisdiction over the juveniles, constituted a general appearance and served to waive any such objections that might have been made; and it was inconsequential to the trial court's subject matter jurisdiction that no summons named any of the three juveniles as respondent and that no summons was ever served on the juveniles or their GAL. **In re J.T. (I), J.T. (II), A.J., 1.**

Summons-related defect—subject matter jurisdiction—personal jurisdiction—waiver of defenses—The Court of Appeals erred by vacating a neglect and dependency adjudication order, and a later termination of parental rights (TPR) order, based on its conclusion that it did not have subject matter jurisdiction since there was no signature from an appropriate member of the clerk's office on the summons in the neglect and dependency proceeding, because: (1) summons-related defects implicate personal jurisdiction and not subject matter jurisdiction since the purpose of the summons is to obtain jurisdiction over the

TERMINATION OF PARENTAL RIGHTS—Continued

parties to an action and not over the subject matter; (2) the parents' appearance at the neglect and dependency hearing without objection to jurisdiction waived any defenses implicating personal jurisdiction; and (3) any defenses based on the failure to issue a summons to the minor or to serve the summons on the guardian ad litem (GAL) were waived since the GAL appeared at the TPR hearing without objecting to the court's jurisdiction. **In re K.J.L., 343.**

TRUSTS

Impractical purpose—termination—prior settlement—more than one interpretation—The trial court properly denied defendants' motion to dismiss an action arising from the termination of a trust where the purpose of the trust had become impossible and a prior consent judgment dealt with the distribution of assets. The consent judgment is reasonably susceptible to a reading that would preserve plaintiffs' future interests, and collateral estoppel does not bar litigation of the question of whether the consent judgment was intended to foreclose all of plaintiffs' rights in the land. **Turner v. Hammocks Beach Corp., 555.**

Tobacco settlement—subsequent legislation ending price supports—offsets—no equitable modification—States that did not participate in the tobacco price support system were not entitled to an equitable modification of the Tobacco Grower Settlement Trust because the Settlors (tobacco companies) were allowed to offset their obligations to the Trust by the amount paid as a part of ending the price support system. The statute ending the price support system, FETRA, was not an unanticipated circumstance. **State v. Philip Morris USA, Inc., 623.**

UNEMPLOYMENT COMPENSATION

Acceptance of voluntary early retirement package—left employment without good cause attributable to employer—The Court of Appeals erred by concluding that an employee who accepts a Voluntary Early Retirement Package offered by the employer as part of a company-wide downsizing is eligible for unemployment insurance benefits under N.C.G.S. Ch. 96. **Carolina Power & Light Co. v. Employment Sec. Comm'n of N.C., 562.**

WITNESSES

Sequestering—exposure to prior testimony—The trial court did not abuse its discretion in a capital first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by failing to sequester certain witnesses, which led to at least one witness's testifying based on exposure to prior testimony. **State v. Garcell, 10.**

WORKERS' COMPENSATION

Employee misrepresentation at hiring—adoption of Larson test—judicial legislation—The decision of the Court of Appeals in this case that an employee was barred from receiving workers' compensation benefits for his injury because of misrepresentations at the time of his hiring is reversed for the reason stated in the dissenting opinion that the adoption of the Larson test by the majority opin-

WORKERS' COMPENSATION—Continued

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